

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill Number: HB 108a

51st Legislature, 1st Session, 2013

Tracking Number: .190092.1

Short Title: Rules Development Requirements

**Sponsor(s): Representative Nate Gentry and Senator Daniel Ivey-Soto, and
Representative Patricia Lundstrom**

Analyst: Kevin Force

Date: February 11, 2013 (revised)

FOR THE ECONOMIC AND RURAL DEVELOPMENT COMMITTEE

AS AMENDED

The House Health, Government and Indian Affairs Committee amendments:

- **insert, on page 12, line 16, after “section,” the language “and a detailed justification for that finding,” regarding those findings necessary to justify undertaking an emergency rulemaking, rather than undergoing the normal rulemaking process;**
- **strike “the,” on page 15, line 8, and replaces it with, “No later than six months from the effective date of this 2013 act,” regarding when the Attorney General shall adopt default public rule hearing procedures; and**
- **insert, on page 16, line 23, after the period, “No rule shall be valid or enforceable if it conflicts with statute. A word that is defined in an applicable statute shall not be defined in rule,” regarding when and how a rule shall become valid and enforceable.**

Original Bill Summary:

HB 108 creates new sections and amends existing sections of the *State Rules Act*, primarily focusing on the expansion of requirements pertaining to public notice and participation in the rulemaking process.

A section-by-section summary of HB 108 follows:

Section 1 amends existing definitions and adds new ones, including:

- the addition of “political subdivision” to the definition of “person”; and
- a new definition for “provide to the public,” which means the distribution of rulemaking information in ways designed to notify members of the public of the rulemaking action, particularly those who may be affected by the subject of the rulemaking, provided that:
 - distribution of the rulemaking information shall include:
 - posting on the website of the rulemaking agency;
 - posting on the New Mexico Sunshine Portal;
 - making it available at agency field, district, and regional offices;

- sending it via mail or email to persons who have made a written request for notification of rulemaking affecting the subject; and
 - providing it to the New Mexico Legislative Council for distribution to the appropriate committees; and
- distribution of rulemaking information, where appropriate, may include:
- use of languages other than English;
 - dissemination to local and tribal governments, community and interest groups, and trade publications;
 - display in public facilities such as libraries;
 - public service announcements for radio and television, particularly in areas where the languages used by a significant portion of the population are unwritten; and
 - publication in a newspaper of general circulation in counties where the rule will have a significant impact.

Section 2 details requirements regarding the contents and public dissemination of an agency's annual regulatory agenda, including:

- a list of pending rulemakings and their current status;
- a list of any rulemakings expected to be proposed in the next fiscal year; and
- a requirement that the regulatory agenda be updated on a timely basis to reflect any changes to the status of a rulemaking proceeding.

Section 3 requires the inclusion of preliminary outlines of any rulemakings in the agency regulatory agenda, prior to publication of a notice of proposed rulemaking. These outlines may be requested by the public without recourse to a formal inspection of records request, and shall contain:

- the subject matter, statutory authority, and the purpose of the rulemaking;
- the name of the pertinent agency and its contact information;
- procedures and deadlines for providing input on the rulemaking to the agency; and
- the contemplated timetable for the rulemaking.

Section 4 allows the formation of a “rule drafting committee” of interested stakeholders to comment or make recommendations on the subject of an active rulemaking, and includes:

- measures for appointment to the committee and a requirement that the committee's meetings be open to the public but *not* subject to the *Open Meetings Act* or the *Per Diem and Mileage Act*; and
- a provision invoking the *Governmental Dispute Prevention Act*, under which members of the rulemaking committee may seek alternative dispute resolution during rulemaking, with the agency left to decide whether to proceed with rulemaking during the dispute resolution process.

Section 5 details requirements for notices of proposed rulemaking, including:

- notice to the public and publication in the *New Mexico Register* at least thirty days prior to a public hearing on the rulemaking;
- a summary of the full text of the rule and a short explanation of its purpose;

- citation to the specific legal authority for adoption of the rule;
- information on how a copy of the full text of the rule may be obtained;
- information on public comment procedures;
- information on public hearings on the rulemaking; and
- citation to any technical information used for the rulemaking and information on how it may be obtained.

Section 6 contains required procedures for public participation in the rulemaking, including procedures for:

- public comment periods and the submission of comments to the rulemaking agency, including a requirement that the agency consider all submitted information within the comment period; and
- public hearings.

Section 7 contains requirements for agency records of rulemaking proceedings, including:

- a requirement that the records be available for public inspection and be displayed on the sunshine portal; and
- the specific elements the records must contain, including:
 - a copy of all pertinent publications from the *New Mexico Register*;
 - a copy of any technical information used in the formation of the rule;
 - any transcripts or recordings of public hearings on the rulemaking; and
 - a copy of the rule and a concise explanatory statement filed with the New Mexico records center.

Section 8 details required elements of the “concise explanatory statement” of the rule, to be provided to the public upon the rule’s adoption, including;

- the date of the rule’s adoption;
- a reference to specific statutory and other authority authorizing the rule;
- any findings required by law for the adoption of the rule;
- the agency’s reasons for adopting the proposed rule, including reasons for not accepting substantial arguments made in testimony or comments; or
- the reasons for any substantive change between the rule as proposed and as adopted.

Section 9 outlines procedures for the adoption of emergency rules, outside the normal process outlined in the bill, including requirements that:

- in order to be considered an emergency rule, the time required to complete the normal rulemaking process be found by the issuing agency to:
 - cause an imminent peril to public health, safety, or welfare;
 - cause the loss of funding for an agency program; or
 - place the agency in violation of federal or state law;
- these findings be included in a record provided to the public, including a statement that the emergency rule shall be temporary, after which the agency may adopt the rule without prior notice or hearing; and

- an emergency rule remain in effect until the adoption of a rule through the regular rulemaking process, except that, if a regular rule is not adopted within 180 days of the effective date of the emergency rule, that rule shall expire.

Section 10 states that an agency may not deviate from the proposed action included in the notice of proposed rulemaking unless that action is a “logical outgrowth of the action proposed in the notice.

Section 11 details the required timeline of a rulemaking action, other than emergency rulemaking, including:

- a requirement that an agency not adopt a rule prior to the completion of the public comment period;
- a provision noting that if an agency fails to adopt a rule within two years of the notice of proposed rulemaking is published in the *New Mexico Register*, the rulemaking be terminated unless the agency files a statement of good cause for extension of the rulemaking period;
- a provision allowing termination of a rulemaking by publishing a notice of termination in the *New Mexico Register*, with notice of termination provided to each person who has participated in the rulemaking; and
- a requirement that a rule be filed with the records center and published in the *New Mexico Register* no later than 180 days after adoption of the rule.

Section 12 requires the attorney general to adopt default procedures for rulemaking public hearings, and allows an agency to adopt its own procedures in lieu of these default procedures.

Section 13 amends the *State Rules Act* to:

- require inclusion of the concise explanatory statement in those materials submitted to the records center; and
- allow the state records administrator to make minor, non-substantive, grammatical, spelling, and format corrections, after written notification to the pertinent agency.

Section 14 strikes language regarding emergency rules that would be redundant under the provisions of this bill.

Section 15 repeals that section of the *State Rules Act* allowing then-properly filed rules prior to 1995 to remain in effect if they have not been otherwise repealed, amended or superseded.¹

Fiscal Impact:

HB 108 does not contain an appropriation.

Original Fiscal Issues:

According to the Commission of Public Records (CPR):

¹ 14-4-5.1 NMSA 1978

- There will be an indeterminate, recurring effect, for FY 13 through FY 15, on revenue of the Records Center Revolving Fund.
- There will be minimal fiscal impact for FY 13 and indeterminate recurring impact for FY 14 and FY 15, on the General Fund.
- Requiring concise explanatory statements to be filed with the rules will necessitate CPR developing both processes and means for filing and retaining these documents, although the actual cost is difficult to determine.
- Because the explanatory statements are public records, CPR must develop some means of ready access to the statements, which would involve additional staff time and recourses.
- At minimum a 0.25 FTE would be needed for management of the explanatory statements.

The Administrative Office of the Courts (AOC) identifies an indeterminate recurring impact on an undetermined fund for FY 13 through FY 14.

According to the Taxation and Revenue Department (TRD), the requirement, in Section 1(E)(2)(f), for publication of notice of administrative actions with statewide implications in a “newspaper of general circulation, if any, in each county,” may impose an unreasonable cost on agencies. Further, TRD notes that the number of such newspapers is unknown.

Original Substantive Issues:

According to the CPR, HB 108:

- will add additional steps in the rulemaking process;
- may slow the promulgation of rules, and require additional resources for both affected state agencies, and the CPR; and
- would make rulemaking across state agencies more consistent with each other; and
- afford the public better understanding of, and greater participation in, the rulemaking process.

According to the Attorney General’s Office (AGO):

- HB 108 represents a substantial overhaul of the *State Rules Act*, which currently addresses only procedural requirements for the publication of rules, but does not deal with rulemaking procedures, per se; and
- the *Administrative Procedures Act*, while very limited in application to just a few agencies, deals exclusively with rulemaking procedures and may be a better location for these amendments and new sections by making it applicable to all state agencies.

According to TRD, agencies should not be required to comply with timely posting requirements for inclusion on the sunshine portal, as other agencies have no control over that process.

According to the Energy, Minerals and Natural Resources Department:

- HB 108 will make rulemaking more complicated for agencies, because it provides many new procedural requirements;
- new requirements will lengthen the time for agencies to complete a rulemaking and may either discourage agencies from some rulemakings or result in consolidated rulemakings to preserve agency resources; and

- agencies will need to plan for the rulemaking process to fulfill the requirements of this legislation.

According to the Economic Development Department, under HB 108:

- current provisions of the *State Rules Act* do not give the level of notice and involvement HB 108 would afford the public;
- substantial portions of the Model Administrative Procedures Act (MAPA; see “Background,” below) would be adopted into the *State Rules Act*; and
- better notice and greater participation in the rulemaking process will yield more effective rules, with a more predictable regulatory environment and better compliance by affected entities.

According to the Department of Health (DOH):

- HB 108 would impede the ability of executive agencies to develop sound public policies while adding little to the existing regulatory framework under the *State Rules Act*;
- the bill would require agencies to give notice of contemplated rulemaking before the actual text had been written;
- HB 108 proposes that agencies create committees for rule drafting, to include members of the public representing varied interests. DOH contends that this would radically alter the way administrative rules are made, and possibly lead to lawsuits by interested parties not included in rulemaking committees, claiming that their interests had not been fairly represented in the process. However, the language of the bill is permissive, rather than prescriptive. According to Section 5, “An agency *may* appoint a rule drafting committee to comment or make recommendations on the subject matter of a rulemaking under active consideration within the agency.” (Emphasis added.) If the agency does appoint such a committee, *then* the agency “*shall make reasonable efforts* to inform the public and to seek a balance in representation from among interested members of the public.” (Emphasis added.) Thus, under HB 108, an agency may avoid the situations that concern DOH merely by declining to form a rulemaking committee; and
- HB 108 contains language about proposed rulemakings being terminated after two years, but does not explain the effect of such a termination. According to Section 11 (B), if an agency fails to take action on a proposed rule within two years of the publication in the *New Mexico Register* of the notice of proposed rulemaking, that rulemaking shall be terminated automatically, unless the time period is extended. It should be noted that a proposed rulemaking is not a final administrative action; without an adopted rule, the status quo would remain unchanged and any rules that were in effect before the proposed rulemaking would remain effective.

According to the New Mexico Medical Board, HB 108 proposes several internally inconsistent provisions:

- Section 2(A) requires agencies to provide to the public an annual regulatory agenda, but Section 2(C) neither requires a rulemaking included in the agenda to be accomplished nor prohibits a rulemaking not so included from being undertaken. In actuality, these provisions appear to be complementary, rather than contradictory: an agency must publish a regulatory agenda, but retains the flexibility to deviate from that agenda, with the proper notice and procedures, for rulemakings not contemplated in that agenda.

- Section 3(B) requires a preliminary outline of the rulemaking to be included in the regulatory agenda, but Section 3(D) allows agencies to change or decline to pursue considered rulemakings. Again, these provisions are not truly contradictory. A preliminary outline must be included, but agencies may deviate from that outline.
- Section 12(A) requires the Attorney General (AG) to adopt *default* procedural rules for public rule hearings, while Section 12(C) allows agencies to adopt their own procedural rules that may differ from those adopted by the AG. It is important to note that the rules adopted by the AG are “default” rules, to be employed in the absence of agency procedural rules, which are expressly permitted by Section 12(C). There appears to be no contradiction between these two subsections.

According to the Office of the State Engineer (OSE), their office should be exempted from the requirements of HB 108, because:

- OSE has longstanding rulemaking authority, and experience, over a vital and unique subject matter, i.e.: water rights;
- OSE has been promulgating rules with statutory authority since 1907, five years before New Mexico joined the union;
- water and water rights are the exclusive areas of OSE rulemakings, a complex area of law that the New Mexico Supreme Court has recognized by creating a judge to hear only water matters in each judicial district, and a judge pro tempore to hear nearly all New Mexico state court water rights adjudications; and
- OSE has developed its rulemaking process over the course of the last century, refining it to better address this area of law, thus this process should be left undisturbed.

According to the New Mexico Department of the Environment (NMDE):

- HB 108 allows agencies to create rule drafting committees, the meetings of which are open to the public but not subject to the requirements of the *Open Meeting Act* and the *Per Diem and Mileage Act*, which may be problematic, because:
 - New Mexico is a large state, and it may be difficult to get participation from many areas if potential committee members must pay transportation costs;
 - under the *Department of the Environment Act*, NMDE already has authority to create advisory committees, which do receive per diem and mileage expenses; it is unclear whether and how statutes regarding advisory committees would apply under HB 108; and
 - it is unclear how meetings of the rule drafting committees should be conducted, thus potentially creating unintended perceptions of unfairness.
- HB 108 Section 4(B) applies the *Governmental Dispute and Resolution Act* to agency rulemakings (although participation is not required of any party). Most of NMDE’s rules are not adopted by NMDE, but rather by a board or commission², and any person can petition for a particular rulemaking. If such a board or commission decides to call for alternative resolution, NMDE would be compelled, as a practical matter, to participate, resulting in significant costs, even though participation is not explicitly required. Additionally, achieving a resolution through alternative dispute resolution in a rulemaking proceeding may be problematic because:

² For example, Environmental Improvement Board or the Water Quality Control Commission.

- NMDE undertakes rulemakings involving large numbers of people, any one of whom may initiate or become party to dispute resolution proceedings and advocate for a particular result, or even attempt to delay the timely completion of a rulemaking;
- NMDE disallows ex parte communication with hearing officers or final decision makers, such as a board or commission, and may make decisions on rulemakings without recourse to what may have been decided in a dispute resolution hearing; and
- many of NMDE's rules are based on empirical scientific evidence, which may contradict a consensus decision, no matter how widely held, and may lead to additional appeals of such rulemakings.

Original Technical Issues:

According to CPR:

- The *Uniform Licensing Act* has rulemaking requirements that potentially conflict with provisions in HB 108. For example, licensing boards are required to make reasonable efforts to give notice of rulemaking action to licensees and the public³, while HB 108 would require more specific actions, such as posting on the pertinent agency website and the sunshine portal, or publishing notices in languages other than English.
- Section 8 of HB 108 requires an agency to include in its concise explanatory statement to the public the reasons for any “substantive change” between the rule as proposed and the rule as adopted. However, Section 10 allows an agency to change the text of the proposed rule only if the action is a “logical outgrowth” of the proposed action. These two legal terms might be defined differently, and CPR suggests using one term, “logical outgrowth,” which is the term used in the MAPA. However, CPR's interpretation of these sections appears to be a misreading of the language of the bill:
 - Section 8 requires explanation of the *reason* for any substantive change in the *text* of the rule from the text that was proposed.
 - Section 10 prohibits an agency from taking any *action* different from the proposal unless that action is a logical outgrowth of the action proposed in the notice; it does not speak to *textual* changes.
 - Thus, an agency might make substantive textual changes to a rule and be required to explain them, but still be barred from taking any different *action* on the proposal, such as amendment, repeal or the promulgation of a new rule.

The AGO also refers to the potential conflict between the requirements of HB 108 and the *Uniform Licensing Act*, noting that it is not clear which law would rule in the case of an actual conflict. The AGO further notes that, while HB 108 requires their office to adopt default procedural requirements for rulemaking hearings, it may be difficult to do so without further statutory guidance on the resolution of conflicts between HB 108 and other laws, such as the *Uniform Licensing Act*.

According to TRD, the language in Section 1(E)(2) regarding translation of rulemaking information into languages other than English is unclear. TRD notes that, while translation of notices and summary descriptions of rulemaking actions into other languages might be appropriate, in order to ensure only one legal interpretation of a rule, actual regulatory text should only be rendered in English, thus avoiding the unintended consequences of imprecise translation.

³ 61-1-29 NMSA 1978.

As noted by DOH, HB 108 was introduced on behalf of the Economic and Rural Development Committee, which would appear to be inconsistent with the subject matter of the bill. However, as noted in “Background,” below, the Economic and Rural Development Committee is one of those three interim committees whose membership was represented on the Regulatory Process Subcommittee, whose work ultimately resulted in the introduction of HB 108.

According to OSE:

- many agencies have current statutory procedures with specific timelines that may conflict with the timelines mandated by HB 108, potentially leading more challenges to the validity of rules promulgated under the authority of the bill;
- while HB 108 defers to agency-specific statutes regarding emergency rulemaking, the bill still requires that the agency specifically find that a rulemaking meets criteria under the bill before initiating the emergency rulemaking, which may still conflict with agency-specific criteria; and
- the repeal, in Section 15, of the statute legitimizing rules properly filed prior to 1995 may result in the invalidation a number of rules currently implemented.

According to NMDE:

- HB 108, Section 10 limits changes to a proposed rule to those which are a “logical outgrowth” of the rule as proposed, a term that should be defined to reduce the possibility of legal disputes. NMDE offers the following:

“A final rule is a logical outgrowth of a proposed rule if any differences between the proposed rule and the final rule are in character with the original scheme and if the proposed rule would have given fair notice to interested parties that the change was possible and that they should have filed any comments during the notice and comment period.”

- Section 12 requires the Attorney General to adopt default procedural rules for rulemaking hearings, which an agency must use unless it adopts its own rules of procedure. It is unclear whether an agency’s *existing* procedural rules may be retained or whether the intent of Section 12 is to require all agencies to either follow the Attorney General’s default rules *or promulgate new procedural rules*.
- Section 13 allows the state records administrator to make minor, non-substantive corrections in spelling, grammar, and format in filed rules after notification to the filing agency. However, sometimes a change in grammar may change the meaning of a filed rule in a way that the state records administrator may not appreciate. NMDE suggests an amendment to this language allowing a filing agency 10 days to comment on any changes proposed by the state records administrator as to whether such changes are truly non-substantive.

Background:

MODEL STATE ADMINISTRATIVE PROCEDURES ACT

In the 2010 legislative session, SJM 7, *Review Model Administrative Procedures Act* (MAPA) was introduced, but failed to move out of committee. That joint memorial would have created a

task force to study administrative procedures in New Mexico, with focus on reviewing the MAPA, and making recommendations to the Legislature regarding the adoption of all or part of its provisions.⁴ When SJM failed to leave committee, the Lieutenant Governor formed a task force with similar objectives,⁵ which met every three weeks in 2010 between May and December. Ultimately, the task force decided to draft proposed legislation amending the *State Rules Act*, and presented their work to the Interim Regulatory Process Subcommittee.⁶ Arising out of the work of the subcommittee and the task force, SB 30 and HB 360 were introduced in the 2011 regular legislative session, but neither bill moved out of committee. HB 108 is the current result of that work begun by the subcommittee and the task force.

CURRENT STATE LAW

In general, under current law, rules are written by the various state agencies to implement, clarify, and support the more general laws enacted by the Legislature. Each agency can have its own rulemaking procedures, but all agencies⁷ must adhere to certain provisions of law regarding the rulemaking process prescribed in:

- the *State Rules Act* (Chapter 14, Article 4 NMSA 1978);
- the *New Mexico Administrative Code (Code)* (Title 1, Chapter 24); and
- Chapter 14, Article 11 NMSA 1978, regarding records, rules, notices, and oaths.

STATE RULES ACT

Provisions pertaining to the authority and duties of the State Records Administrator, the Administrative Law Division, and technical rulemaking requirements are contained in the *State Rules Act*.

Authority and duties of the State Records Administrator and Administrative Law Division include:

- the publication and maintenance of the *Code* and the *Register*;
- the promulgation of rules of procedure prescribing the format, structure, and compilation of the *Code*; and
- the supplementation or revision of the *Code* at least once annually.

Technical rulemaking requirements and procedures currently state that:

⁴ The *Model State Administrative Procedures Act* was developed by the National Conference of Commissioners on Uniform State Laws in 1981 and updated in 2010. (<http://www.uniformlaws.org/Act.aspx?title=State%20Administrative%20Procedure%20Act,%20Revised%20Model>)

⁵ The task force included two state senators, two state representatives, the Secretaries of several cabinet departments, two representatives from New Mexico boards and commissions, the Attorney General, a member of the New Mexico State Bar, a faculty representative from UNM School of Law, a representative from the judicial branch, two members from affected industries, two members from public advocacy groups, and the State Records Administrator.

⁶ The subcommittee comprised 18 members from three interim committees: Revenue Stabilization and Tax Policy, Economic and Rural Development, and Courts, Corrections and Justice. The subcommittee submitted its report in December of 2010.

⁷ The legislative and judicial branches are exempt from the requirements of the *State Rules Act*.

- rulemakings must be submitted to the State Records Center, who shall then publish them in a timely manner in the *Register*, which is published twice monthly, and compile them into the *Code*;
- an agency must adhere to the technical, formatting, and clerical submittal requirements for publication by the State Records Administrator;
- the Administrative Law Division will ensure that the rule complies with these technical requirements, and date- and time-stamp the rule for publication;
- no rule is valid or enforceable until filed and published;
- failure to comply with statutory requirements, such as any required publication of notice, may result in invalidation of the rulemaking; and
- emergency rules may be effective immediately upon filing with the Division, but will be effective for only 30 days unless published in the *Register*.

NEW MEXICO ADMINISTRATIVE CODE (TITLE 1, CHAPTER 24)

Title 1, Chapter 24 of the *Code* contains rules promulgated by the New Mexico Commission of Public Records outlining technical requirements and procedures that must be followed in order for a rule to be accepted for publication in the *Register* and the *Code*. These rules include provisions stating that:

- when an agency file rules with the Administrative Law Division, they must include a transmittal form signed by the appropriate agency authority, such as the secretary of an agency;
- if a rulemaking does not conform to the clerical, technical, and formatting requirements necessary to publication, it may be rejected; and
- upon publication, emergency rules are “converted” to regular rules.

CHAPTER 14, ARTICLE 11, NMSA 1978

According to Chapter 14, Article 11 NMSA 1978, regarding notices, records, rules, and oaths, all legal notices must also be published on the agency’s website, although this electronic posting is not a substitute for the other required publication, and failure to post this information to the website is not grounds to challenge a rule’s validity. These sections also establish standards for the publication of notice in newspapers and periodicals, if required.

ADMINISTRATIVE PROCEDURES ACT

Although New Mexico’s *Administrative Procedures Act* (APA) provides the most comprehensive current procedural requirements for an agency to undertake a rulemaking, it is the least widely applicable body of law pertaining to rulemaking.⁸ The provisions in the APA include requirements for many of the issues addressed by HB 108, such as:

- publication of notice and public comment;
- agency review of public input and other materials; and
- emergency rules.

⁸The *Administrative Procedures Act* applies only to agencies that are specifically deemed to be subject to its requirements. Even then, that applicability might be limited to certain areas. For example, the Attorney General’s Office and the Office of Indian Affairs must adhere to the provisions of the APA when jointly promulgating rules for the implementation of the *Indian Arts and Crafts Sales Act*.

Committee Referrals:

HHGIC/HJC

Related Bills:

SB 157 *Public Education Dept. Rules and Procedures*