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FISCAL IMPACT REPORT

ORIGINAL DATE 03/15/09
 SPONSOR SFI LAST UPDATED 03/17/09 HB _____
 SHORT TITLE Water Quality Act Rulemaking Limits SB CS/206/aHENRC
 ANALYST Aubel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		NFI				

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB 479 and SB 607

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Environment Department (NMED)

SUMMARY

Synopsis of HENRC Amendment

The House Energy and Natural Resources Committee Amendment makes the following changes:

- Removes the word “specific” from the proposed new Section 74-6-4 (C) NMSA 1978, as follows: ”...that exceeds a ~~specific~~ grant of rulemaking authority listed in the ~~specific~~ statutory section of the Water Quality Act authorizing the standard or regulation.” This change addresses NMED’s concern that the WQCC powers could be limited.
- Clarifies that regulations shall be promulgated specifying the measures to be taken to prevent water pollution and monitor water quality at all permitted facilities. The amendment allows the WQCC discretion to adopt regulations for a specific regulated industry, and requires that specific regulations be promulgated for the dairy and copper mining industries.
- Addresses concern noted below in the Technical Issues section that the Senate floor substitute created a conflict within the statutory Section 74-6-5.D.

With those minor amendments, NMED proposes that the bill allows some flexibility to address future changes in technology, science, business, and public interests for permitted facilities.

Synopsis of Original Bill

The Senate Floor Substitute for Senate Bill 206 amends sections of the Water Quality Act (Act) to require NMED to create stakeholder groups to negotiate specific dairy and mining regulations. The negotiated regulations will then be submitted to the Water Quality Control Commission for promulgation. Finally, the bill limits discharge permits subject to conditions to those specifically authorized by statute or rule, and puts the burden of showing that each condition is reasonable and necessary to ensure compliance with the Act on the permitting agency.

FISCAL IMPLICATIONS

NMED states that it is ready to take on the added burden of these stakeholder groups with existing staff if such regulations are done sequentially. There are added costs associated with all rulemakings, but the agency notes that it will absorb those costs with existing budgets.

SIGNIFICANT ISSUES

NMED provides the following background information:

The Senate Floor Substitute for Senate Bill 206 directs the WQCC to specify in regulations the measures facilities must take to prevent water pollution and to monitor water quality at dairies and hard rock mining facilities, excluding uranium mining and processing facilities. The promulgation of these regulations by the WQCC will include public input and stakeholder negotiations. Ultimately, it will lead to prescriptive requirements for discharges at dairies and mines. Such rules will result in binding requirements for these facilities with little flexibility for variable site specific conditions. The dairy industry has indicated in its testimony that it wants the certainty created by prescriptive rules.

Each discharge permit is based upon unique, site specific conditions that address the varying nature of the type of discharge operation, site geology, aquifer characteristics, the chemical and physical characteristics of the discharge and other site specific conditions. Currently, the WQCC regulations set out performance criteria that must be considered in order to approve a permit application. That allows permits to be tailored to meet individual business needs.

In its more than 30 year history, the Water Quality Act has been a remarkably flexible document that has provided a basis for protection of public health and water quality through periods of change in technology, science, and business and public interest. This framework is necessarily broad to account for the diverse universe of activities that are regulated under the Act. Additionally, this framework has been successfully applied to protect the state's water quality over time and provides appropriate structure under which the WQCC has successfully applied its technical and administrative rulemaking authority. Any business or public party can propose new rules as these issues change over time. With some minor amendments, FS/SB 206 will continue to account for future changes in technology, science, and business, and public interests. However, the dairy and mining industries will have more prescriptive regulations that would need to be amended to account for future changes in science.

PERFORMANCE IMPLICATIONS

NMED suggests that the “ability to meet performance measures could be reduced for the percent of groundwater discharge permits issued within the time allowed by statute or regulation and the percent of permitted facilities where monitoring results demonstrate compliance with ground water standards.”

ADMINISTRATIVE IMPLICATIONS

The required rulemaking in this bill will require staff resources to be shifted from permitting to rulemaking for the duration of developing the rules.

RELATIONSHIP

Senate Bill 206/SFIS relates to the following bills:

SB 607, which proposes to change the Water Quality Control Commission membership; and SB 479, which proposes to have the Department of Agriculture issue certain water discharge permits.

TECHNICAL ISSUES

FS/SB 206 also states “a permit subject to conditions shall not contain a condition that is not specifically authorized by statute or rule.” The amended language then goes on to describe how the constituent agency can condition a permit beyond what is in the rule or statute. The proposed amendment creates a conflict within the statutory paragraph. The negotiated intent of this language was that most conditions shall be in statute or rule for the dairy and hard rock mining industries. For any additional conditions in a permit, the constituent agency has the burden of showing that the condition is reasonable and necessary to ensure compliance with the Water Quality Act. Plus, the constituent agency shall provide the applicant an opportunity to comment on the condition. Under a narrow reading of this language in FS/SB 206, a permit could be limited to the conditions specifically authorized in 74-6-5.J, which could result in the unintended consequence of permit denials where the applicant has not provided measures to protect ground water quality such as lining of waste lagoons, because those requirements are generally authorized by statute, and not specifically authorized in 74-6-5.J.

OTHER SUBSTANTIVE ISSUES

NMED provides additional background information:

The amendments proposed in the bill were negotiated between Freeport Mining Company and the Environment Department. The Environment Department believes some minor amendments are still needed. The bill proposes to limit the powers of the WQCC so it could not adopt a standard or regulation “that exceeds a specific grant of rulemaking authority listed in the specific statutory section of the Water Quality Act authorizing the standard or regulation.” This language could be interpreted as limiting any general grants of authority to the WQCC for rulemaking. It could provide legal uncertainty or arguments that regulations adopted by the WQCC are beyond the scope of

its specific rulemaking authority. SB 206/SFIS directs the WQCC to promulgate regulations, but then limits its authority to do so. To cure this concern, the word “specific” should be deleted from Paragraph 74-6-4.C.

The Water Quality Act states that the Water Quality Control Commission shall adopt a comprehensive water quality management program. As currently proposed, SB 206/SFIS may cause the WQCC to lose its ability to promulgate regulations that meet this broad directive because all the elements of the water quality management program are not specifically defined by statute.

To address these concerns, the Environment Department proposes the following amendments:
Page 2, line 2, delete the word “specific”

Page 2, line 3, delete the word “specific”

Page 9, lines 15 -17, delete “A permit subject to conditions shall not contain a condition that is not specifically authorized by statute or rule.”

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The WQCC will continue to promulgate rules and standards that comply with the mandates and goals of the Water Quality Act.

MA/mt:svb