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## FISCAL IMPACT REPORT

SPONSOR Altamirano ORIGINAL DATE 2/13/2006  
LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_  
SHORT TITLE Regulatory Reform Task Force SB SJM65/aSRC  
ANALYST McSherry

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY06	FY07	FY08	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)

New Mexico Environment Department (NMED)

Energy Minerals and Natural Resources Department (EMNRD)

### SUMMARY

#### Synopsis of SRC Amendment

The Senate Rules Committee amendments to Senate Joint Memorial 65, "Regulatory Reform Task Force" make technical changes and specify that the joint memorial should be transmitted to the secretaries of the Environment, and Energy Natural Resources Departments and heads of other state agencies that have regulatory responsibility, in addition to the superintendent of regulation and licensing.

#### Synopsis of Original Bill

Senate Joint Memorial 65, "Regulatory Reform Task Force" states that a regulatory environment that enhances confidence and accountability and allows for reasonable expectations and planning would better serve businesses.

The Memorial requests that RLD establish a task force to study regulatory reform. The task force would consist of equal numbers of members from regulatory agencies, regulated licensees and permittees. The task force would study:

1. Permitting and licensing review time frames
2. Enforcement of time limits

3. Rules and procedures for publication enhancement
4. Creating uniform inspection procedures
5. Administrative Procedures Act applications to all rulemaking
6. Whether hearing officers and administrative law judges should be pooled within an agency or employed by an independent executive agency.

The Memorial requests the task force to make recommendations, including identifying possible legislation, in a report to the Legislative Finance Committee by October 15, 2006.

## **FISCAL IMPLICATIONS**

According to the Energy Minerals and Natural Resources Department, a significant amount of resources would be required to participate in the task force. The Department asserts that further legislation resulting from SJM 65 could have a large fiscal impact.

There is no funding provided or proposed in the Memorial to conduct the additional tasks requested.

The New Mexico Environmental Department cites the following additional concerns:

- The Environment Department issues air quality, water quality, hazardous waste, and solid waste permits and utility operator certification licenses. License issuance timeframes are dependent on the applicant's completions of training, testing requirements and are out of the control of the agency. Permit issuance can take between 180 days and several years depending on the scope of the permit, the amount of technical information that is required to demonstrate that the facility will be protective of public health and the environment, and the forthrightness of the applicant in providing necessary information. Examples of complicated and lengthy permit processes include site-wide hazardous waste permits for Department of Energy facilities such as Los Alamos National Laboratory, and site-wide closure permits for large mining facilities.
- An incomplete technical review of environmental protection permit applications can lead to long-term environmental problems such as air pollution, water quality contamination and threats to public health. Taking the time to ensure that permits are protective of the state's air, water and land resources can prevent costly and lengthy cleanups that can result from inadequate or rushed permitting.
- The proposed structure of the task force does not include citizen stakeholders, yet the issues to be addressed are of interest to citizens and relate to how citizens are able to be involved in permitting actions. Failure to include citizen participation would be counter to open and transparent government. The Environment Department is accountable not only to regulated and permitted entities, but also to the general public whose environment we protect. Members of the public have a legitimate interest in our rulemaking and permitting actions and procedures, and have consistently made clear to us the need for their meaningful involvement in these decisions and procedures. SJM65 would exclude members of the general public from the task force, and thereby establishes a process that is not fully accountable and transparent to the public.
- The number of regulatory agencies, regulated licensees and permittees necessary to comprise a task force applicable to all state agencies and activities would be unwieldy. Using one type of NMED permittee as an example, NMED issues permits for protection of ground water quality pursuant to New Mexico Water Quality Control Commission Regulations. NMED has approximately 900 active ground water discharge permits. There are

approximately 23 types of permittees representing these 900 discharge permits including, Municipal Wastewater Treatment Facilities; Dairies; Cheese Producers; Milk Processors; Chile Processors; Meat Processors; Industrial Facilities; Mining Operators; Energy Utilities; Responsible Parties for Ground Water Remediation Projects; Car Wash Facilities; Bulk Fuel Facilities; Ethanol Producers; Landfarms for Remediation of Hydrocarbon-Contaminated Soils; Sludge Disposal Facilities; Septage Disposal Facilities; and Domestic Waste Dischargers (those with discharge volumes greater than 2,000 gallons per day) at Lodging Facilities, Mobile Home Parks, Residential Subdivisions, RV Parks, Amusement and Recreational Facilities, Schools, Churches, Correctional Facilities, Office Facilities and Retail Facilities. This is only one type of permitting activity conducted by the NMED. When considering all permitting and licensing activities of NMED, the number of regulated licensees and permittees necessary to comprise the task force would be unworkable. This also does not account for the regulated licensees and permittees of other state agencies.

- The Environment Department's Radiation Control Bureau is required, under an Agreement with the US Nuclear Regulatory Commission (NRC), to maintain program compatibility with NRC. This includes timeframes for regulatory actions such as licensing and responding to violations identified during an inspection. If in aligning our regulatory practices with other state programs, we are found to no longer be compatible with the NRC program, our agreement status could be jeopardized. Ultimately this could result in the federal government assuming responsibility for the radiation control program in New Mexico, loss of state jobs, and an increased cost to the regulated community (NRC fees are overall significantly higher than the State's).
- The Administrative Procedures Act is a little used and now historically outdated procedural act that most governmental agencies in New Mexico do not use because one size does not fit all licensing and permitting actions. Additionally, the Administrative Procedures Act requires the agency to promulgate specific rules anyway, which is inefficient.
- The Environment Department's regulatory area is very scientific and specific. It requires an administrative law judge have expertise in the area being regulated.

## SIGNIFICANT ISSUES

EMNRD reports that several divisions within the Department regulate including the Mining and Minerals Division, the Oil Conservation Division, the Forestry Division, the Parks Division and the Energy, Conservation and Management Division. EMNRD asserts that participation in the task force would divert essential resources already spread thin in terms of regulatory administration. The Department points out

- SJM 65 does not identify which regulatory agencies in New Mexico should be reviewed. The task force could include dozens of regulatory agencies with such disparate authority that the reviews would be extremely time consuming and inefficient for agencies involved. This could result in further delays in permitting and licensing by reallocating limited resources to a task force. This would be counter productive to the intent of the Memorial.
- Some regulatory agencies in New Mexico have federal mandates to follow certain procedures that cannot be changed without federal sanctions or rescission of state authority. For example, within EMNRD, the Coal Regulatory Program operates under a specific delegation of authority (primacy) from the Office of Surface Mining pursuant to the Surface Mine Control and Reclamation Act (SMCRA) and cannot be less stringent than the

federal act. Reducing permit timeframes could result in permitting procedures that are less stringent than federal requirements, which could jeopardize state primacy agreements.

- SJM 65 is not clear on how the committee would come to resolution on disagreements over recommendations. Though the Memorial is not clear on this point, it is presumed that the RLD would lead the task force and finalize recommendations that are sent to the legislative finance committee. RLD does not have knowledge or expertise about many regulatory agencies and recommendations made by RLD could negatively impact agencies.
- An incomplete technical review of permit applications can lead to long-term environmental problems such as surface and ground water contamination and other threats to public health. Taking time to ensure that permits are protective of the state's air, water and land resources can prevent costly and lengthy cleanups that can result from inadequate or rushed permitting. Amending permits to include items that may be missed will result in costly delays and expose the environment and the public to hazards in the interim period.
- The Administrative Procedures Act is little used and now a historically outdated procedural act that most governmental agencies in New Mexico do not use because one size does not fit all licensing and permitting actions. Additionally, the Administrative Procedures Act requires the agency to promulgate specific rules anyway, which is inefficient.

According to the Administrative Office of the Courts,

1) “adjudicatory proceeding” is defined within the Administrative Procedures Act as

...a proceeding before an agency, including but not limited to ratemaking and licensing, in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for a trial-type hearing;...

Section 12-8-2 NMSA 1978.

2) Section 12-8-16 NMSA 1978 allows a party who has exhausted all administrative remedies available within an agency and who is adversely affected by a final order or decision in an adjudicatory proceeding to appeal pursuant to the provisions of Section 39-3-1.1 NMSA 1978, allowing for appeal to the district court unless standing is further limited by a specific statute.

3) Section 39-3-1.1 NMSA 1978 provides the following

E. A party to the appeal to district court may seek review of the district court decision by filing a petition for writ of certiorari with the court of appeals, which may exercise its discretion whether to grant review. A party may seek further review by filing a petition for writ of certiorari with the supreme court.

F. The district court may certify to the court of appeals a final decision appealed to the district court, but undecided by that court, if the appeal involves an issue of substantial public interest that should be decided by the court of appeals. The appeal shall then be decided by the court of appeals.

## **PERFORMANCE IMPLICATIONS**

The additional task of participation in the proposed task force may cause agency performance in other tasks to diminish.

## **ADMINISTRATIVE IMPLICATIONS**

Increased administrative workload would be realized by RLD, EMNRD, NMED and other regulatory and licensing agencies.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

SJM 65 duplicates some of the 2005 House Bill 869, the Small Business Regulatory Relief Act. The SBRRA establishes a Commission that provides state agencies with comments regarding proposed rules that may adversely affect small businesses. The Commission also considers requests from small business owners to review rules an agency adopts to determine whether the rule places an unnecessary burden on small businesses and make recommendations to the agency.

## **OTHER SUBSTANTIVE ISSUES**

There are many regulatory agencies in New Mexico. EMNRD asserts that items on the list for the task force to review may not be relevant or pertinent to some agencies. The Department points out that the memorial does not differentiate which agencies would look at what issues, and contends that may result inefficiencies and unnecessary use of time many agencies.

EMNRD points out that:

- In situations where a permit applicant does not provide information necessary for the agency to evaluate the proposed activity, and issue a permit that is protective of public health and the environment, permit denial is generally the remedy. However, the Department contends that permit denial is not an acceptable solution in all situations.
- Shortening permit issuance timeframes negatively impacts the public's ability to participate in the permitting process and conflicts with other state initiatives. Environmental justice initiatives expand the public's opportunities to review permit applications and get involved in permits for activities in their neighborhood.
- Many permittees benefit from the agency's ability to work through application deficiencies rather than taking action to deny the permit. When a permit is denied, the applicant must resubmit its application, which can be costly and time consuming for both the agency and the applicant.
- Many applicants need significant agency assistance in developing permit applications and technical data to support permit approval, which can slow down the permit issuance process.

NMED cites the following Departmental concerns:

- Some permittees regulated by the Environment Department are not forthcoming in providing technical data and other required information to support applications for new or expanded activities. These businesses should not be rewarded through legislation mandating permit timeframes. Rather, incentives should be

provided to encourage technically complete applications in support of proposed activities.

- In situations where a permit applicant does not provide the information necessary for the agency to evaluate the proposed activity and issue a permit that is protective of public health and the environment, permit denial is generally the remedy. However, permit denial is not an acceptable solution in all situations.
- Some permit applications are submitted after the regulated activity has begun. In these situations, the most appropriate solution is to ensure the ongoing activity comes into compliance with permit requirements. Permit denial only extends the time that the activity is out of compliance with existing laws and rules.
- Some activities cannot be stopped, even if a permit is denied. For example, a mobile home that has an unpermitted wastewater system serving various families cannot be shut down without displacing residents, even if the owner is not forthcoming during the permitting process.
- Shortening permit issuance timeframes negatively impacts the public's ability to participate in the permitting process and conflicts with other state initiatives.
  - Environmental justice initiatives expand the public's opportunities to review permit applications and get involved in permits for activities in their neighborhood.
  - 2005 legislation expanded up-front public participation procedures in order to reduce the time spent on appeals and court proceedings that occur after a permit has been issued.
- Federal permit processing requirements must be complied with in situations where a federal program has been delegated to the state.
- Reducing permit timeframes could result in permitting procedures that are less stringent than federal requirements, which could jeopardize state primacy agreements.
- Many permittees benefit from the agency's ability to work through application deficiencies rather than taking action to deny the permit.
- When a permit is denied, the applicant must resubmit its application, which can be costly and time consuming for both the agency and the applicant.
- Many applicants need significant agency assistance in developing permit applications and technical data to support permit approval, which can slow down the permit issuance process.

NMED contends that timeframes for permitting or licensing of regulated activities vary necessarily because there are different levels of complexity attendant with the review of the disparate applications. For example, a food permit application can be reviewed and issued in a much shorter timeframe than a hazardous waste permit or radioactive materials license application.

## **ALTERNATIVES**

NMED suggests the following amendments to the Memorial:

1. Insert two new paragraphs on page 1, line 21:

“WHEREAS, permitting procedures should provide incentives for businesses to provide technically complete applications to support their proposed activities;”

“WHEREAS, adequate opportunities for public participation in permitting processes are necessary and beneficial, and must not be compromised;”

**Senate Joint Memorial 65/aSRC – Page 7**

2. Insert on page 1, line 24, after the word “reform”, the phrase: “except environmental regulatory reform,”
3. Insert after the word “agencies” on page 1, line 25 -- “, public representatives including public advocacy groups, tribes and local governments,”
4. Page 2, line 24, strike “2006” and insert “2007”

AOC suggests that the Attorney General’s office may be better suited to review whether administrative law judges and hearing officers should or could be pooled within an existing agency or whether the Administrative Procedures Act should apply to all rulemaking and adjudicatory proceedings.

AOC further suggests limiting the number of agencies covered by this memorial.

EMNRD suggests the following amendments:

1. Page 1, line 24, insert after the word...reform, “*except environmental regulatory agencies*”. OR
2. Page 1, line 24 insert after the word...reform, “*for those agencies subject to the Uniform Licensing Act*”.
3. Page 2, line 20 after the semi-colon, add the following before the word...and, “*G. ensuring that the public is provided a significant opportunity to participate in rulemaking and adjudicatory proceedings*”.

EM/mt