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## FISCAL IMPACT REPORT

ORIGINAL DATE 01/29/09  
 LAST UPDATED 03/11/09    **HB** 106/aHJC

SPONSOR Heaton

SHORT TITLE Environmental Civil Penalties & Reporting    **SB** \_\_\_\_\_

ANALYST Aubel

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY09	FY10	FY11		
Indeterminate Minimal See Below	Indeterminate Minimal See Below	Indeterminate Minimal See Below	Recurring	General Fund Special Funds

(Parenthesis ( ) Indicate Revenue Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

New Mexico Environment Department (NMED)

### SUMMARY

#### Synopsis of HJC Amendment

The House Judiciary Committee Amendment to House Bill 106 replaces language that automatically required exemption from penalties for self-reported violations of environmental laws with language that now requires a consideration of reducing or eliminating penalties under those circumstances if 1) the violation is reported to the New Mexico Environment Department within 60 days of discovery of the potential violation; 2) corrective action is initiated; 3) the person has not previously violated the same provision of law; 4) the violation does not present an imminent and substantial endangerment to health or the environment.

The amendment also aligns the bill title with this substantive change.

### FISCAL IMPACT

NMED now estimates that the amended bill will not significantly impact the amount of penalties collected in a year.

## SIGNIFICANT ISSUES

NMED provides the following analysis regarding the amendment:

The amendment to the bill now requires the Environment Department to consider reduction or elimination of the penalty when certain criteria are met by an entity that violates an environmental law. The idea behind HB 106/aHJC has merit, to provide incentives for regulated entities to voluntarily comply with state environmental laws and regulations. By achieving voluntary compliance, the Environment Department ensures the protection of human health and the environment in a manner that is beneficial to both the regulated community and the regulatory agency. Though self-disclosure is already part of the Environment Department's penalty policies, the amendment to HB 106 assists NMED in striving to achieve those goals.

The U.S. Environmental Protection Agency (“EPA”) has a policy called “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations.” In order to qualify for incentives under EPA's policy, regulated entities would have to meet certain criteria with regard to the audits that were conducted. Specifically, the following conditions usually apply if a regulated entity wishes to claim the advantages of the policy:

- **Systematic discovery** of the violation through an environmental audit or the implementation of a compliance management system.
- **Voluntary discovery** of the violation through a process other than a result of a legally required monitoring, sampling or auditing procedure.
- **Prompt disclosure** in writing to EPA within a prescribed time period.
- **Independent discovery and disclosure** before EPA or another regulator would likely have identified the violation through its own investigation or based on information provided by a third-party.
- **Correction and remediation** within a prescribed time period.
- **Prevention of recurrence** of the violation.
- **Repeat violations are ineligible**, as defined in the policy
- **Certain types of violations are ineligible** such as those that result in serious actual harm, those that may have presented an imminent and substantial endangerment, and those that violate the specific terms of an administrative or judicial order or consent agreement.
- **Cooperation** by the disclosing entity is required.

Under the federal policy, the penalty is reduced but not forgiven; there is no recommendation for criminal prosecution and no routine requests for audits.

See: <http://cfpub.epa.gov/compliance/resources/policies/incentives/auditing/>

NMED concludes that HB 106/aHJC is now more in line with EPA's Self Audit and Disclosure Policy.

Synopsis of Original Bill

House Bill 106 amends the Environmental Improvement Act (Act) to provide for exemption from civil penalties for persons who voluntarily report potential violations to the Department of Environment within 60 days and have initiated corrective action, if the person has not previously violated the same provision of law and the violation does not present an imminent and substantial endangerment to health or the environment.

**FISCAL IMPLICATIONS**

The fiscal impact of HB 106 of reducing revenues pursuant to collection of penalty fees is indeterminable. First, it is uncertain which penalties the bill encompasses. If the bill is determined to apply only to penalties assessed by authority specified in the Environmental Improvement Act, which would include liquid waste violations and drinking water violations, the fiscal impact would be minimal if penalties were “forgiven” because these penalties are typically low. For example, records show the total penalties assessed and collected for liquid waste violations since June 2005 total \$1,700.00. If the bill is determined to encompass all penalties assessed for all types of violations – including those related to hazardous waste, air quality, food safety, solid waste, and occupational safety – NMED estimates the reduction in revenue could be as high as \$2 million. This estimate appears high because most high penalties relate to significant violations that present “an imminent and substantial endangerment to health or the environment.” This bill limits the exemption to those violations that do not pose such a threat. Because the excluded violations would not be significant in nature, the reduction in revenues would most likely not be significant.

Second, the percent of violations that would be “forgiven” according to the bill is unknown, contributing to the uncertainty in the fiscal impact analysis.

**SIGNIFICANT ISSUES**

Penalties accrue to both general fund and special revenue funds. The following table shows the aggregate penalties collected by NMED from FY03-FY07 by program.

NMED Program	General Fund	Other State Funds
<b>Water Quality Program</b> (Groundwater Quality Bureau and Hazardous Waste Bureau)	\$317,583.00	\$2,677,983.00
<b>Environmental Health</b> (Liquid Waste Bureau, Radiation Bureau, and Drinking Water Bureau)	\$148,035.99	\$59.28
<b>Environmental Protection</b> (Air Quality Bureau and Solid Waste Bureau)	\$3,835,577.63	\$259,236.27
<b>Environmental Protection</b> (Occupational Safety)	\$1,161,211.28	
<b>TOTAL</b>	<b>\$5,462,407.9</b>	<b>\$2,937,278.55</b>

This bill would limit the power of NMED to collect civil penalties pursuant to law by making an exception that essentially “forgives” violations that meet the criteria listed in the bill. Thus, it is assumed that a certain percentage of violations would be forgiven and would reduce the amounts of revenues entering the general fund and special funds as noted above. As discussed in the Fiscal Impact section, however, this reduction would not appear to be significant.

According to NMED, House Bill 106 may provide an incentive for regulated entities to voluntarily comply with state environmental laws and regulations for reporting violations. Voluntary compliance ensures the protection of human health and the environment in a way that benefits the regulated community, the public, and the regulatory agency. However, the agency expresses concerns that HB 106 may unintentionally provide loopholes for polluters, as follows:

*For example, a polluter may be able to “save up” pollution and waste, dispose of it illegally, and simply make one report to the department and be shielded from paying penalties. This would provide an uneven playing field for industries and competitors that do comply. It may also significantly reduce the deterrent effect of enforcement actions, sending the message to industry that polluting is acceptable, so long it is reported after the fact. In addition, HB 106 could shield a polluter from intentional acts. For example, an operator of a wastewater storage system could be generating more waste than can be handled through the storage system. The operator could intentionally discharge this waste and then report the event to the agency, thereby avoiding a penalty. Finally, HB 106 may erode the protections offered to New Mexicans by environmental permits that control or limit discharges of dangerous pollutant; industry could substitute self-reporting for responsible permitting.*

While these concerns merit discussion, it appears the intent of the bill is to provide an exemption for incidental, first-time violations of limited extent.

## **ADMINISTRATIVE IMPLICATIONS**

NMED points out that HB 106 may only apply to the liquid waste and drinking water violations because these are the only violations for which enforcement is detailed in the Act that is being amended. The other environmental acts, including the Hazardous Waste Act, Air Quality Control Act, Food Safety Act, Solid Waste Act, the Occupational Health and Safety Act and other acts, have separate statutory sections for enforcement. According the agency, “under the general-specific rule of statutory construction”, if one statute deals with a subject in general terms and another statute addresses part of the same subject matter in a more specific manner, the latter controls. (*State v. Davis*, 129 N.M. 773, 14 P.3d 38, 2000 -NMCA- 105.) Since HB 106 does not amend the other environmental laws, HB 106 would not be applicable to those other acts. NMED anticipates that this issue may be litigated if HB 106 is enacted.

## **ALTERNATIVES**

NMED proposes that regulations developed under the Environmental Protection Agency may be an alternative, as follows:

“The U.S. Environmental Protection Agency (“EPA”) has a policy called “Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations.” In order to qualify for incentives under EPA’s policy, regulated entities would have to meet certain criteria with regard to the audits that were conducted. Specifically, the following conditions usually apply if a

regulated entity wishes to claim the advantages of the policy:

- **Systematic discovery** of the violation through an environmental audit or the implementation of a compliance management system.
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- **Cooperation** by the disclosing entity is required.

Under the federal policy, the penalty is reduced but not forgiven, there is no recommendation for criminal prosecution, and no routine requests for audits.” NMED claims that HB 106 does not contain the protections that a well-vetted self reporting law would have because the agency believes the bill provides a potential loophole for polluters.

#### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Compliance and enforcement for violations under the Environmental Improvement Act would continue as currently structured, without any exemptions as defined by the bill.

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