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## FISCAL IMPACT REPORT

**SPONSOR** Heaton      **DATE TYPED** 02/02/04      **HB** 206/aHENRC

**SHORT TITLE** Eliminate De Novo Water Quality Hearings      **SB** \_\_\_\_\_

**ANALYST** Wilson

### APPROPRIATION

<b>Appropriation Contained</b>		<b>Estimated Additional Impact</b>		<b>Recurring or Non-Rec</b>	<b>Fund Affected</b>
<b>FY04</b>	<b>FY05</b>	<b>FY04</b>	<b>FY05</b>		
			See Narrative		

### SOURCES OF INFORMATION

LFC Files

Responses Received From  
 Attorney General's Office (AGO)  
 Environment Department (ED)

### SUMMARY

#### Synopsis of HENRC Amendment

The House Energy & Natural Resources Committee amendment simplifies and enlarges the public notice requirements. It also allows a party who has not had a reasonable opportunity to submit comment or evidence at the original permitting hearing to be heard on the record by the original constituent agency.

#### Synopsis of Original Bill

House Bill 206 changes the permit hearing process for the ED and other constituent agencies under the Water Quality Act (WQA).

Under current statutory authority, permitting actions and certifications of federal permits under the WQA may be subject to a full evidentiary hearing before a constituent agency. Agency final permitting actions and certifications under WQA may be appealed to the Water Quality Control Commission (WQCC). Presently, even if there was a full evidentiary hearing on a permit before a constituent agency, an appeal of the agency permitting action or certification takes the form of a de novo evidentiary hearing before the WQCC. This can result in two full evidentiary hearings on the same permit.

HB 206 amends Section 74-6-5 of the WQA to provide that an appeal of an agency permitting action will be conducted as a record review by the WQCC, instead of conducted as a de novo evidentiary hearing. This WQCC will perform a review of the record created before the constituent agency instead of conducting an entirely new hearing on the same permit.

Presently in appeal proceedings, based upon the record before it, the WQCC will sustain, modify or reverse the action of the agency. However, under HB 206 the WQCC is not bound by the factual findings or legal conclusions of the constituent agency, and may develop its own findings and conclusions based on the evidence contained in the record.

The bill directs that appeals of water quality permits be taken to State District Court instead of the Court of Appeals. Appeals of regulations adopted shall be taken to the Court of Appeals.

### Significant Issues

ED states that the two evidentiary hearings currently provided for are redundant, time consuming and costly for ED, the regulated community and the public. The proposed amendment is consistent with basic principles of administrative law as well as permitting procedures under federal environmental statutes. In general, evidentiary hearings are held before the administrative agency with expertise in the matter, in this case ED. Appeals from the administrative agency generally take the form of an appeal, which involves a review of the record created below, not another full evidentiary hearing on the same matter. It is generally recognized that two full evidentiary hearings on the same matter is unnecessary and not a wise use of limited resources.

Under the provisions of this bill, the WQCC may remand the matter to the agency to take additional evidence or comment if, before the date set for the review, a party shows to the satisfaction of the WQCC that there was no opportunity to submit the additional evidence or comment on an issue being challenged. If the WQCC orders the agency to take additional evidence, the agency may revise its decision. The agency must file with the WQCC the record of the additional evidence together with any modified findings and decision.

ED supports the streamlining of the hearing process, but would like to see an expanded notice for the initial public evidentiary hearing, since the appeal hearing will be limited to a review of the record.

ED notes that currently, all appeals of water quality permits and regulations adopted are taken to the Court of Appeals. This bill will require permit appeals to be taken to a state district court. It will increase the expenses to the ED to handle actions all over the State.

### **FISCAL IMPLICATIONS**

HB 206 will greatly reduce the financial burden of duplicative air permitting hearings on ED. ED claims they are not provided with sufficient budget to cover the cost of the initial hearing and a second evidentiary hearing. The costs to ED for the 2002 Phelps Dodge Tyrone permit appeal hearing were more than \$249,000. This does not include costs that the public and the requestor incurred to present their cases in each hearing.

**ADMINISTRATIVE IMPLICATIONS**

Elimination of duplicative hearings will have a positive administrative impact on ED. Duplicative hearings take staff resources from their core work assignments which are to issue and oversee water quality permits.

**DW/lg:dm**