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FISCAL IMPACT REPORT

ORIGINAL DATE 01/23/13

SPONSOR Roch LAST UPDATED _____ HB 97

SHORT TITLE Homicide and Great Bodily Harm by Boat SB _____

ANALYST Weber

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$40.0*	\$40.0*	\$80.0*	Recurring	General

(Parenthesis () Indicate Expenditure Decreases)

*See Fiscal Implications

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Court (AOC)
 Administrative Office of the District Attorney (AODA)
 Attorney General Office (AGO)
 Energy Minerals and Natural Resources Department (EMNRD)

No Responses Received From

Department of Public Safety (DPS)
 New Mexico Corrections Department (NMCD)

SUMMARY

Synopsis of Bill

House Bill 97 adds a new section to the Boating While Intoxicated Act (“BWI”), Section 66-13-1, et seq. NMSA 1978, to create new crimes of Homicide by Boat and Great Bodily Injury by Boat for someone who kills a person or causes great bodily injury to a person while operating a boat under the influence of intoxicating liquor or drugs. Except for applying the statute to operating a boat, instead of driving a vehicle, it is virtually identical to the Homicide by Vehicle and Great Bodily Injury by Vehicle statute, Section 66-8-101, NMSA 1978. It also permits the penalties provided in both acts be increased by four years for each prior driving or boating while impaired convictions obtained within the past ten years in New Mexico or in other jurisdictions.

FISCAL IMPLICATIONS

The AODA notes that the creation of two new categories of crimes may lead to an increased number of criminal prosecutions although the number of persons killed or seriously injured by someone by boating while intoxicated or under the influence of drugs is unknown. The statute does provide that the basic sentence of someone convicted for either driving while intoxicated or boating while intoxicated within the past ten years shall be increased by four years for each conviction so the potential terms of incarceration for both DWI and BWI could be increased and cost more.

Since the statute proposes to create additional crime categories, that alone might have a fiscal impact on DA offices. Those cases that are filed will probably require expert testimony and laboratory evidence so their prosecutions will also impact DA offices.

The AGO speculates that to be properly enforced more law enforcement officers would have to be hired to patrol the waterways in New Mexico. Currently, state parks officers, like Game and Fish officers, patrol the state's waterways. Furthermore, New Mexico State Police patrols Elephant Butte only during the high holidays like Memorial Day and Labor Day. New Mexico State Police occasionally receives requests from certain districts to patrol waterways but those waterways are not patrolled on a consistent basis.

Additionally, more prosecutors and court personnel on a statewide basis would have to be hired to deal with potentially increasing caseloads.

While it is impossible to project the specific cost increases, it is possible to estimate that if only one additional person is incarcerated per year for the new crimes, the annual direct cost of incarceration approaches \$30,000. This added with law enforcement, court costs and expert testimony makes a total of \$40,000 per year a reasonable minimum estimate.

SIGNIFICANT ISSUES

The AODA offers the following information:

The bill requires death or great bodily injury of a person be caused in the “unlawful operation of a motorboat.” It seems likely that some of the cases may require expert testimony to interpret what happened in operating the boat. Experts will probably also be required if the boat operator's blood alcohol content is less than .08% or they were under the influence of drugs because that standard requires that the substance(s) left them “unable to safely operate a motorboat.” The term “motorboat” is defined in the BWI Act to include any boat, personal watercraft or other vessel propelled by machinery and sailboats (excluding wind surfers and sailboards), but not a houseboat or other vessel which is moored and not moving. It is unclear if the definition would include watercraft which are rowed or paddled like white-water rafts and dory boats, or boats that are sometimes powered but not always. The BWI Act also defines “operate” as someone who physically handles the controls of a motorboat while it is moving on the water. There is an argument that if someone was not at the controls of the boat when it caused the death or great bodily injury of a person (they had the controls fixed or were not “hands on” in control of a boat and, e.g., it ran over a swimmer in the water), they could not be prosecuted under the act as drafted.

The bill would permit prior DWI convictions to be used to enhance the sentences of someone convicted of homicide by boat or great bodily injury by boat, and permit prior BWI convictions—including those in another jurisdiction—to be used to enhance the sentences of someone convicted of those crimes or vehicular homicide or great bodily injury by vehicle. It is always difficult to use prior convictions from another jurisdiction to enhance sentences since the trial procedures and constitutional protections are frequently applied differently than they are in New Mexico; the foreign statutes may also be challenged as not sufficiently similar to those in our state. Article IV, Sec. 34 of the New Mexico constitution (which states no act of the legislature may negatively affect any pending case) will also probably prohibit the proposed increased sentencing enhancements from being used in any cases filed before the effective date of this bill if it is passed.

The AGO provides the following technical points:

On a national scale, boaters who have committed homicide by boat or great bodily harm by boat have not been impaired by alcohol or other drugs. These boaters have been distracted or operating the boat in a reckless fashion. Frequently boaters have been engaged in the following activities:

- Failing to slow down at obstructed viewpoints
- Frequent and choppy directional changes
- Following too closely

Article Source: <http://EzineArticles.com/5983237>

There is no portion of this bill that calls for a circumstance when the offender is operating a boat recklessly, in a distracted fashion or without due caution.

Furthermore, there is no specific definition of “operating a motor boat” in this section. There needs to be a reference to 66-13-2 (D) that provides a definition of what operation of a motor boat entails. Currently, with DWI cases involving motor vehicles, there are debates as to what actual physical control of a motor vehicle entails. See State v. Sims, 2010-NMSC-27 and State v. Mailman, 2010-NMSC-36. The same debates would arise with boats. For instance, if the keys are in the ignition of boat and the state parks law enforcement officer boards the boat and the offender is not “behind the wheel” of the boat at the time, can that offender be prosecuted? Does the officer have to see the offender operating the boat? Can circumstantial evidence be used to determine offender was operating the boat? What other physical evidence on the waterway can be used to determine operation by the offender? Will the prosecution then be compromised because of some loophole in the law?

MW/bm