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## FISCAL IMPACT REPORT

ORIGINAL DATE 03/10/09  
 SPONSOR SFI LAST UPDATED 03/20/09 HB \_\_\_\_\_  
 SHORT TITLE Water Quality Control Commission Members SB CS/607/aHENRC  
 ANALYST Haug/Aubel

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

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		\$1.0	\$1.0	\$1.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 106, HB 576, HJM 49, SB 206, and SB 479

NOTE: The FIR has been updated with comments from NMED and OSE regarding this HENRC amendment. There appears to be a conflict between this amendment and the proposed amendment presented to the HENRC, which is included as Attachment A.

### SOURCES OF INFORMATION

LFC Files

#### Response Received From (for HENRC Amendment)

New Mexico Environment Department (NMED)  
 Office of State Engineer (OSE)

#### Responses Received From (for Original Bill)

New Mexico Environment Department (NMED)  
 Office of the State Engineer/Interstate Stream Commission (ISC)  
 Energy, Minerals and Natural Resources Department (EMNRD)  
 Department of Game and Fish (DGF)  
 New Mexico Department of Agriculture (DAA)

#### Synopsis of HENRC Amendment

The House Energy and Natural Resources Committee Amendment to Senate Bill 607 amends the Senate Floor Substitute for Senate Bill 607 to increase the WQCC to 13 members with the following composition:

- Secretary of Environment or designee;
- Secretary of Health or designee;
- Director of the Department of Game and Fish or designee;
- State Engineer or designee;
- The Secretary of Energy, Minerals and Natural Resources or designee;

- Director of the New Mexico Department of Agriculture or designee;
- Chair of the Soil and Water Conservation Commission or designee;
- Director of the Bureau of Geology and Mineral Resources at the New Mexico Institute of Mining and Technology or designee;
- A municipal or county government representative; and
- Four public appointees of the governor, to include as follows:
  - A least one member of a New Mexico Indian tribe or pueblo and
  - Two representatives of the industries subject to commission regulations.

The amendment exempts the two industry representatives from the restriction on receiving “a significant portion” of compensation from permit holders or applicants for a permit. It also appears they are exempt from the conflict of interest provision that requires a member employed by an “agency” to recuse him or herself from participating in the consideration of an appeal or a public hearing on a compliance order if the agency who employs that member is a party to the appeal or the issued compliance order.

The amendment prevents that commission chair from being selected from the constituent agencies.

## **FISCAL IMPACT**

The public membership qualifying for reimbursement pursuant to the Mileage and Per Diem Act would equal the current number. Thus, there is no fiscal impact due to this bill.

## **SIGNIFICANT ISSUES**

NMED submitted the following comments:

**This amendment does not reflect the written amendment (see Attachment A) nor what was verbally presented to the members of the House Energy and Natural Resources Committee during their hearing on Wednesday, March 18<sup>th</sup>. At that hearing, the members of the committee were told by the sponsor and his expert witness that the amendment would:**

1. Restore the current agency members to the commission (the HENRC amendment posted shows that the Oil Conservation Division and State Parks Division members would be eliminated from the commission and replaced by one EMNRD member),
2. Designate two public members of the commission as industry members and one as a representative for “environmental advocates” (the HENRC amendment posted only shows 2 industry representatives),
3. Include language requiring both agencies and industry representative recuse themselves from appeal hearings on issues on which they have a conflict (the HENRC amendment only includes recusal language for agencies, but not for industry reps),
4. Restore existing language which allows the commission to elect a chair from any of its members (the HENRC amendment states that the commission chair shall not be from an agency.)
5. Change the number of members that constitute a quorum from 6 to 7 (the HENRC amendment maintains the number at 6).

This amendment restores most of the agency representation on the WQCC. The remaining difference from existing language is that there will be one representative from EMNRD; OCD and State Parks are no longer called out as members. Interestingly, OCD is delegated authority from the WQCC to administer the Water Quality Act and WQCC Regulations at its facilities, yet it is no longer named as a WQCC constituent agency, despite being directly affected by WQCC actions.

Agency representatives are now “conflicted out” from participating in appeal proceedings “if the agency who employs that member is a party to the appeal or the issued compliance order.” However, there is no similar conflict-of-interest provision for the mandated industry members. Industry members are also exempted from the conflict-of-interest provisions in § 74-6-3.B. (NMSA 1978) applicable to all other WQCC members. Consequently, industry members could conceivably, and legally, participate and vote in appeal or compliance-order matters affecting the member’s own employer or business sector.

In regards to this last comment, the language states as follows (page 3, first paragraph – underline added for emphasis):

*A member of the commission shall not participate in the consideration of an appeal or a public hearing on a compliance order if the agency who employs that member is a party to the appeal or the issued compliance order.*

It appears that this new language would exempt the four governor-appointed public members for the conflict of interest provision, because they presumably would not be employed by an “agency.”

The OSE offers the following analysis:

Although § 74-6-3.A(10) prescribes that four representatives of the public be appointed by the governor, the requirement of having two of those representatives “represent industries subject to commission regulations” calls into question whether those members are truly “public” representatives. Additionally, the industry representatives would be eligible for compensation for their participation by the Environment Department through the provisions of the Per Diem and Mileage Act, even though, presumably, the industries they represent would be paying them for their participation. This seems to be in conflict with the spirit, if not the letter, of “public representation.”

The regulated community currently has the opportunity to participate in all rulemaking proceedings and have its concerns heard. It further has the opportunity to appeal any WQCC decision to the District Court. Mandating industries’ participation as voting members of the WQCC seems unnecessary, and potentially in conflict with protection of New Mexico’s water quality.

### Synopsis of Original Bill

Senate Floor Substitute for Senate Bill 607 amends Section 74-6-3 NMSA 1978, to change the composition of the Water Quality Control Commission (WQCC). The substitute would reduce the WQCC from its current fourteen members to twelve members of whom five would be public

members appointed by the governor and confirmed by the Senate representing each of the five Public Regulation Commission districts. The public members would represent:

- Native Americans – 1 member
- Conservation interests – 1 member
- New Mexico municipalities or counties – 1 member
- Industries subject to Commission regulations – 2 members plus 1 alternate.

The alternate member would sit in the place of one of the industry members should the industry member be disqualified in consideration of an appeal.

For purposes of appeals, only the five members appointed by the governor would be voting members, with other members serving in an ex-officio capacity. All members would be voting members for all other matters.

The chair would be elected by the members but could not be a representative of a constituent agency.

## **FISCAL IMPLICATIONS**

NMED provides the following fiscal analysis:

The WQCC is administratively attached to the Environment Department. There is no separate budget for the WQCC. Per diem for public members is paid from the Department's budget, specifically from the general fund budget of water quality programs.

Under SB 607, costs of per diem for public member commissioners will increase by approximately 20%. As proposed, the WQCC would include five public members rather than the four currently authorized by statute. WQCC per diem payments in FY08 totaled \$3,906. Per diem payments for the first half of FY09 total \$3,433.

SB 607 would indicate an increase of approximately \$1 thousand based on the reported per diem rates to NMED's operating budget that would be recurring.

## **SIGNIFICANT ISSUES**

The WQCC is the water regulatory agency for New Mexico for all purposes of the federal Clean Water Act and the "wellhead protection and sole source aquifer" programs of the federal Safe Drinking Water Act. It has the authority to take all action necessary and appropriate to secure the benefits of this statute and programs to this state, its political subdivisions, or interstate agencies.

The current members of the WQCC, as defined in the Water Quality Act, are as follows:

- Secretary of environment or his/her designee
- Secretary of health or his/her designee
- Director of the department of game and fish or his/her designee
- State engineer or his/her designee
- Chair of the oil conservation commission or his/her designee
- Director of the state parks division or his/her designee
- Director of the department of agriculture or his/her designee

- Chair of the soil and water conservation commission or his/her designee
- Director of the bureau of geology at the New Mexico Tech or his/her designee
- Municipal or county government representative
- Four public representatives appointed by Governor, at least one of whom shall be a member of a New Mexico Indian tribe or pueblo. Public members are appointed for 4 year terms, and can be reappointed for successive terms.

According to the ISC, the WQCC has the following three main functions:

The first is the promulgation of regulations and standards pursuant to the state's Water Quality Act and the federal Clean Water Act. The second is adjudication of permit reviews, variances, and enforcement actions pursuant to the Water Quality Act. The third is decision-making regarding administrative issues such as approval of the federally mandated biennial Clean Water Act Section 305(b)/303(d) report to Congress; the state's Continuing Planning Process document; Total Maximum Daily Load planning documents for impaired watersheds; and the state's Nonpoint Source Management Plan. The WQCC also approves annual interest rates for the State Revolving Loan Fund and appoints members to the Utility Operator Certification Advisory Board.

## **PERFORMANCE IMPLICATIONS**

The ISC points out that SB 607 does not provide any qualification requirements for the five public members appointed by the governor. This issue becomes relevant in Section G. of the bill, which limits voting to these members regarding appeals with other members sitting ex-officio.

The NMDA points out that the bill does not provide guidance on qualifications for the proposed five public members and suggests that "this may result in membership that may not possess the necessary background to make sound decisions regarding state water quality issues."

## **ADMINISTRATIVE IMPLICATIONS**

All responding agencies noted that the WQCC is a time-consuming process. While meetings are set one time a month, hearings and rulemaking proceedings often extend for many days.

## **RELATIONSHIP**

Senate Bill relates to other bills that affect oversight of water quality programs:

HB 106 – ENVIRONMENTAL CIVIL PENALTIES & REPORTING  
HB 576 – AGENCY LICENSING PROCESS TIME FRAMES  
HJM 49 – NO OUTSTANDING RESOURCE WATERS DESIGNATION  
SB 206 – WATER QUALITY ACT RULEMAKING LIMITS  
SB 479 – DEPT. OF AGRICULTURE FOR WATER QUALITY

## **OTHER SUBSTANTIVE ISSUES**

The duties and powers of the WQCC are defined in statute. Pursuant to 74-6-4 NMSA 1978, the WQCC:

- May accept and supervise the administration of loans and grants from the federal government and from other sources,
- Shall adopt a comprehensive water quality management program and develop a continuing planning process,
- Shall adopt water quality standards for surface and ground waters of the state,
- Shall adopt regulations to prevent or abate water pollution,
- Shall assign responsibility for administering regulations to constituent agencies,
- May enter into or authorize constituent agencies to enter into agreements with the federal government or other state governments for purposes consistent with the Water Quality Act, and to receive and allocate funds received by the WQCC to constituent agencies,
- May grant variances from regulations of the WQCC,
- May adopt regulations to require the filing of plans and specifications for construction and operation of new sewer systems, modified existing sewer systems, or treatment works,
- May adopt regulations requiring notices of intent to introduce water contaminants into waters of the state,
- May adopt treatment regulations establishing pre-treatment standards to prevent the introduction into publicly owned treatment works of certain contaminants, and
- Shall coordinate application procedures and funding cycles for loans and grants with the Department of Finance and Administration pursuant to the NM Community Assistance Act.

Pursuant to 61-33-3, the Utility Operators Certification Act, the WQCC shall also:

- Adopt regulations to classify public water and wastewater facilities, provide standards and criteria for the certification of plant operators, and to implement the Utility Operator Certification Act,
- Approve and accredit schools and training programs for utility operator certification,
- Provide for examination of operators,
- Enter into agreements with other government agencies,
- Receive and accept financial and technical assistance, and
- Appoint a seven member Utility Operator Certification Board.

Pursuant to 74-6A-9, the Wastewater Facility Construction Loan Act, the WQCC is assigned the following additional duties which may be implemented by NMED:

- To provide financial assistance to local authorities to finance wastewater facilities,
- To adopt resolutions regarding the issuance of bonds,
- To execute agreements concerning state contributions to the fund,
- To foreclose upon, attach or condemn wastewater facilities in the event of default,
- To acquire, hold title or lease real property, and to sell, convey or lease that property to satisfy a default or enforce a loan agreement,
- Through NMED, to manage the wastewater construction loan fund and accept grants,
- To appoint and employ attorneys, financial advisors, and other experts,
- To sue or be sued, to prosecute and defend, at law or in equity in any court having jurisdiction, and
- To collect fees from local authorities.

## **ALTERNATIVES**

NMED suggests the following alternative:

If the Legislature intends to implement a restructuring of the WQCC, consideration should be given to creating and appropriately funding a fully paid Water Quality Board of subject matter experts. The Water Quality Board should at a minimum include experts in environmental and civil engineering, ground and surface water hydrology, aquatic chemistry and biology, and water quality. Expertise in the above disciplines would ensure that regulations and policies are technically feasible and legally defensible. Paid board members would be able to develop an in-depth understanding of the issues before the board.

Several states have implemented such a structure including Texas and California. In several states the water board is made up of full-time members who are paid an annual salary and receive the necessary traveling and other expenses incurred in the performance of their official duties. In some states the water rights and water quality functions of state government have been combined into one water resources board to allow consideration of water pollution, water quality, and availability of unappropriated water in a single forum.

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

The structure of the WQCC would remain unchanged.

MA/mc:svb:mt

FORTY-NINTH LEGISLATURE  
FIRST SESSION

PROPOSED AMENDMENT DIRECTED TO A COMMITTEE

March 17, 2009

Mr. Chair:

I propose to the HOUSE ENERGY AND NATURAL RESOURCES COMMITTEE the following amendments to

SENATE FLOOR SUBSTITUTE FOR SENATE BILL 607

1. On page 1, line 12, strike "NUMBER" and insert in lieu thereof "COMPOSITION".

2. On page 1, line 13, after "TO", strike the remainder of the line, strike lines 14 through 16 up to the period and insert in lieu thereof "INCLUDE INDUSTRY REPRESENTATION ON THE WATER QUALITY CONTROL COMMISSION".

3. On pages 1 through 5, strike Section 1 and insert in lieu thereof:

"Section 1. Section 74-6-3 NMSA 1978 (being Laws 1967, Chapter 190, Section 3, as amended) is amended to read:

"74-6-3. WATER QUALITY CONTROL COMMISSION CREATED.--

A. There is created the "water quality control commission" consisting of:

(1) the secretary of environment or a member of the secretary's staff designated by the secretary;

(2) the secretary of health or a member of the secretary's staff designated by the secretary;

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(3) the director of the department of game and fish or a member of the director's staff designated by the director;

(4) the state engineer or a member of the state engineer's staff designated by the state engineer;

(5) the chair of the oil conservation commission or a member of the chair's staff designated by the chair;

(6) the director of the state parks division of the energy, minerals and natural resources department or a member of the director's staff designated by the director;

(7) the director of the New Mexico department of agriculture or a member of the director's staff designated by the director;

(8) the chair of the soil and water conservation commission or a soil and water conservation district supervisor designated by the chair;

(9) the director of the bureau of geology and mineral resources at the New Mexico institute of mining and technology or a member of the director's staff designated by the director;

(10) a municipal or county government representative;  
and

(11) four representatives of the public to be appointed by the governor for terms of four years and who shall be compensated from the budgeted funds of the department of environment in accordance with the provisions of the Per Diem and Mileage Act. At least one member appointed by the governor shall be a member of a New Mexico Indian tribe or pueblo, two members appointed by the governor shall represent industries subject to commission regulations and one member appointed by the governor shall represent environmental advocates.

B. Except for the two members appointed to represent industries subject to commission regulations, a member of the commission shall not receive, or shall not have received during the previous two years, a significant portion of the member's income

directly or indirectly from permit holders or applicants for a permit. A member of the commission shall, upon the acceptance of the member's appointment and prior to the performance of any of the member's duties, file a statement of disclosure with the secretary of state disclosing any amount of money or other valuable consideration, and its source, the value of which is in excess of ten percent of the member's gross personal income in each of the preceding two years, that the member received directly or indirectly from permit holders or applicants for permits required under the Water Quality Act. A member of the commission shall not participate in the consideration of an appeal if the subject of the appeal is an application filed or a permit held by an entity that either employs the commission member or from which the commission member received more than ten percent of the member's gross personal income in either of the preceding two years. A member of the commission shall not participate in the consideration of an appeal or a public hearing on a compliance order if:

(1) the agency that employs that member is a party to the appeal or ~~the~~ issued compliance order; or

(2) for a member appointed to represent industries subject to commission regulation, the member is employed by an industry category that is the subject of the appeal or public hearing on a compliance order.

C. The commission shall elect a chair, who shall not represent a constituent agency, and other necessary officers and shall keep a record of its proceedings.

D. A majority of the commission constitutes a quorum for the transaction of business, but no action of the commission is valid unless concurred in by ~~six~~<sup>7</sup> or more members present at a meeting.

E. The commission is the state water pollution control agency for this state for all purposes of the federal act and the wellhead protection and sole source aquifer programs of the federal Safe Drinking Water Act and may take all action necessary and appropriate to secure to this state, its political subdivisions or interstate agencies the benefits of that act and those programs.

F. The commission is administratively attached, as defined in the Executive Reorganization Act, to the department of environment."".

Respectfully submitted,

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