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LAWYERS

**New Mexico House Bill 520 – Consolidated Environmental Review Act:
A Wolf in Sheep’s Clothing?**

Advertised as something equivalent to the long-standing federal National Environmental Policy Act (“NEPA”) and its procedural requirements for the preparation of environmental assessments or environmental impact statements to assess the impacts of projects requiring federal permits or approvals, New Mexico House Bill 520 or the Consolidated Environmental Review Act (“HB 520” or “CERA”) goes well beyond imposing comparable procedural requirements on state and local agencies and project proponents engaged in state (and certain local) permitting and approval activities. HB 520, as introduced, has the potential to impose procedural requirements far more burdensome than NEPA. (To see the full text of HB 520, please click on the following link: [HB 520](#).)

Going far beyond the federal NEPA, the bill includes action-forcing provisions that would require state agencies to choose “the best available alternative to a proposed project that, to the maximum extent practicable, minimizes or avoids adverse environmental effects and shall incorporate that alternative in the conditions of a permit, license or other authorization for the proposed project issued pursuant to law.” HB 520, Section 8.

Among its provisions:

- The Purpose Section, Section 2, states that the purposes of the bill include:
 - “to . . . take all action necessary to protect, rehabilitate and enhance the environmental quality of the state”, Section 2.A;
 - “to . . . take all action necessary to provide the people of New Mexico with clean air and water . . . and freedom from threats to human health, excessive noise and light pollution”, Section 2.B;
 - “to . . . ensure that the **long-term protection of the environment**, consistent with the provision of a suitable living environment for every state resident, **shall be the guiding criterion in public decisions**”, Section 2.D;
 - “to . . . require governmental agencies at all levels . . . to consider all reasonable alternatives to proposed actions affecting the environment”, Section 2.G;
 - “to . . . **deny projects as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen the significant environmental effects of such projects**”

- Section 5.B of HB 520 provides that “all public agencies shall require an applicant, as part of a permitting, licensing or certification approval process pursuant to law, to prepare or cause to be prepared . . . an environmental assessment on all proposed projects.” Public agencies pursuing their own projects are also subject to the requirements of CERA.
 - “Public agency” is defined to mean “any state agency, board, commission or post-secondary educational institution or any regional, county, municipal or local entity responsible for administering state environmental laws.” Section 3.J.
 - The term “state environmental laws” is not defined. The absence of a definition of this term creates uncertainty.
 - The term “project” means “any activity that may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment and that is any of the following: (1) an activity directly undertaken by any public agency; (2) an activity undertaken by a person that is supported, in whole or in part, through contracts, grants, subsidies, loans or other forms of assistance from one or more public agencies; or (3) an activity that involves one or public agencies issuing a lease, permit, license, certificate or other entitlement.” Section 3.I. This definition is very far reaching.
 - Activities permitted by the Office of the State Engineer and the Interstate Stream Commission are exempted from the requirements of CERA unless the activities are permitted by another public agency. Section 7.D. (Other exemptions are listed in Section 7, as discussed briefly below.)

- As noted above, Section 8 requires the public agency to select the “best available alternative to a proposed project that, to the maximum extent practicable, minimizes or avoids adverse environmental effects”
 - This language dictates a substantive result in the permitting process, which goes far beyond the “procedural” requirements of the federal NEPA. As many courts have noted, NEPA is a “stop, look and listen” style statute that does not dictate a particular result. In contrast, HB 520 could lead to value-laden litigation over whether the agency chose the “best” alternative, including whether one type of resource, such as cultural and historic properties, deserves more protection or weight than other resources, such as air or water.
 - The standard imposed likely will complicate public agency and project proponent permitting efforts significantly. This may be particularly true because there is no statutory recognition of the necessity for an agency to ensure that the alternatives considered meet the purpose and need of the agency and project proponent. Moreover, the proposed act allows no consideration of economic considerations. To the contrary, HB 520 gives environmental considerations over-riding weight.

- As currently drafted, it appears that public agencies and project proponents must first prepare an environmental assessment, and then determine whether the project either would not result in a significant impact or whether an environmental impact statement is required. Section 5.B.
 - Under the federal NEPA, federal agencies have the authority to skip the environmental assessment step and proceed directly to prepare an environmental impact statement. The obligation to require an environmental assessment first and then an environmental impact assessment appears destined to simply draw out the environmental review with unnecessary time and expense for agencies and project proponents alike.
 - Language in Section 9 of HB 520 suggests that the Environmental Improvement Board may enact regulations that would eliminate the need to prepare an environmental assessment in all instances, but a reasonable question arises concerning whether such a regulation would run afoul of the mandatory language in Section 5.B. This is an example of an ambiguity or inconsistency in the bill as introduced.
- As noted, there are exemptions identified in Section 7 of the Bill. Among the exemptions are “actions subject to the federal [NEPA].” However, for actions subject to NEPA, state agencies “may [still] require additional information and evaluation on a project or proposed project before approving any permits, licenses or authorizations required under New Mexico law.” Section 7.E. This proviso (or exception to the exemption) is so large as to potentially render the exception meaningless. Fundamentally, this language allows state agencies to require the full analysis required under CERA or even “additional evaluation” beyond those requirements.
- HB 520 includes administrative and judicial review provisions that are difficult to decipher. On its face, there appear to be provisions suggesting streamlined administrative review, however, it is not clear how such reviews would work when there are multiple state agencies involved in permitting a particular project.

This article does not fully summarize all of the provisions of the 22 plus page bill, but HB 520 includes provisions that appear to be inconsistent and ambiguous. Consequently, irrespective of one’s philosophical views, a great deal is left to the discretion of the New Mexico Environmental Improvement Board, the agency charged with developing implementing regulations with little specific statutory guidance. And, in all likelihood, the legislation would lead to a great deal of litigation, not only regarding whether state agencies and project proponents have complied with its statutory requirements but also regarding what the legislation requires in the first place.

Many other states have adopted “mini-NEPA” statutes. Most notable, perhaps, is the California Environmental Quality Act or CEQA. This article is not intended to suggest necessarily that New Mexico should not give due consideration to such a statute. However, such legislation should be considered deliberately with thought devoted not just to environmental issues, but to economic and other considerations as well.

We understand that HB 520 has been referred to the Energy and Natural Resources Committee and the Appropriations and Finance Committee of the New Mexico House of Representatives.

For questions regarding this legislation, please feel free to contact Walter Stern, 505-848-1837 or western@modrall.com, others in the Natural Resources and Environment Department, or members of Modrall Sperling’s Lobbying Group, including Patrick J. Rogers, Marco E. Gonzales, and Leslie Padilla.

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