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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/22/11

SPONSOR Sapient LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Sandoval Flood Control Director Elections SB 121

ANALYST Aubel

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		NFI				

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 306  
 Duplicates HB 293

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of the State Engineer (OSE)  
 New Mexico Department of Agriculture (NMAG)  
 Office of the Attorney General (OAG)  
 Secretary of State (SOS)

### SUMMARY

#### Synopsis of Bill

Senate Bill 121 amends the Eastern Sandoval County Arroyo Flood Control (ESCAFC) Act to provide for elected representation from “single-member” districts rather than having all members for the authority be elected at large.

The OGA provides additional detail SB 121 as it relates to the ability of the authority to incur debt:

The bill amends 72-20-11 to change the requirement to incur debt to be submitted to “taxpaying” electors instead of “qualified electors.” This change is significant as a “qualified elector” is “a person qualified to vote in general elections in the state, who is a resident of the authority at the time of any election” under the Act. SB 121 adds a definition for “taxpaying election” which is qualified elector who “is an owner of real or personal property within the boundaries of the authority, which property is subject to general (ad valorem) taxation at the time of any election held under” the Act. The main

effect of the amendment is to restrict voting rights to those who own real property or personal property subject to ad valorem taxes rather than those who reside in the authority but do not own property or own property not subject to taxation.

## **FISCAL IMPLICATIONS**

No fiscal impacts were reported.

## **SIGNIFICANT ISSUES**

According to the Albuquerque Journal, the flood authority was created by law in 2007 after three Sandoval County communities suffered flood damage. Governor Richardson initially appointed members to the five-person board. By law, the continued existence of the authority and the board depended on receiving voter approval for bonds to fund flood control projects. The bonds would be backed by property taxes. In 2008, the authority received voter approval to issue up to \$6 million in bonds by a 54 percent to 45 percent margin. However, the board was criticized for not providing full disclosure of all costs, including the operating costs that are funded through the bonds -- and property owners received larger tax bills than expected. There was much public comment, particularly from the residents in the Village of Placitas, that the “election at large” process left that community without representation. In addition, concern was expressed that the flooding potential in Placitas was different than in the rest of the area under the authority. Two Placitas residents were elected to the board in November 2004.

Also according to the Albuquerque Journal, “the ESCFCA’s board is concerned the flood authority could risk a legal challenge.” According to the newspaper account, “this occurred to the Albuquerque Metropolitan Arroyo Flood Control Authority, which switched to districted representation to settle a lawsuit that claimed at-large board representation violated the Voting Rights Act because it disenfranchised some voters.”

The OAG understands “that the ESCAFCA board voted on November 16, 2010 to change into single-member districts, but there has been legal controversy whether this change was permissible absent statutory change.”

## **ADMINISTRATIVE IMPLICATIONS**

Each of the districts would elect one member that lived within its boundaries.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Senate Bill 121 duplicates House Bill 293.

Senate Bill 121 conflicts with House Bill 306, which would split the area into three districts and allow each district to exclude itself from the ESCAFCA. Flood projects under way would be placed under the responsibility of Sandoval County.

## **TECHNICAL ISSUES**

Several technical issues were raised by agency respondents.

OAG (as it relates to the duplicate bill, SB 121):

Under SB 121, the current board would be required to establish the single-member districts no later than December 31, 2011. The amendment also provides that the board “shall determine by lot the district from which directors shall be elected in the next three subsequent elections.” This particular provision is unclear as to whether this means that the current board determines, after establishing the districts, which district each member represents or whether the current board is to establish the districts by lot. This language, however, may lead to confusion in the implementation of the bill if made law.

There also appears to be a conflict between the final two sentences of Subsection A. The bill provides that an incumbent director whose residence is redistricted out may service out the remainder of his term. Yet, the following sentence provides that if a director no longer resides in the district from which he was elected, he will be deemed to have resigned. It is unclear what the difference is between the two situations the bill addresses. It is arguable that a director whose residence is redistricted out is the same as a director no longer residing in the district from which he was elected.

SB 121 amends 72-20-11 to change the requirement to proposal to incur debt to be submitted to “taxpaying” electors instead of “qualified electors”.... This change is significant as a “qualified elector” is “a person qualified to vote in general elections in the state, who is a resident of the authority at the time of any election” under the Act. SB 121 adds a definition for “taxpaying election” which is qualified elector who “is an owner of real or personal property within the boundaries of the authority, which property is subject to general (ad valorem) taxation at the time of any election held under” the Act. The main effect of the amendment is to restrict voting rights to those who own real property or personal property subject to ad valorem taxes rather than those who reside in the authority but do not own property or own property not subject to taxation. It is unclear what personal property subject to ad valorem taxes would qualify under this section. SB 121 clarifies that ownership of property subject to ownership tax on a motor vehicle or trailer does not constitute ownership subject to ad valorem taxes. It is unclear why this distinction is needed. While restricting the voting rights in regard to incurring debt seems reasonable, it is also possible that persons who are not “taxpaying electors” could be adversely affected by the decisions of the authority and it can be argued that they deserve a say in the debt policy decisions of the authority.

Finally, SB 121 changes the time with which a candidate has to withdraw their name. Previously, a candidate had to withdraw his name before the first publication of the notice of election. Under SB 121, a candidate needs to withdraw their name before the “time established by the county for purposes of absentee ballots or as set forth in the Election Code.” This substitution seems to provide more flexibility in this regard but it also creates more ambiguity. Which deadline is more important?

Office of the State Engineer:

The bill proposes to amend Section 72-20-4, NMSA 1978 by adding a new definition for “taxpaying elector.” The bill appears to have copied the definition for “taxpaying elector” from Section 72-16-4(LL), under the Albuquerque Metropolitan Flood Control Act. However, the definition in the bill differs from that in Section 72-16-4(LL) in two significant places. First, on page 10, line 18, the bill does not include the phrase “general (ad valorem)” before the word “taxes”. Second, on page 10, line 23, the bill again omits the descriptive phrase “general (ad valorem)” before “taxes”, and substitutes it instead on

line 24, where 72-16-4(LL) describes “taxation as provided herein”. These changes cause a significant problem in understanding what taxes are meant to be included for the purposes of defining a taxpaying elector, especially in the last sentence of the proposed paragraph GG. Without the qualifying phrase of “general (ad valorem)” before the word “taxes” the term “such taxes” in lines 22-23 can be read to apply to the taxes previously described in that sentence – i.e., “a specific ownership tax on a motor vehicle or trailer,” so that the ownership of property subject to “any other excise or property tax” would seem to not constitute the ownership of property subject to general ad valorem taxes. The bill could follow the definition in Section 72-16-4(LL) to overcome this vagueness and possible conflict in the proposed language.

The bill also proposes to amend Section 72-20-11, providing for the nomination of directors, by requiring the nomination to be signed by taxpaying electors rather than qualified electors. However, on page 15, line 22, the bill does not substitute “taxpaying” for “qualified,” so that the bill reads that for elections held after November 2008, “nominations shall be made by qualified electors.” This could lead to conflicting interpretations of the applicability of the proposed changes.

The OAG also points out the following points regarding language:

“A redistricting shall be effective at the *next following* regular board election.” The italicized portion is redundant.

Subsection B calls for the qualified electors of the authority to elect “one or two” directors to serve six year terms to succeed the directors whose terms end on the first day of January next following each election. What is the mechanism of deciding whether it should be “one” or “two?”

## **OTHER SUBSTANTIVE ISSUES**

The Secretary of State provided the following comment:

Section 1-1-19 provides that “to the extent procedures are incorporated or adopted by reference by separate laws governing such elections or to the extent procedures are not specified by such laws, certain provisions of the Election Code shall also apply to .... special district officer or special district bond or other special district elections”. As such, some provisions of the Election Code may be applicable to these elections, and the Secretary of State would generally supervise the Authority’s elections. The Secretary of State currently has a pending complaint regarding the Eastern Sandoval County Arroyo Flood Control District.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Even if the Eastern Sandoval County Arroyo Flood Control District Authority wants to hold elections under a single-district process, board members may not be able to implement this election process and board members will continue to be elected “at large.” Also, board members would continue to be nominated by “qualified electors” rather than “taxpaying electors.”