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FISCAL IMPACT REPORT

ORIGINAL DATE 02/19/08

SPONSOR Garcia, MH LAST UPDATED _____ HB 575

SHORT TITLE Rulemaking Regulatory Impact Statements SB _____

ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	\$10.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	Minimal	Unknown	Unknown		Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB45

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Commission of Public Records (CPR)
 Economic Development Department (EDD)
 Department of Game and Fish (DGF)
 Energy, Minerals and Natural Resources Department (EMNRD)
 New Mexico Environment Department (NMED)
 Public Education Department (PED)
 Human Services Department (HSD)
 General Services Department (GSD)
 Department of Transportation (DOT)

SUMMARY

Synopsis of Bill

House Bill 575 appropriates \$10 thousand from the general fund to the Commission of Public Records for the purpose of establishing a filing system for regulatory impact statements.

Specifically, House Bill 575 requires all executive branch agencies, except the Public Regulation Commission, to file a regulatory impact statement (“RIS”) when they file a rule with the state records center. The RIS must contain specified information pertaining to the rule, including a description of the probable negative or positive impact on affected people, resources and political subdivisions; cost-benefit analysis; probable negative or positive impact on state funds and budget; whether alternative, less adverse means of achieving the rule’s purpose exist; and a summary of public comments on the rule. An agency does not have to complete an RIS if it claims hardship, including lack of resources or unavailable information, and indicates the reason for the hardship.

FISCAL IMPLICATIONS

According to the February 2008 revenue estimate, FY10 recurring revenue will only support a base expenditure level that is \$575 million less than the FY09 appropriations before the 2009 solvency reductions. All appropriations outside of the general appropriation act will be viewed in this declining revenue context.

The appropriation of \$10 thousand contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of fiscal year 2010 shall revert to the general fund.

While the bill stipulates only that the State Records Administrator make available to the public and to certain state officials a list of the statements and notices of exemption filed with the Records Center, the actual statements would be public records and open to public inspection. The Commission of Public Records offers that from its experience requests for the information will be for the full statements, not just the list. If true, this will dictate that the agency develop some means of providing ready access to the statements. Either copies of the statements would need to be created (to protect the permanent originals) and made available and reference assistance provided or the statements would need to be scanned and posted online - both of which would involve additional and perhaps significant staff time and resources.

More significant, as explained by the Environment Department is the cost the bill will have on it. Annually, the Department proposes numerous regulations primarily to the Environmental Improvement Board and Water Quality Control Commission. If HB575 were to pass, the Environment Department would need to hire or contract for economists, sociologists, demographers and other experts to prepare the required regulatory impact statement. Currently, the Environment Department employs scientists with degrees in geology, hydrology, engineering, etc., and does not have economists, sociologists, or demographers on staff. There will be significant expense if the Department must either hire or contract for experts in the area of economic, social, community impacts. HB575 does not contain any appropriation to employ or contract with these types of experts.

In addition, many of the Environment Department’s rulemakings involve adopting federal regulations or federal requirements. It will take an extensive amount of agency resources to prepare a regulatory impact statement for regulations required by federal law to maintain state primacy for federal programs.

SIGNIFICANT ISSUES

It is unclear, according to the Attorney General's Office, how this bill improves the rulemaking process. The bill creates an additional bureaucratic burden on agencies that promulgate rules and requires them to divert personnel resources to drafting regulatory impact statements. This will be particularly burdensome for small agencies that promulgate rules only occasionally. The increased strain on agency resources does not appear to be justified by the intended use of a RIS, which, according to the bill, is "for informational purposes only."

The Attorney General's Office expresses several concerns that the bill likely would result in RIS that provide information of limited or questionable use. First, the bill does not provide agencies with any guidance on how fairly to assess a rule's probable impact on affected people and entities, resources, or state funds or how to perform a cost-benefit analysis. As a result, the quality of RIS will vary significantly from agency to agency. Nothing in the bill prevents an agency from performing the required impact and cost-benefit analyses differently depending on the rule involved, resulting in self-serving and arbitrary assessments. Second, the bill makes it easy for an agency to get around its requirements by claiming hardship, i.e., that it lacks resources or sufficient information to complete the RIS.

PERFORMANCE IMPLICATIONS

Section 4 requires that the Commission of Public Records maintain the regulatory impact statement records, keep a list of those files and provide for public inspection. This requirement would impose additional demands on already limited staffing resources as well as require additional physical space in the agency. Section 4 also requires the creation of an annual list of all filed regulatory impact statements. These additional demands would compete with the agency's existing statutory and business obligations.

The Commission of Public Records points out that one of its key performance measures under the Accountability in Government Act concerns the lag time between the effective date of a rule and its online availability in the NM Administrative Code. Another internal performance measure relates to the online availability of the NM Register by established publication dates. An increased work load could affect the ability to meet these and other performance targets.

ADMINISTRATIVE IMPLICATIONS

House Bill 575 would impact the Commission of Public Records directly by requiring that final impact statements be filed with rules and that the statements are prepared in the style and format established by the State Records Administrator. The bill also dictates that the State Records Administrator create and make available to the public a list of all filed impact statements and "notices of exemption" (presumably the hardship statements covered in Subsection B of Section 4 of the bill). The administrator would also have to provide designated state officials an annual list.

There is concern by agencies that personnel and other resources will be diverted from the agency's substantive functions to a potentially overly, bureaucratic task. A lack of staff, expertise, or information may affect an agencies ability to comply. Timely completion of projects may also be affected by reporting requirements.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

House Bill 575 relates to HB45, in fact, with the exception of an appropriation, duplicates HB575. It also relates to Senate Bill 18 as both amend the current rule-making process.

TECHNICAL ISSUES

House Bill 575 would require the Commission of Public Records - State Records Center and Archives to promulgate rules on the filing and format of the regulatory impact statements. These rules would need to be in place before July 1, 2009, which would provide a narrow window in which to develop and advertise and solicit comments on the proposed rule(s) and then adopt and publish the final rule(s).

The Commission of Public Records suggests that in section 1 of the bill the definition of regulatory impact statement is extensive and appears that it may contain substantive law, which may be better placed in Section 4 of the bill. Specifically, the content of the regulatory impact statement listed in the definition may be located with the other requirements for drafting a regulatory impact statement found in Section 4.

Also, the provision for emergency rules found in Section 3 highlights an issue that could place the Commission of Public Records and issuing agencies in difficult positions. There has been some question over the validity of a section of a rule if that section is amended through an emergency rule action and the emergency amendment is not published as required within the 30-day period. If the amendment is not published, is the affected section or sections effectively repealed or does the section or sections revert to the original text? The Commission has to date successfully encouraged agencies to publish emergency rules, so the question has been avoided. The addition of the impact statement requirement to the existing publication requirement for continuation of emergency rules may bring the issue to the forefront. The Commission would need legal guidance, if the impact statement was not filed.

OTHER SUBSTANTIVE ISSUES

According to the Environment Department, the new material in Section 4, page 5 lines 7-8, requires that the agency prepare a regulatory impact statement at the beginning of the rulemaking process. However, the regulatory impact statement must also include a summary of public comments, page 2, lines 21-23. It is impossible to do both of these requirements, since public comments have not been solicited at this point. In addition, the beginning of the rulemaking process is not defined. Typically, at the beginning of the rulemaking process the agency prepares a draft rule, seeks public input through public meetings around the state and negotiates a proposed rule with interested parties. This can involve multiple drafts of proposed rules. HB 45 would require that the agency conduct multiple regulatory impact statements for each draft proposed rule that is presented to the public and interested parties.

The new material in Section 4, page 5 lines 13-16, requires that the agency prepare a regulatory impact statement at the end of the rulemaking process. However, the agency does not create final rules adopted by a board or commission. The final rule is the creation of the respective board or commission based upon testimony at a public hearing. Typically, the board or commission modifies proposed rules in accordance with the facts and evidence presented at the hearing. At this point, the agency would have to conduct a second regulatory impact statement

even though the board or commission already issued a final order documenting the legal and factual basis of the rule, including modifications to the rule based upon regulatory impacts as required by current statutes.

It also adds that lengthening the rulemaking process may cause the Environment Department to lose “primacy” on the federal programs it administers. HB575 will require that the Department hire these experts for drafting the regulatory impact statement. This will be a significant budgetary expense and will take scarce resources away from other priorities.

House Bill 575 also amends Section 14-4A-4 of the Small Business Regulatory Relief Act. The bill requires the submission of the draft regulatory impact statement to the Small Business Regulatory Advisory Commission if the proposed rule may have an adverse impact on small business.

ALTERNATIVES

The Commission of Public Records notes that the Uniform Law Commission (ULC) is working on a revised Model State Administrative Procedure Act that should be finished before the end of 2009. It may be beneficial to wait until the Model State Administrative Procedure Act is finished to see what best practices are suggested by the model act.

EO/svb:mc