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FISCAL IMPACT REPORT

ORIGINAL DATE
SPONSOR Cotter **LAST UPDATED** 02/12/15 **HB** _____

SHORT TITLE Expiration of Rules **SB** 219

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY15 | FY16 | FY17 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|------|------|----------------------|------------------------------|---|
| Total | | NFI | NFI | NFI* | Recurring | General Fund and Other State Funds |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Aging & Long Term Services Department (ALTSD)
 Attorney General's Office (AGO)
 Children, Youth & Families Department (CYFD)
 Commission of Public Records (CPR)
 Department of Game & Fish (DGF)
 Department of Health (DOH)
 Department of Information Technology (DoIT)
 Economic Development Department (EDD)
 Energy, Minerals & Natural Resources Department (EMNRD)
 Office of the State Engineer (OSE)
 Public Education Department (PED)
 New Mexico Department of Transportation (NMDOT)
 State Land Office (SLO)

SUMMARY

Synopsis of Bill

Senate Bill 219 enacts a new section of the State Rules Act to provide for the expiration of all rules on July 1, 2020. Rules adopted by the Taxation and Revenue Department are exempted from this termination. Also exempted are rules adopted within two years of the rule's expiration date.

After July 1, 2020, any rule that is adopted will expire on July 1 five years from the calendar year when the rule was published in the New Mexico Register.

A rule may be re-filed with the State Records Center if prior to the expiration date the regulating agency conducts a review of the rule to determine if it is no longer applicable, cost-effective, timely or necessary for the implementation of the agency's mission under the law. As part of its review, that agency may conduct a public hearing on the rule.

The effective date of this bill is July 1, 2015.

FISCAL IMPLICATIONS

As to agencies that promulgate rules, the fiscal impact is expected to be significant. For example, ENMRD reports that the impacts to it are unknown but could be significant, as it is responsible for a large number of rules which are filed in 13 different chapters of the New Mexico Administrative Code (NMAC). To conduct a thorough review of each rule would involve a substantial amount of employee time, or require the hiring of a consultant. If the requirement to "re-file" rules involves full publication in the New Mexico Register, there would be a significant cost for the publication.

CYFD reports these cost estimates for compliance with SB 219:

For Early Childhood Services, currently responsible for promulgating eight rules, a minimum of 220 staff hours estimated at \$25/hour and a minimum outlay of \$2 thousand are required to change one rule, for a total anticipated cost across all eight rules of \$60 thousand. This division typically updates four of its eight rules on average every two years, while the remaining rules are updated when the enabling law for that rule is passed.

For the Children's Behavioral Health Division, NMAC 7 (Health) 20 (Mental Health) 11 (Certification Requirements for Child and Adolescent Mental Health Services) is required under Title XIX of the Federal Social Security Act regarding certification requirements for children's behavioral health services. Any interruption in coverage by NMAC 7.20.11 could jeopardize federal Medicaid funding for infants, children and youth. A comprehensive review for continued applicability, cost-effectiveness, timeliness and continued necessity for CYFD's mission as provided by law would require one full FTE. As noted above, a minimum of 220 staff hours estimated at \$25/hour and a minimum outlay of \$2 thousand are required to change one rule.

For Protective Services, all rules are reviewed on a biennial basis. As such, once the five-year expiration and re-issuance has passed, there will be no further effect on Protective Services. As noted above, a minimum of 220 staff hours estimated at \$25/hour and a minimum outlay of \$2 thousand are required to change one rule.

Further, CPR reads the rule as charging the State records administrator with determining the sufficiency of agency review as to the criteria for rule elimination (i.e. no longer applicable, cost-effective, timely or necessary to implement the agency's statutory mission). It reports that that additional responsibility will require at least one paralegal position. Further, it anticipates filing and publications with the record center will increase given the additional requirements for filing

(review to determine whether rule should be eliminated), which may impact its operating budget.

NMDOT reports that currently it has 40 rules published in the New Mexico Administrative Code. The development of each of those rules required NMDOT to conduct statewide public hearings. The rules are necessary for NMDOT's day-to-day operations in the accomplishment of its mission. The mandatory expiration of all of those rules on July 1, 2020, and a commensurate requirement that each one of the rules would have to undergo a new rule adoption process would result in what is believed to be the unnecessary expenditure of public funds. It is unknown what those costs would be.

Both because of the unknowable nature of agency expenditures to comply with SB 219 and because these expenditures will not occur until one or two years before the July 1, 2020 termination date set in the statute, no numbers are included in the operating budget impact table above.

SIGNIFICANT ISSUES

CYFD, as well as other agencies, expresses its concern about whether it will be able to continue its regular business in the event there is a period of time between the expiration of all rules and their re-establishment. In particular, CYFD comments:

Any interruption in coverage by NMAC 7.20.11 could jeopardize the health, safety and welfare of children in New Mexico especially regarding intake, assessment, treatment planning, discharge planning, and discharge from mental health treatment and the qualifications of staff who provide services to them.

NMAC 7 (Health) 20 (Mental Health) 12 (Licensing Requirements for Child and Adolescent Mental Health Facilities) ensures that treatment facilities meet minimal standards to promote the health, safety and welfare of children. Any interruption in coverage by NMAC 7.20.12 would pose a significant risk to the physical safety of children and youth in mental health facilities.

NMAC 7 (Health) 8 (Residential Health Facilities) 3 (Regulations Governing Residential Shelter Care Facilities for Children) provides for monitoring of facility compliance with these regulations through surveys to identify any factors that could affect the health, safety, and welfare of the clients or the staff and assures that adequate supervision must be provided at all times. Any interruption in coverage by NMAC 7.8.3 would pose a significant risk to the health, safety, and welfare of the clients or the staff residing or working in shelter facilities or homes.

In the same vein, PED reports that while it endorses keeping current and working towards efficient administration, revamping its rules could pose significant administrative problems, especially in compliance with federal rules. It explains:

PED has one of the state's largest budgets and its rules have an impact on a broad range of individuals and businesses, thousands of students and parents throughout the state, vendors who provide materials and expertise to schools, teachers and teachers-in-training. The State Rules Act requires PED to publish as rules any policy that affects persons outside of the agency. Through publishing its rules, holding hearings on revisions to

those rules and modifying rules in response to hearings, PED provides a means for people outside the agency to get what they need—to figure out ahead of time if they have amassed enough credits to graduate, to decide whether they can afford to get a teaching license, whether a school has done its duty to provide a safe environment for learning, whether a school is being administered in an ethical manner—among them.

It also notes that it receives substantial amounts of federal funding that is dependent on PED's compliance with federal law and rules. If a federal requirement is permanent, PED will need to take special care to avoid any lapse that could threaten funding.

CYFD delineates the multi-step process involved in the review process set out in SB 219:

Review of this rule for applicability would require accessing and completing a comparative analysis with relevant state law, other state administrative codes, federal statute, and federal regulations. Review of this rule for cost-effectiveness would require additional resources to make an informed decision balancing costs of enforcement with life and safety risks to children and youth. Review of this rule for timeliness would require a careful analysis of changes in social, technological and economic development that impact each sub-section of the rule.

Several agencies report that they review their rules on a periodic basis already. For example, DGF reports that it maintains 50 NMAC rules with seven chapters of the Code: 38 are permanent, one is renewed annually, ten are renewed every four years, and one is a 20-year rule. Many of the four year rules are set on schedules based on the acquisition of biological information and both public and agency needs. When appropriate, DGF already seeks State Game Commission action to eliminate or combine rules as necessary, applicable or timely. DGF anticipates that this bill will result in a significant increase in Commission public hearings and meetings and may result in rule promulgation that lacks a sufficient biological or scientific basis, as well as reducing the amount of time personnel will be able to spend focused on wildlife management activities.

More generally, EMNRD suggests SB 219 could be subject to a challenge under the Separation of Powers clause in the New Mexico Constitution. Article III, Section 1 directs that no branch of government “shall exercise any powers properly belonging to either of the others.” Arguably, the Legislature here is exercising the Executive branch's power to repeal its own rules.

Responding agencies also suggest SB 219 may suffer from vagueness and ambiguity problems. CPR, EMNRD and AGO all point out that the language of this bill (page 2, lines 5-7) seems to permanently exempt rules filed between 2018 and 2020. EMNRD also calls attention to the provision for re-filing a rule, which is part of a sentence that applies to rules adopted after July 1, 2020. Presumably, the re-filing process is intended to apply to all expiring rules--not just those that expire after July 1, 2020. If so, that intent should be clarified. Additionally, it notes that SB 219 does not define the scope of a “rule” for purposes of the review and re-filing. “Rule” is defined in the State Rules Act, but NMAC categorizes rules by Title, Chapter, Part, Section, etc. At what level must the review occur? It also comments, contrary to CPR's reading (discussed under Fiscal Impact), that there is no oversight over the agency's review process, and each agency is left to determine what processes to employ or how seriously to treat the review process.

Similarly, OSE notes that the bill specifies no procedure for certification of the results of an agency's review of its rules. It is unclear whether it would be necessary for an agency to re-promulgate an existing rule found to still be applicable, cost-effective, timely or necessary for the implementation of the agency's mission. Clarification on this point would be useful in avoiding confusion and the potential for litigation were the bill to be enacted.

SLO advises this bill would have very significant impacts on it, and would add a significant administrative burden requiring much more frequent review and publication of rules than performed typically over the last several decades by SLO. Frequent rule changes could impose future architecture requirements on SLO IT systems in both resources and monies expended necessary to respond. Most of the current Land Office regulations were adopted in 2000-2004 (Parts 1-18, 20, and 100), although some parts were adopted more recently (Parts 21 and 22 adopted in 2012, Part 19 adopted in 2013).

PERFORMANCE IMPLICATIONS

DOH reports that staff time to review all agency rules, and to inform the public and conduct public hearings, would be necessary. Given DOH's approximately 34 separate chapters of rules, DOH would effectively be required to re-adopt a rule more frequently than every two months. The requirements associated with re-adoption of administrative rules will require significant staff resources be dedicated to the process on a full-time basis.

ADMINISTRATIVE IMPLICATIONS

As ALTSD and other agencies comments, their time and attention will be regularly and continuously diverted from regular duties and instead expended on activities associated with the review and re-filing of rules

OTHER SUBSTANTIVE ISSUES

OSE advises that New Mexico statutes require the State Engineer to adopt rules and regulations to implement laws that govern the appropriation and use of water. See, e.g., NMSA 1978, Section 72-5-1 ("Any person, association or corporation . . . intending to acquire the right to the beneficial use of any waters, shall, before commencing any construction for such purposes, make an application to the state engineer for a permit to appropriate, in the form required by the rules and regulations established by him."). State Engineer rules, compiled at N.M.A.C., Title 19, Chapters 25 – 27, are principally for the purpose of implementing the statutorily defined duties of the State Engineer. Mandatory review of the OSE's rules every five years could be beneficial in determining whether agency rules are still needed or beneficial. Since, however, OSE-promulgated rules implement duties imposed on the agency by statute, the burden of requiring mandatory review of all rules every five years may outweigh any potential benefits that might be gained.

ALTERNATIVES

NMDOT suggests that, rather than mandate the expiration of all rules on a specified date, the bill could instead require agencies to conduct an annual review of their respective rules with the mandate to let obsolete rules expire. This would avoid unnecessary costs of having to re-promulgate rules that continue to be relevant and current but are required under the proposed law to expire on July 1, 2020.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Properly promulgated rules will continue to have effective dates that are set by the promulgating agency and will not “sunset” except as may be determined by the individual rule or agency.

AMENDMENTS

CPR suggests that references to “records center” and “state records center” (page 1, lines 22-23) should be replaced with “state records administrator”, as it is the position not the physical location that is charged with accepting filing.

Additionally, CPR proposes the bill be amended to clarify that agencies publishing rules between 2018 and 2020 are exempt only from the 2020 expiration, but the five year provision of the bill still applies.

MD/bb