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FISCAL IMPACT REPORT

SPONSOR Lopez DATE TYPED 2/24/05 HB _____

SHORT TITLE New Mexico Healthy Community Act SB 710

ANALYST Hadwiger

APPROPRIATION (in \$000s)

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
			See Narrative		

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB 722.

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Office of the Attorney General (AG)
- Department of Finance and Administration (DFA)
- Department of Environment (NMED)
- Office of the State Engineer (OSE)
- Energy, Minerals and Natural Resources Department (EMNRD)
- Department of Health (DOH)
- Public Regulation Commission (PRC)

SUMMARY

Synopsis of Bill

Senate Bill 710 would enact the New Mexico Healthy Communities Act. The Act would require the Energy, Minerals and Natural Resources Department (EMNRD), New Mexico Department of Environment (NMED), and municipal and county zoning authorities to identify regulatory and infrastructure decisions that have negative health, environmental and cultural impacts on specified communities (particularly those sharing a common ethnic, income or racial background) and to avoid decisions that would have a disproportionate negative impact on the communities. In particular, the bill would:

1. Require the chief administrative officer (cabinet secretary of EMNRD, NMED or the

- chief administrative officer of the municipal or county zoning authority) to determine whether a decision concerning a regulated facility may have an impact on an affected community
2. Require the CAO to give written notice of the application, proceeding and any public hearing to properties adjacent to the facility and provide notice to other community residents through all of the following media: a newspaper, conspicuously posted notices, by mail (to individuals who request a notice), posted on a web site, and provided in at least one additional medium (television, radio, newsletter). The notice would be in English and any other written language appropriate to the affected community.
 3. Require a community impact report prior to any decision concerning a regulated facility including:
 - a. The demographic composition (ethnicity, income-level, and racial composition) of each affected community.
 - b. The present and future impacts that the existing or proposed facility will or may have on the public health, environment or culture of each affected community.
 - c. Other known existing and proposed facilities that will affect public health, environment or culture of each affected community.
 - d. Any other factors that would affect the health, environment or culture of each affected community
 4. Prohibit agencies from making any decision concerning a regulated facility if the decision would result in disproportionate public health, environmental or cultural impact or risk being imposed on the members of any ethnic, income-level or racial population of an affected community or would result in a concentration of regulated facilities in an affected community.
 5. Allow individuals to undertake civil actions to compel agency compliance with the Act and establish a process for such actions.
 6. The provisions of the Act would be in addition to other regulatory requirements for locating and operating a regulated facility.
 7. Contrary decisions made after July 1, 2005 would be void if not in substantial compliance with the Act.

Significant Issues

According to the Department of Health (DOH), environmental health risks have consistently been higher in racial and ethnic minority and low-income populations. The New Mexico Healthy Communities Act would prevent disproportionate, negative public health, environmental and cultural impacts on members of ethnic, low income-level and disenfranchised populations. DOH indicated that SB710 supports critical components for fostering healthier communities including assuring comprehensive assessments of the potential impact of a regulated facility located within communities; the impact of public, environmental, cultural, social and economic health of the residents; and the need to provide mechanisms for critical partnerships and between communities, regulatory agencies and regulated facilities in protecting the publics' health.

The AG noted that SB710 is designed to achieve the commendable goal of enhanced community involvement in regulatory decision making and zoning. As structured, however, the bill imposes potentially burdensome requirements on NMED, EMNRD and local governments. This added burden will likely significantly slow down and increase the cost of regulation. In turn, this administrative burden will likely result in increased costs to the regulated businesses.

The AG also indicated that the citizen suit provisions appear to create a significant new waiver of

New Mexico's sovereign immunity without explicitly amending the New Mexico Tort Claims Act. New Mexico taxpayers would be potentially liable for attorney fees and costs for successful citizen suits against the State of New Mexico to enforce this bill. The AG was concerned that the lack of objective criteria to make the determination of whether an action would result in a disproportionate public health, environmental or cultural impact or risk being imposed on members of an ethnic, income level or racial population of an affected community opens the doors for litigation by anyone dissatisfied with the agency or local government decision. Additionally, according to the AG, indefinitely permitting citizen suits following regulatory approval could have a chilling effect on industry, as companies are likely to be concerned that their permits will indefinitely remain in a state of limbo, subject to a citizen suit challenging them. These lawsuits will also result in additional regulatory delays and significant legal costs in defending the state agencies even if the courts ultimately rule in favor of the regulatory agency.

NMED identified the following concerns with the general provisions of SB710:

1. This bill would greatly increase costs to a business seeking a zoning change from a local government or permit from NMED or EMNRD. Any projects funded by NMED such as drinking water system improvements may also be subject to the requirement of a community impact report.
2. The bill contains no objective criteria for determining whether an action would result in a disproportionate public health, environmental or cultural impact or risk being imposed on members of any ethnic, income level or racial population of an affected community. Also, no objective criteria are given for determining what is an "affected community."
3. A community impact report must be prepared when, in the opinion of the chief administrative officer, there may be an impact on an affected community, but the bill provides no criteria for making this determination. The bill also requires that the community impact report be in English and any other written language most appropriate to the affected community. However, there is no definition of the "most appropriate" language for the writing of the report. Although this determination may be readily assumed, perceptions and assumptions often vary.
4. With the exception of the demographic information required, the other required components of the community impact report are difficult to define. Rules promulgated under the Act must be specific and definitive of "future impact", types of "other known existing and proposed facilities" and "other known environmental factors." In order for the report to be meaningful and useful.
5. The public notice requirements are also unclear. For example, the public notice requirement is only applicable for those facilities requiring a community impact report. The determination of a need for the report is made by the CAO, which can only be made once the application has been filed and at least preliminarily reviewed. SB710 states that the notice shall be given at the time the application or other request for the decision is filed.
6. Although it seems that the intentions of the section on Prohibited Acts are to prevent regulated facilities from being permitted that would result in disproportionate impacts on certain communities, and to prevent an oppressive concentration of such facilities in any one community, the statement that permitting agencies may not make any decision re-

garding a regulated facility is misguided, as a decision must be made even if it is denial.

7. Because there are no objective criteria for decisions about what would result in a “disproportionate public health, environmental or cultural impact or risk being imposed on the members of any ethnic, income level or racial population of an affected community,” there will be much litigation over the meaning of these terms.

EMNRD noted that the scope of the proposed bill is vast. Thousands of facilities in New Mexico hold permits from EMNRD or NMED. The Oil Conservation Division (OCD) of EMNRD, alone, processes over 2,000 applications for drilling permits each year. In addition, both EMNRD and NMED provide funding for numerous projects and facilities, including those intended for energy conservation. The number of facilities covered by local zoning actions is even greater. EMNRD reiterated many of the comments made by NMED, placed in the context of its own agency operations.

PERFORMANCE IMPLICATIONS

DOH indicated that SB710 aligns with the Department of Health’s (DOH) Strategic Plan, “Program Area 3: Epidemiology and Response – Epidemiology and Response Division strategic direction: Improve capacity of the state to respond to health emergencies”. It also relates to “Program Area 1: Objective 6: Prevent and control chronic diseases”.

FISCAL IMPLICATIONS

Implementation of SB710 would require additional responsibilities of NMED and EMNRD as well as local governments. The full extent of these additional responsibilities, and the costs associated with completing these requirements, cannot be precisely evaluated; however, additional costs may be incurred with the notification requirements, additional public hearings, increased possibility and likelihood of litigation, the review of the community impact reports and necessitated responses, as well as additional materials and publications required.

ADMINISTRATIVE IMPLICATIONS

DOH indicated that SB710 as supporting the agency mandate to protect public health, including environmental exposures. SB710 may result in additional requests for information and data to DOH from communities concerned about potential health effects of proposed facilities. This will be provided with existing staff, to the extent of available resources.

NMED indicated this bill will likely increase the amount of time needed to process permits and projects, and hearing issues will be expanded. In addition, more lawsuits may occur. As stated above, the full extent of these additional responsibilities, and the time associated with completing these requirements, cannot be completely evaluated without the implementing regulations.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB710 contains much of the same text and intent of HB722, however there are differences in the text, particularly in the order of the sections.

OTHER SUBSTANTIVE ISSUES

DOH provided the following general background with regard to SB710:

Facilities that affect New Mexico communities' environment and that are regulated by EMNRD, NMED or local governments according to their zoning authority tend to be concentrated in communities of certain ethnic and economic composition. According to the Congressional Black Caucus Foundation, Inc. an estimated 50% of African-Americans and 60% of Hispanics live in a county in which levels of two or more air pollutants exceed governmental standards. Communities with the greatest number of commercial hazardous-waste facilities have some of the highest proportions of minority residents. Half of all Asian/Pacific Islanders and American Indians live in communities with uncontrolled toxic waste sites. A recent report from the New Mexico Environmental Law Center raised concerns about a municipal waste disposal site, the Southwest landfill in Bernalillo County. The population disproportionately impacted by the location of this landfill is the largely Hispanic population of the South Valley and the people of Isleta Pueblo. Currently, decisions about granting permits to regulated facilities are made by state and local governments according to their zoning authority only. These decisions may not consider the full public health, environmental, and cultural negative impacts of the regulated facilities on ethnic and low-income populations.

NMED provided the following comments about agency activities with regard to environmental justice:

NMED recently concluded a year-long series of "Environmental Justice Listening Sessions." These sessions were held to allow citizens to present issues of perceived environmental injustices or issues where regulated facilities were concentrated in communities that fit certain ethnic, income-level or racial demographics. NMED's Environmental Justice Policy Committee drafted a definition of Environmental Justice based on the input received at the listening sessions. The definition is as follows:

The fair treatment and meaningful involvement of all people, regardless of race, ethnicity, culture or income level, with respect to the development, implementation, and enforcement of environmental laws, regulations and policies. Environmental Justice goals are:

- 1. Ensure that no community is forced to shoulder a disproportionate burden of the negative human health impacts, environmental impacts and environmental risks of pollution or other environmental hazards;*
- 2. Provide for meaningful participation to all New Mexicans in the development, implementation and enforcement of environmental laws, regulations and policies.*

The Policy Committee has the duty of recommending policy to the Environment Department that would positively affect and address issues of environmental injustices. The Policy Committee also drafted an Executive Order that addresses environmental justice for executive agencies in the state.

DH/lg