

**NOTE: As provided in LFC policy, this report is intended for use by the standing finance committees of the legislature. The Legislative Finance Committee does not assume responsibility for the accuracy of the information in this report when used in any other situation.**

**Only the most recent FIR version, excluding attachments, is available on the Intranet. Previously issued FIRs and attachments may be obtained from the LFC office in Suite 101 of the State Capitol Building North.**

## FISCAL IMPACT REPORT

SPONSOR: Madalena DATE TYPED: 02/18/01 HB 681  
 SHORT TITLE: Construction Materials Mining Act SB \_\_\_\_\_  
 ANALYST: Dotson

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY01	FY02	FY01	FY02		
	\$ 250.0			Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY01	FY02			
	\$ (250.0)		Recurring	General Fund
	\$ 250.0		Recurring	New Fund

(Parenthesis ( ) Indicate Revenue Decreases)

### SOURCES OF INFORMATION

State Highway and Transportation Department, Office of the State Engineer and the New Mexico Energy, Minerals and Natural Resources Department.

### SUMMARY

#### Synopsis of Bill

HB 681 appropriates \$250.0 from the General Fund to the Construction Materials Mining Act Fund for use by the Energy, Minerals and Natural Resource Department in carrying out the purpose of the Construction Materials Mining Act. This purpose of this bill is to promote the responsible utilization and reclamation of lands affected by surface mining and exploration.

HB 681 purports to promote responsible utilization and reclamation of land affected by extraction of construction materials.

HB 681 would bring the mining of construction materials under the jurisdiction of the Energy and Minerals Department that would be responsible for promulgating and implementing administrative procedures for permitting such mining.

### Significant Issues

According to the Energy, Minerals and Resources Department, half of construction materials mine sites are located on private lands that are not subject to agency reclamation requirements. Other types of mines, including coal, most metals and industrial minerals are subject to laws that require permits for reclamation of the mines after mining ceases. Currently there is no state law mandating reclamation of disturbances caused by the mining of construction materials, although leases for mining of these materials on state and federal lands contain reclamation requirements.

According to the Energy, Minerals and Resources Department, the bill includes a Citizen's Suit provision. Currently, only two other acts in the state contain similar provisions. They both impact the mining industry. These provisions may discourage development in the state.

According to the Energy, Minerals and Resources Department, the bill expressly states that the Act does not preempt the authorities of political subdivisions to regulate mining operators under the zoning and land use authority. This language will allow for multiple layers of regulation of small mining operators. It also can create a "crazy quilt" of rules with programs differing in every county. Differences in standards will cause confusion that will be expensive to resolve in court and, again will discourage development. The bill should clarify what case law has determined for other mining programs. That is, the state law preempts county or city ordinances in the areas regulated by the state law. This leaves local government to address areas not regulated by state programs, especially zoning questions and off-site impacts.

According to the Highway and Transportation Department, this bill may create uncertainty in availability of construction materials.

The bill establishes a streamlined permitting process for operations with less than five acres of disturbance, or less than ten acres of disturbance if the operation will produce materials solely for use under a government contract that must begin within a specified short time frame. This should help to address concerns that the permitting process should not unduly delay government construction activities.

### **PERFORMANCE IMPLICATIONS**

According to the Energy, Minerals and Resources Department, it does not have staff to implement this program, and will need to create a new program for this purpose. New performance measures will be established to measure its performance.

According to the Energy, Minerals and Resources Department, the division cannot absorb the additional workload this bill will impose.

### **FISCAL IMPLICATIONS**

The appropriation of \$250.0 contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of 2002 shall revert to the general fund.

According to the Energy, Minerals and Resources Department, it anticipates that these funds will be

used to establish the regulatory program. The bill contains a provision for permit application fees to be collected. However, these fees will not be paid until FY 03. Therefore, all program activities in FY 02 will be funded by the \$250,000 appropriation. These fees are to cover no less than half of the budget for the regulatory program. The balance of the budget required to run the program, if any, will likely come from the general fund, and will be a recurring cost.

It is unclear where the revenues generated from fines go.

### **ADMINISTRATIVE IMPLICATIONS**

According to the Highway and Transportation Department, it will have to find ways to completely change the ways it plans, designs, procures, and constructs highways. The profound effects of this proposed legislation on this agency cannot be overstated.

According to the State Engineer, this Bill will possibly affect the administration of water rights within the state in that reclaimed lands affected by mining or construction materials extraction could be graded such that ponds are formed. These ponds would waste water to evaporation. Utilization of such ponds as a part of post-mining land uses require a permit from the State Engineer.

### **CONFLICT**

According to the State Engineer, there is a possible conflict with Section 72 NMSA 1978.

### **OTHER SUBSTANTIVE ISSUES**

Mining of construction materials is currently subject to lease requirements, including reclamation provisions, if the operation is on State or federal lands. It will be necessary to coordinate with these agencies when developing regulations and permits for these operations, as the act will apply to these lands.

The act does not address off-site impacts of construction materials mining operations, such as noise, dust, truck traffic and certain visual impacts. The main focus of this act is land reclamation and on-site impacts. Local zoning and land use ordinances can address the off-site impacts, but the bill should establish that the state program preempts local governments in the areas it addresses. Efforts to include these requirements in this act would create duplicate and overlapping jurisdiction, and greatly increase the cost of implementing this program.

Attached is a synopsis of each section and overview from the Highway and Transportation Department and the Energy, Minerals and Natural Resource Department.

MFV/njw:ar  
Attachments

## Highway and Transportation Department.

1. The bureaucracy required by this legislation has been underestimated. The number of permits will overwhelm Energy and Minerals.
2. The application procedures are very involved requiring information that may not be known at the time the permits are sought.
3. Many contractors explore areas to determine if material is available when submitting a bid. Most of these explorations do not result in any excavation since only one bidder is awarded the contract. Much unnecessary paperwork may result from the proposed legislation.
4. Public notice provisions are time consuming.
5. Financial assurance provisions will be difficult to administer.
6. The requirements for determining violations and for investigation will be time-consuming and will restrict our ability to manage projects.
7. A contractor must explore and obtain necessary permits for material sources in a very short time frame. This bill would allow 60 days for the director to issue a permit. This would not even allow exploration to begin within the time frames we are working under now.
8. Pit owners may not have the financial resources to make financial assurances acceptable to the Energy, Minerals and Natural Resources Department. This legislation could put out of business many small pit owners.
9. Section 5 E. It may prove impractical to require a contractor to be financially responsible for 3 years for re-vegetation after construction.
10. This proposed legislation would increase the time necessary for securing construction materials by permit requirements, public review, and dispute resolution. This agency does not have the luxury of extra time to accommodate this permit process.
11. Contractor claims will escalate if permit issues in any way delay contractors after award.
12. Overall project costs will escalate and project delays will increase.
13. Section 3 B - The examples do not cover all the types of rock the Department uses for the construction of roads. Also, caliche is exempt, yet we use this all the time in District 2 and 4.
14. Section 4 A - If either a Federal or Tribal agency or a private land owner grants a permit, does the State have the right to rescind such permission if they do not agree either with the issuance and/or remediation efforts?
15. Section 4 B - If the State endures a long drought period, is it fair to hold the permit holder indefinitely until the drought is over and reclamation is "self-regenerated"?
16. Section 4 D (2) - Why limit streamlined procedure to 10 acres? Maybe more than 10 acres are needed because of site conditions, location of suitable deposits, or needed material quantities.
17. Section 4 E - What if the same operator has two separate projects that are for a federal, state or local government contract and they need two locations that happen to be within ½ mile of one another? Why shouldn't the streamlined process still be available?

18. Section 5 E Lines 9 thru 13 - If there are monies left over after this three year period has gone by, will the permit owner get them back?
19. Section 7 B Lines 1 thru 5 - If the pit location is on either Federal, Tribal, or private lands, does the State have an implied right of entry to inspect the site without obtaining the same from the land owner prior to the State's entry? What if the land owner doesn't want to allow the State onto their property?
20. Section 4. A. What is the time frame for obtaining a permit? What constitutes "good cause"? What constitutes a timely permit? For example, if a contractor is low bidder on a project and does not apply for the permit until that time, would he have the permit available for the project?
21. Section 4. D. (2). The 10 acre threshold for the streamlined review process appears arbitrary and is not tied to the size of construction projects. What is the time frame for a streamlined permit application review process?
22. Section 5. A. (1) The 60 day period for issuing a permit would be detrimental to this agency's bidding process. Even if the contractor started the permit process when the project is first advertised, he would not know at the time of submitting his bid if the permit would be issued or denied. This has direct impact on the unit bid prices established for the surfacing material items, and is detrimental to our competitive bidding process. Contractors can't secure sources well in advance of construction to establish prices. Provision for public hearings will delay our letting and award of contracts. This is a concern given our comparatively short advertising period.
23. Section 5. A. (2) Reference is made to a simplified application and public notification process. Time frames for obtaining a permit under this procedure have not been developed.
24. Section 5. C. Reference is made to public hearings. This is a concern given our short advertising period. Again, this is a concern given the time constraints in this agency's competitive bidding process. Also, it would be difficult for contractors to submit the proof required by (1) thru (3).
25. Section 7. C. Agreements between this agency and the Mining and Minerals Division would have to allow for the timely issuance of permits (during advertising of the project). Because our letting schedule is subject to modification or change, it would be difficult for contractors to start the process on a project that the Department may not let for an extended period of time.
26. Section 8 Enforcement-Civil Penalties. If contractors are found to be in violation and materials can't be obtained, delays in construction will occur. If this is the only material source, the project could be indefinitely delayed or will have to be canceled at great expense to the state.
27. Section 9 Administrative Review. This process could cause additional unforeseen delays beyond what has been mentioned above.
28. Section 11 Citizen Suits. Giving the right to the public to file suit will simply result in yet more time delays. Any person having an interest that may be adversely affected can sue and delay. Such persons presumably could include Environmental special interest groups, adjoining property owners, and even disgruntled contractors who were not low bidders.

## Details of Energy, Minerals and Natural Resources Department comments.

Section 3 of the bill provides definitions including definitions for “construction materials” and “mining operation”. These two definitions define what operations would be required to be permitted under this Act. “Construction materials” means any rock that is typically excavated or quarried for use in construction or road building including clay, silt, sand, gravel, limestone, dimension stone, marble, shale, flagstone, scoria or base course. “Construction materials” does not include coal or caliche. A “mining operation” covered by this Act is an operation that engages in the process of obtaining construction materials from the earth’s crust. A “mining operation” does not include transportation, concentrating, milling, cleaning, preparation and other off-site processing activities not conducted in the area defined for the permit, the excavation or grading of construction materials by the owners of the property, or the lessees or permittees of the owner, solely for on-site purposes not associated with a mining operation or any operation regulated under the Mining Act.

Section 4 of this Act requires that mining operations have a permit by December 31, 2003, or it cannot operate. The Director however, may allow an extension for up to twelve months, A provision is provided, however, that allows for an extension for up to 12 months, for good cause shown, if a timely and complete permit application has been submitted.

Section 4 also requires that the rules include a schedule for the submission of permit applications. The application must include disclosure of ownership information, a map of the operation including location, a description of the mining deposit and overburden, anticipated starting and termination dates and life of the mining operation, location of surface waters within one-half mile of the site, the estimated depth to ground water, a reclamation plan and the permit application fee. The reclamation plan is required to include a detailed description of the proposed post-mining land use, final topography after reclamation, soil salvage details, disposal of metal and other mine-generated wastes, vegetative cover that is capable of self-regeneration, the schedule of when reclamation will begin and end, evidence that other applicable local, state and federal permits and land use approvals have been obtained, and the permit application fee.

Section 4.C describes what the director must find to issue a permit for a mining operation: the permit application is complete; the financial assurance is adequate and has been provided; the reclamation plan conforms to the requirements imposed by the Act; the proposed mining operation is not contrary to the requirements of the Act and rules or any applicable federal, state or local laws and rules; and the mining operation has been designed to meet, without perpetual care, the requirements of the Act. The director must also find that the applicant, operator or owner is not currently charged with an unabated violation, has not forfeited financial assurance required for another operation in the United States, and has not demonstrated a pattern of willful violations of this Act or other New Mexico environmental statutes.

Section 4.D establishes a streamlined permit application process for mining operations conducted on less than five acres and for those operations conducted on ten acres or less when the operation is conducted solely to obtain materials for construction purposes under a federal, state or local government contract that requires work to commence within a specified short period of time.

Sections 4.E, 4.F, 4.G and 4.H describe additional requirements. Section 4.E excludes operations within one-half mile of another operation operated by the same entity from receiving a streamlined permit. Section 4.E also excludes from the streamlined process any proposed facility or portion of a facility located in an inhabited or environmentally sensitive area. Section 4.F provides for a permit term of five years and subjects each permit to an annual review by the director. Section 4.G requires an annual report. Section 4.H allows the director to revoke or suspend a permit for violations of the permit, rule, or provision of this Act.

Section 5 of this Act describes the duties of the secretary. The secretary is required to adopt rules within one year after the effective date of the Act. Sections 5.A and 5.B require that the rules provide for different requirements and time frames for reclamation. Section 5.A allows for rules to account for different application processes for different categories of mines that may include a requirement that the director issue or deny a permit within sixty days unless a public hearing is conducted. Section 5.B requires that the rules provide reclamation requirements for all mining operations and that reclamation commence no later than one year after the cessation of mining activity and be completed within five years after the completion of the mining operation or each phase of the mining operation.

Section 5.C requires that the rules describe public notification requirements. Public notification is required for issuance, renewal, or revision of a permit, variances and release of financial assurance. The operator is required to provide proof that the notice has been provided to owners of property within one-quarter mile, all municipalities, counties and Indian nations, tribes or pueblos within a ten-mile square radius of the mining operation, to the public by publishing in a local newspaper of general circulation and posting a notice in at least four publicly accessible places, and all persons who have requested to be noticed concerning the particular operation.

Sections 5.D and 5.E describe financial assurance requirements. The operator is required to file financial assurance prior to issuance of a permit that is sufficient to cover requirements of the permit. For release of financial assurance, the director is required to retain the amount of financial assurance necessary for a third party to reestablish vegetation for a period of three years after the last year of general reclamation work.

Sections 5.F, 5.G, 5.H and 5.I require that the rules include a schedule of fees, provide for smaller permit modifications, allow for variances and describe all requirements necessary to carry out purposes and provisions of the Act.

Section 6 describes the requirements for adoption of the rules. No rule can be adopted, amended or repealed without a public hearing before the secretary. Section 6 also describes publication requirements and opportunities for interested parties to submit data or arguments at hearings.

Section 7 describes the duties of the director. The director exercises the powers of enforcement and administration of the Construction Materials Mining Act. Section 7 also gives the director the right to enter lands where mining or reclamation is being conducted, allows the director to enter into agreements with other agencies and requires the director to create an advisory committee.

Section 8 describes enforcement authority and civil penalties. The director is required to issue a cessation order if there is a violation of the Construction Materials Mining Act that creates an imminent danger to the health or safety of the public or will cause significant imminent environmental harm. The director also is provided enforcement authority to issue notices of violation and if the violation is not abated, a cessation of the mining operation or portion of the mining operation subject to the violation. The director or commission may assess civil penalties not to exceed ten thousand dollars per day.

Section 9 provides for administrative review. A person who is adversely affected by an order, penalty assessment or issuance or denial of a permit by the director may request review of that decision by the Mining Act Commission, already established in law. The commission is required to hold a hearing and affirm, reverse, modify or remand the decision of the director. Section 9 also provides time frames for hearings and findings of fact.

Section 10 describes judicial review. This section allows a person who is affected by a rule to appeal the rule adopted by the secretary to the court of appeals. A person who is affected by a

final decision of the commission may appeal the decision of the commission to district court. Stays of an action being appealed may be granted by the commission or secretary or by the court if the commission or secretary denies a stay or fails to act on a stay.

Section 11 provides for citizen suits. This section allows a citizen to commence a civil action to compel compliance with the Construction Materials Mining Act. Such an action may be brought against anyone other than the director, the division, the secretary or the commission who is in violation of the Act and rules. An action can be brought against the director, the division, the secretary or the commission when there is a failure to perform a nondiscretionary act under the Construction Materials Mining Act.

Section 12 provides for criminal penalties. A person may be subject to criminal penalties if they knowingly or willfully violate the Construction Materials Mining Act, rules, a condition of a permit or refuses to comply with a final decision or order of the commission or director. Such a person is guilty of a misdemeanor and is subject to a fine not to exceed ten thousand dollars per day of violation or imprisonment of up to one year, or both.

Section 13 creates the "Construction Materials Mining Act fund". This fund is created within the state treasury and is the repository for all money received by the state pursuant to the Construction Materials Mining Act.

Section 14 limits the Act. The Construction Materials Mining Act does not supersede other applicable state or federal laws, preempt authority of local subdivisions, or limit the right that a person or class of persons may have pursuant to a statute or common law to seek enforcement of this Act.

Section 15 includes an appropriation of two hundred fifty thousand dollars. This appropriation is for use by the energy, minerals, and natural resources department in carrying out the purposes of the Act.