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FISCAL IMPACT REPORT

ORIGINAL DATE 01/31/11

SPONSOR Neville LAST UPDATED 02/25/11 HB _____

SHORT TITLE Damage to Energy Production Facility SB 240/a SPAC

ANALYST Graeser

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$62.4	\$62.4	\$128.8	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Attorney General's Office (AGO)
 Energy, Minerals and Natural Resources (EMNRD)
 New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of SPAC Amendment

Senate Public Affairs Committee amendment to Senate Bill 240 address the language problem identified by AOC and AGO. In all of the places in the original bill that use the term, "vandalizing", the SPAC amendment replaces "vandalizing" with "stealing."

The differences between penalties proposed in this bill as amended and the penalties for larceny are presumed to be intentional. The minimum penalty for damage to energy production facilities of value less than \$2,500 is a fourth degree felony, instead of a petty misdemeanor or misdemeanor as specified in the penalty for Larceny.

Synopsis of Original Bill

Senate Bill 240 would create a new section of the Criminal Code making it a felony offense to damage or steal from an energy production facility. If the value of the property vandalized, destroyed or stolen over a six-month period has a value of

- \$2,500 or less, the crime would be a fourth degree felony;
- \$2,500 to \$20,000, it would be a third degree felony; and

- \$20,000 or more, it would be a second degree felony.

An energy production facility is defined as a facility involved in the production, storage, or distribution of electricity, fuel, or another form of energy, or a research, development or demonstration facility relating to such forms of energy “regardless of whether such facility is still under construction or is otherwise not functioning.”

FISCAL IMPLICATIONS

NMCD reports a relatively small fiscal impact:

The bill is unlikely to have a substantial fiscal impact on NMCD. NMCD estimates that the three year operating budget impact will be \$62,400, which is based on an assumption of two convictions (serving prison time) for the new crime during the relevant three year period...

The classification of an inmate determines his or her custody level, and the incarceration cost varies based on the custody level and particular facility. The cost to incarcerate a male inmate ranges from an average of \$49,347 per year in a state owned/ operated prison to \$31,239 per year in a contract/private prison (where primarily only level III or medium custody inmates are housed). The cost to house a female inmate at a privately owned/operated facility is \$33,258 per year. Because the capacities of medium and higher custody state owned prisons are essentially at capacity, any net increase in inmate population will likely have to be housed at a contract/private facility.

The cost per client in Probation and Parole for a standard supervision program is \$1,521 per year. The cost per client in Intensive Supervision programs is \$3,445 per year. The cost per client in Community Corrections is \$3,475 per year. The cost per client per year for female residential Community Corrections programs is \$41,653 and for males is \$24,803.

AOC reports, but does not quantify, a potential fiscal impact

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase. The AOC is currently working on possible parameters to measure the resulting case increase.

SIGNIFICANT ISSUES

NMCD has long-term concerns about increasing the number and penalties for felony crimes: “If numerous new or expanded crime bills such as this one are passed, NMCD will eventually reach its rated capacity for its prison population. At that point, NMCD and/or the State will have three options: house inmates out of state, consider early release of inmates in accordance with the Corrections Population Control Act or other applicable state laws, or build more prisons or add space to existing prisons. All of these options have negative consequences. Early release jeopardizes public safety, and both housing inmates out of state and building new prisons is expensive.”

EMNRD offers an example of circumstances that would invoke the penalties of this bill:

SB 240 identifies specific acts of damage and theft related to small and large businesses involved in energy production. An example would be theft of feedstock such as bio-oil or damage to equipment necessary to produce electricity or fuel. Such equipment or product could include agricultural or food wastes that have value as feedstock for electrical power, process heat or transportation fuel and equipment necessary to produce energy or an energy source, as well as products necessary to manufacture the finished product.

SIGNIFICANT LEGAL ISSUES:

AODA and AGO are concerned with the use of the term “Vandalizing” in this bill.

AGO notes:

“Vandalizing” is a word in common usage with multiple interpretations, and is not defined in the bill. To vandalize could be interpreted as damaging, the likely intended meaning; or could be interpreted as something else, such as graffiti, which was not likely intended and quite different in nature and with potentially quite different value and felony degree classifications. If the damage meaning is intended, the statute should specifically use that word and not the undefined “vandalizing”. If the preference is for using vandalizing, it should be defined.

The AGO also points out a legal defect in the bill:

The bill uses “theft”, “stolen” and “removing...any property of value”. A theft, a.k.a. to steal, is to commit a larceny under the Criminal Code. To commit a larceny, the person 1) took and carried away property 2) belonging to another and 3) at the time of the taking that person intended to permanently deprive the owner of the property. Carrying away is further defined as moving the property from the place where it was kept or placed by the owner. The bill only includes “removing”, which would address the “taking” aspect, but does not address the carrying away requirement, the requirement that the property belong to another, nor that they intended to permanently deprive the rightful owner of that property when they took it.

AODA comments that, “...the amounts set forth in this bill are not consistent with the felony limits set for Criminal Damage to Property (30.15.1) and Larceny (30-16-1).”

30-15-1 NMSA 1978 -- Criminal damage to property – provides that criminal damage to property consists of intentionally damaging any real or personal property of another without the consent of the owner of the property and whoever commits criminal damage to property is guilty of a petty misdemeanor, except that when the damage to the property amounts to more than one thousand dollars (\$1,000) he is guilty of a fourth degree felony.

30-16-1 NMSA 1978 – Larceny – provides that larceny consists of the stealing of anything of value that belongs to another.

B. Whoever commits larceny when the value of the property stolen is two hundred fifty dollars (\$250) or less is guilty of a petty misdemeanor.

C. Whoever commits larceny when the value of the property stolen is over two hundred fifty dollars (\$250) but not more than five hundred dollars (\$500) is guilty of a misdemeanor.

D. Whoever commits larceny when the value of the property stolen is over five hundred

dollars (\$500) but not more than two thousand five hundred dollars (\$2,500) is guilty of a fourth degree felony.

E. Whoever commits larceny when the value of the property stolen is over two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000) is guilty of a third degree felony.

F. Whoever commits larceny when the value of the property stolen is over twenty thousand dollars (\$20,000) is guilty of a second degree felony.

G. Whoever commits larceny when the property of value stolen is livestock is guilty of a third degree felony regardless of its value.

H. Whoever commits larceny when the property of value stolen is a firearm is guilty of a fourth degree felony when its value is less than two thousand five hundred dollars (\$2,500).

The penalties in this bill are significantly greater than for Criminal Damage to Property and similar to the penalties imposed for Larceny, however, larceny of smaller amounts are dissimilar to the proposed penalties. The minimum penalty for damage to energy production facilities of value less than \$2,500 is a fourth degree felony, instead of a petty misdemeanor or misdemeanor.

OTHER SUBSTANTIVE ISSUES

The AODA explores the issue surrounding the use of the term, “vandalizing.”

The term vandalize is not defined in SB 240, and I have found no statute or jury instruction that defines that term. However, our Supreme Court incorporated a dictionary definition of the term in *Battishill v. Farmers Alliance Ins. Co.*, 139 N.M. 24, 26, 127 P.3d 1111, 1113 (2006). The court cited WEBSTER'S THIRD NEW INT'L DICTIONARY 2532 (2002) for the definition of “vandalism” as “willful or malicious destruction or defacement of things of beauty or of public or private property.”

The Revised Code of Ohio, § 2909.05 defines Vandalism as:

- (A) No person shall knowingly cause serious physical harm to an occupied structure or any of its contents.
- (B)(1) No person shall knowingly cause physical harm to property that is owned or possessed by another.

“Serious physical harm” means physical harm to property that results in loss to the value of the property of five hundred dollars or more.

West's Annotated California Codes § 594 defines Vandalism as:

- (a) Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own, in cases other than those specified by state law, is guilty of vandalism:
 - (1) Defaces with graffiti or other inscribed material.
 - (2) Damages.
 - (3) Destroys.

Apparently theft from or damage to an oil rig would violate this statute assuming that an oil rig would be a facility involved in the production of oil another form of energy.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

There will not be a specific crime of damage to energy production facilities with substantially increased penalties compared to larceny or criminal damage to property.

POSSIBLE QUESTIONS

Have there be incidents of damage to energy production facilities that would justify the penalties proposed in this bill?

LG/mew:bym