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FISCAL IMPACT REPORT

SPONSOR Nuñez DATE TYPED 1/28/2005 HB 194

SHORT TITLE Construction Materials Mining Act SB _____

ANALYST Aguilar

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
	\$250.0		Indeterminate	Recurring	General Fund
			\$250.0	Recurring	Construction Materials Mining Act Fund

(Parenthesis () Indicate Expenditure Decreases)

REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY05	FY06			
	\$250.0	\$250.0	Recurring	Construction Materials Mining Act Fund

(Parenthesis () Indicate Revenue Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Energy, Minerals and Natural Resources Department (EMNRD)

Commissioner of Public Lands (SLO)

New Mexico Department of Transportation (NMDOT)

SUMMARY

Synopsis of Bill

House Bill 194 creates the Construction Materials Mining Act fund.

HB 194 appropriates \$250 thousand 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.

HB 194 establishes a regulatory oversight program for construction materials mining operations within the Mining and Minerals Division of the Energy, Minerals and Natural Resources Department.

Construction mining operations will be required to obtain a permit which must include an approved reclamation plan and financial assurance.

This bill further authorizes citizen suits for violation of rules, orders or permits and suits against EMNRD for failure to perform nondiscretionary acts.

Significant Issues

HB 194 applies to operations engaging in mining any rock “that is typically excavated or quarried for use in construction or road building”. Milling or other off-site processing of materials and any excavation or grading of construction materials by a property owner or lessee solely for use on-site is not covered by the provisions of this bill.

Of note is the exception of caliche from the provisions of the act. Caliche is mined heavily throughout the state from a number of small pits and many times these pits are abandoned once the material is removed.

According to EMNRD, this bill contains a Citizen’s Suit provision. Currently only two other acts in the state contain similar provisions, 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 the 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.

This bill creates the “Construction Materials Mining Act fund”. This fund is created within the state treasury and is a nonreverting fund. An appropriation of \$250 thousand is included in this bill for the purposes of carrying out the purposes of the Act.

The State Land Office notes under New Mexico case law, state trust lands are not subject to local ordinances. This may stand in conflict with the portion of the bill providing that the Act does not preempt authority of local subdivisions to regulate land use, zoning and off-site impacts of mining operations

PERFORMANCE IMPLICATIONS

At present the Energy, Minerals and Natural Resources Department (EMNRD) 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.

EMNRD notes The act establishes a very short, and arguably unworkable, timeframe to establish a program, promulgate rules and procedures, process applications and issue permits for all existing mining operations covered by the act. The act would be effective July 1, 2005. MMD must adopt rules by October 1, 2005 and all mining operations must have a permit by December 31, 2005. Depending on who is covered, MMD currently estimates that there may be between 100 and 250 operations that will fall under the act.

FISCAL IMPLICATIONS

The appropriation of \$250 thousand contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2006 shall revert to the Construction Materials Mining Act fund.

This bill creates a new fund and provides for continuing appropriations. The LFC objects to including continuing appropriation language in the statutory provisions for newly created funds. Earmarking reduces the ability of the legislature to establish spending priorities.

ADMINISTRATIVE IMPLICATIONS

EMNRD is concerned the new program will require a number of new FTEs. These will include engineers, inspectors, permit writers and staff support. Not including shared administrative and legal support from the division, the coal and hard rock programs currently employ between 8 FTE and 10 FTE. We conservatively estimate that the new program will require 6 new FTE.

TECHNICAL ISSUES

EMNRD has provided the following amendments for the legislature's consideration:

A. The bill establishes time deadlines for adopting rules and submitting and approving permit applications that are extremely short and likely unworkable. We propose the following amendments:

Section 4. MINING OPERATION PERMITS REQUIRED.--Except as otherwise provided in this section, no person shall conduct a mining operation after December 31, 2006 without a permit issued by the division. For good cause shown, the division may allow a mining operation to operate without a permit for a stated period not to exceed twelve months after December 31, 2006 if the division has received a timely and complete permit application for the mining operation prior to December 31, 2006.

Section 5. MINING OPERATION RULES.--Prior to October 1, 2006, the division shall adopt and promulgate, with the secretary's approval as required in Subsection E of Section 9-1-5 NMSA 1978, rules to carry out the provisions of the Construction Materials Mining Act, including rules:

B. We propose that penalties paid under the Act be deposited in a fund for the reclamation of abandoned mines. The following provides for penalties to be deposited in a fund already established in the Mining Act and can be added to Section 13:

C. All money received from administrative or court-imposed penalties shall be delivered to the state treasurer and deposited in the "inactive or abandoned non-coal mine reclamation fund" established pursuant to Subsection B of Section 69-36-19 NMSA 1978. Money in the fund is appropriated to the department to conduct reclamation activities on abandoned or inactive non-coal mining areas. Any unexpended or unencumbered balance remaining in the inactive or abandoned non-coal mine reclamation fund at the end of a fiscal year shall not revert to the general fund but shall remain and accrue to the benefit of the inactive or abandoned non-coal mine reclamation fund.

D. In Section 12, under the list of requirements needed before the State can issue a permit, is the mandate for the State to "adequately address" all public concerns raised during the public hearing. At public hearings, citizens will often raise issues that are beyond the authority of the agency to address. This requirement implies that the agency will address all issues, even those that are beyond its scope. We propose the following amendment.

Section 12. PERMITS--ISSUANCE--SUSPENSION AND REVOCATION.--

A. The division shall issue the permit for a mining operation if it finds that:

(6) public concerns expressed during public hearings, which are within the scope of the Construction Material Mining Act, are adequately addressed;

OTHER SUBSTANTIVE ISSUES

Mining of construction materials is currently subject to lease requirement, including reclamation provisions, if the operations are 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 the off-site impacts of construction materials mining operations, such as noise, dust, truck traffic and certain visual impacts. The main focus of this bill is land reclamation and on-site impacts.

The following section contain a synopsis of each section and overview from the New Mexico Department of Transportation (NMDOT).

PA/lg

New Mexico Department of Transportation

1. The administrative machinery required by this legislation may be underestimated. The number of applications for permits could number in the thousands.
2. The application procedures require information that may not be known at the time the permits are sought.
3. Many Contractors explore areas to determine if material is available before submitting a bid. These Contractors will have to file applications for, and obtain a permit, even if they are not later awarded a contract.
4. The public notice and public hearing provisions may result in significant delays that cannot be quantified.
5. Administration of the Financial Assurance provisions may pose a significant challenge to the Division.
6. The Division's procedures for investigation and determining violations will pose delays that cannot be quantified.
7. A contractor must explore and obtain necessary permits for material sources in a short time frame. Projects typically receive only a 30-day advertisement. This bill would allow up to 60 days for the Division to issue a permit under the Streamlined Permit Procedure. This would not allow exploration to begin within the time frames for project advertisement set by the Procurement Code. 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 would impact the unit bid prices established for the surfacing material items. Because of the involved permitting process and the uncertainty in being awarded a contract, Contractors will be unable secure sources well in advance of construction to establish prices. Provision for public hearings may contribute to further delays.
8. Pit owners may not have the financial resources to make financial assurances acceptable to the Division. This legislation may put out of business many small pit owners who rely on supply of construction materials to public works projects for their livelihood.
9. The NMDOT is subject to the same permit requirements, and civil and criminal sanctions, as is any other construction materials mining operator.
10. This proposed legislation would increase the time necessary for securing construction materials by permit requirements, public review, and dispute resolution. The NMDOT operates within tight time constraints imposed by the STIP that may not readily accommodate this permit process.
11. Contractor claims may escalate if permit issues in any way delay Contractors after award.
12. Overall project costs may escalate and project delays may increase.
13. Caliche is exempt from the Act, yet no reason for this exemption is provided.

14. The Act applies to any land in New Mexico for which a construction materials mining activity is contemplated. It is unclear under what jurisdiction the Act may extend to federal lands or Indian Lands.

15. The Streamlined Procedure is limited to 10 acres. This threshold appears arbitrary, as more than 10 acres may be needed to supply the needs of a public works project because of quantities of acceptable material within the pit, haul distance to suitable deposits, or the need to use the pit for multiple projects.

16. The Streamlined Procedure is unavailable if the operator has two separate pits within ½ mile of each other. It is unclear why there is such a limitation given the concurrent demands of federal, state and local public works construction in some areas of the state.

17. Except for obtaining permits under the Streamlined Procedure, it is unclear what time limits are established for obtaining a permit. Given the Notice and Public Hearing requirements, permits could be subject to significant delays.

18. If contractors are found to be in violation of the Act, their pit operations are made subject to a cessation order, and construction materials for a project cannot be obtained, delays in construction will occur. If this is the only material source, the project may be indefinitely delayed or cancelled at great expense to the NMDOT.

19. Giving the right to the public to file suit may result in significant project delays. Any person having an interest that may be adversely affected is authorized to sue and thereby delay the project. Such persons may include environmentalists, adjoining property owners, or disgruntled contractors who were not low bidders on the project.