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FISCAL IMPACT REPORT

ORIGINAL DATE 2/01/08

SPONSOR Komadina LAST UPDATED 2/04/08 HB _____

SHORT TITLE Defeat Federal Clean Water Restoration Act SM 46

ANALYST Padilla/Aubel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY08	FY09	FY10	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		\$1,900.00*	\$1,900.00*	\$3,800.00*	Recurring	See narrative

(Parenthesis () Indicate Expenditure Decreases)

*Potential

Note: The original FIR has been substantially updated to incorporate comments from New Mexico Environment Department, which had not been available.

SOURCES OF INFORMATION

LFC Files

Response Received From

New Mexico Environment Department (NMED)

SUMMARY

Synopsis of Bill

Senate Memorial 46 requests that Congress defeat United States H.R. 2421 and United States S. 1870, the Clean Water Restoration Act (CWRA). SM 46 further proposes New Mexico Representative Tom Udall be requested to withdraw his support for this Act. Copies of this Memorial are to be transmitted to the New Mexico Congressional Delegation, to the Speaker of the United States House of Representatives and to the majority and minority leaders of the United States Senate.

FISCAL IMPLICATIONS

SM 46 notes several potential fiscal impacts to the state if CWRA is enacted, including unfunded mandates, increased costs for building and maintaining transportation systems, administrative burdens, and delayed development of new projects and maintenance of existing infrastructure. However, these fiscal concerns were not quantified and remain unknown.

NMED notes that for the past three decades the U.S. Environmental Protection Agency (EPA)

has administered the National Pollutant Discharge Elimination System (NPDES) program in New Mexico at little cost to the state. The New Mexico Environment Department maintains this would continue under the CWRA.

However, the department states that if the CWRA is not implemented and the state must develop a surface water quality protection program to ensure continued protection of its waters, costs have been estimated at \$1.9 million. Although NMED is funded from other state funds and federal funds in addition to general fund, most of the burden for funding this program would most likely fall on the general fund because the agency already utilizes most of its special funds and federal dollars have been declining the last few years except in limited circumstances.

This potential fiscal impact is based on the assumption that only about 10 percent of New Mexico's surface waters would be protected by federal definition of "water" without the enactment of CWRA and, therefore, under the auspices of the EPA. In May 2007 the state Court of appeals unanimously confirmed a state Water Quality Control Commission's decision that all of New Mexico's waters are subject to federal water quality standards, regardless of how the federal government defined those waters. Thus, NMED assumes that the state would need to implement its own NPDES program.

SIGNIFICANT ISSUES

The U.S. Environmental Protection Agency (EPA) provides the following brief history of the Clean Water Act:

Growing public awareness and concern for controlling water pollution led to enactment of the Federal Water Pollution Control Act Amendments of 1972. As amended in 1977, this law became commonly known as the Clean Water Act. The Act established the basic structure for regulating discharges of pollutants into the waters of the United States. It gave EPA the authority to implement pollution control programs such as setting wastewater standards for industry. The Clean Water Act also continued requirements to set water quality standards for all contaminants in surface waters. The Act made it unlawful for any person to discharge any pollutant from a point source into navigable waters, unless a permit was obtained under its provisions. It also funded the construction of sewage treatment plants under the construction grants program and recognized the need for planning to address the critical problems posed by nonpoint source pollution.

Subsequent enactments modified some of the earlier Clean Water Act provisions. Recent Supreme Court rulings have also modified the application of the Act by defining "waters" covered under the Act to those that only fall under federal jurisdiction based on navigability. According to the New Mexico Environment Department, prior to the Supreme Court's 2001 ruling in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*) and its 2006 ruling *Rapanos v. United States*, 547 U.S. ___, 126 S.Ct. 2208 (*Rapanos*), EPA and the U.S. Corps of Engineers construed the term "waters of the United States" to include all waters that have been used, or are susceptible to use in interstate or foreign commerce, all interstate waters, including interstate wetlands; all waters the degradation of which could affect interstate commerce; tributaries of all such waters; and wetlands adjacent to all such waters.

The Clean Water Restoration Act is federal legislation that has been submitted as U.S. House of Representatives 2421 (HR 2421) and in the Senate as Senate 1870 (S 1870), promoted as a means of restoring protections of surface water to align with this original interpretation. The primary issue is how the federal legislation, if enacted, would affect New Mexico.

SM 46 maintains that the Clean Water Restoration Act would have the following effects:

- The Federal Clean Water Act amendments contained in the United States H.R. 2421, co-sponsored by Congressman Tom Udall and Representative Oberstar (D-Minnesota) proposes to give the federal government control over virtually all waters of the United States including expansion of the federal government's control over western water resources to such an extent that, even periodically, wet ground would come under federal hegemony.
- Furthermore, the Memorial maintains that HR 2421 represents one of the most expansive power grabs over western states and the west's resources in memory, fundamentally eroding the ability of westerners, and state governments in particular, to manage their own water resources and cause an avalanche of new unfunded mandates on envelop state and local governments.
- SM 46 also suggests that the bill will make more costly to grow crops, provide water to cities, operate and maintain water storage and delivery facilities, produce energy, including renewable power, build and maintain public transportation systems, deliver affordable goods and services to consumers and carry out virtually any activity that occurs on land without federal agencies constantly threatening to interfere.

HM 46 concludes:

- The bills' sponsors contend that United States water are threatened due to United States Supreme Court decisions in 2001 and 2006, which clarified the waters that fall under federal jurisdiction to include those
- By changing the Federal Clean Water Act's jurisdictional sweep from regulation of "navigable waters" to "waters of the United States," the bill would have a devastating impact on western states' sovereignty by expanding the regulatory reach of the Federal Environmental Protection Agency and the Army Corps of Engineers;
- Essentially grant the Federal Environmental Protection Agency and the Army Corps of Engineers a veto over local land-use policies and any activity involving water, including commercial and residential real estate development, agriculture, electric transmission, transportation, mining and energy development and even recreational activities.
- There is virtually no business or job-creating activity in the west that would not be adversely affected by this bill.
- Under this legislation, liability for citizen lawsuits and exposure to attorney-fee awards would increase for all landowners who have water features on or near their properties.

According to the Department of Environment, the Clean Water Restoration Act (CWRA) only restores protections that have been in place since the 1970s. The department maintains that its purpose is "to reaffirm the original intent of Congress in enacting the Federal Water Pollution Control Act Amendments of 1972...to restore and maintain the chemical, physical, and biological integrity of the waters of the United States." Furthermore, the department concludes as follows:

- The proposed legislation directly affirms each state’s responsibility and right to prevent, reduce, and eliminate pollution of waters.
- The *CWRA* simply restores protections that were in place for three decades during which time the quality of America’s rivers, lakes, wetlands and streams improved dramatically.
- If the protections previously afforded by the Clean Water Act are not restored, through the *CWRA*, then New Mexico could lose protection for more than 90% of its waters, such as such as closed basin waters, playa lakes, wetlands and non-perennial streams.

OTHER SUBSTANTIVE ISSUES

NMED provides additional background information regarding New Mexico water and possible implications for not supporting CWRA:

Waters within closed basins cover up to one-fifth of New Mexico might be vulnerable to pollution. Closed basins include perennial and non-perennial streams that provide water for municipal, industrial, agricultural (irrigation and livestock watering), recreation, and wildlife uses. Such basins include the Tularosa, Mimbres, San Augustine, Estancia and Salt in central, south central and southwestern New Mexico. The water beneath just one of these basins – the Salt – has been estimated by the U.S. Geologic Survey to contain as much as 57 million acre feet of water, including 15 million that is potable. According to NMED, this could prove to be a vital, and needed, future water supply for the rapidly growing City of Las Cruces in southern New Mexico. However, according to NMED, if this aquifer is allowed to be polluted by surface dumping, its benefits for future New Mexicans will be severely curtailed. NMED notes that *SWANCC* and *Rapanos* also would apply to thousands of playa lakes, headwaters, springs, cienegas and wetlands that would not be covered by federal standards.

NMED provides three examples where it claims CWRA may be vital:

In the southeastern part of New Mexico there are many economically and ecologically valuable playa lakes that are isolated from navigable waters, which nevertheless serve as critical oasis-like over-wintering habitat for migratory birds within the important Central Flyway. In particular, these waters provide habitat for the Northern Pintail which is a highest priority waterfowl species according to the North American Waterfowl Management Plan (USFWS et al, 2004), and for 15 priority species of shorebirds listed in the US Shorebird Conservation Plan for the Central Plains /Playa Lakes (Fellows et. al, 2001). These playas are also used by other wildlife such as pronghorn antelope, for irrigation and livestock watering, and provide recreational opportunities such as hunting and bird watching. Without the *CWRA*, these waters could be destroyed by development without a Clean Water Act Dredge or Fill permit, or could receive unlimited pollutant discharges without a *NPDES* permit.

Another example involves the non-perennial streams that receive stormwater and wastewater discharges from the Los Alamos National Laboratory. The laboratory encompasses thousands of sites contaminated by cold war legacy pollutants. If these streams lose protection they could become inundated with contaminated runoff from industrial facilities and process wastewater. In this example, the lab is up-gradient of the major cities of Santa Fe and Albuquerque, which are currently developing multimillion dollar facilities to directly access the surface water resources of the Rio Grande for drinking water supplies necessary to ensure the region’s economic growth.

Finally, on the eastern high plains where surface water is even scarce by New Mexico standards and thus even more critical to economic and biological concerns of the region, Canon Air Force Base has requested the cancellation of its NPDES permit even though it intends to continue discharging pollutants to a playa lake.

NMED concludes as follows:

The *CWRA* solves these problems by replacing the term “navigable waters of the United States” with “waters of the United States.” This fix simply restores protections that were in place for three decades during which time the quality of America’s rivers, lakes, wetlands and streams improved dramatically. It also restores Congress’ original intent when it passed the Clean Water Act in 1972, to protect our nation’s water resources for future generations.

PERFORMANCE IMPLICATIONS

NMED maintains that if the long term protections of the Clean Water Act are not restored, New Mexico would most likely see an increase in miles of impaired waters, which would negatively impact one of the department’s performance measures.

ADMINISTRATIVE IMPLICATIONS

As discussed under fiscal implications, NMED states that if the *CWRA* is not implemented, the state will have to invest significant resources to protect the quality of its waters without federal financial support. As previously noted, SM 46 sees greater unfunded federal mandates and administrative burden to the state if the legislation passes.

ALTERNATIVES

Rather than wholesale opposition to the *CWRA*, NMED suggests that New Mexico could request that the proposed federal legislation be amended as necessary to ensure preservation of the state’s traditional powers over our groundwater resources.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

SM 46 maintains that the consequences of not enacting this bill will result in the federal government’s control over western water resources resulting in federal hegemony and the state’s loss of sovereignty over pertinent water issues in New Mexico, including other states within the nation. NMED maintains that New Mexico will not interfere with federal efforts to protect state waters.