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## FISCAL IMPACT REPORT

SPONSOR Taylor DATE TYPED 2/10/05 HB 705

SHORT TITLE Legislative Review of State Rules SB \_\_\_\_\_

ANALYST Hanika-Ortiz

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
			See Narrative	Recurring	General Fund

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

New Mexico Environment Department (NMED)  
 Energy, Minerals and Natural Resources Department (EMNRD)  
 Public Education Department (PED)  
 Supreme Court Law Library

### SUMMARY

#### Synopsis of Bill

House Bill 705 requires that rules proposed by executive agencies must be filed with the Legislative Council Service (LCS) prior to any public hearing conducted by the agency. The proposed rules will be forwarded to the members of the appropriate interim committee or, if no committee has been designated, the Legislative Council. The Legislative Council Director or a committee member may then request a public hearing before the interim committee within 30 days of the filing of the rule; the hearing must be held within 60 days of the request. The proposed rule would not become effective until after the hearing is held. HB 705 excepts agencies subject to the Uniform Licensing Act, provides for emergency rules that may take effect without a legislative hearing and contains a savings clause addressing existing rules filed prior to July 2, 2005.

#### Significant Issues

The NMED has the following comments:

The standards as codified by rule that protect New Mexico and its citizens are directed by the

legislature to be established primarily by rule and regulation. Rule-making authority is generally vested in various bodies established by statute (e.g., boards and commissions) or in an executive agency (e.g., the Department of Health or the State Engineer). The NMED is not aware of any rules or regulations in state government that are subject to a legislative hearing before becoming effective. By requiring such hearings, HB 705 may be contrary to Article III, Section I of the New Mexico Constitution, regarding the separation of powers of government.

The statutes that set up New Mexico's rule-making framework consider that public participation is a crucial component of effective rules. The legislature required that each rule-making body provide ample public notice for each hearing, whether it is to adopt rules, hear appeals of permit decisions, or gather information the body deems of interest. The notices must be placed in newspapers of wide circulation as well as those that are local to the issue at hand.

The statutes also consider that many rules can be exceedingly complex and detailed. For example, although the Water Quality Control Commission (WQCC) has had but three rule-making hearings in the past two years, two of these hearings lasted more than seven days each. The EIB has held 18 rule-making hearings in the same two years, several of which were multi-day hearings due not just to the complexity of the subject but also to the level of interest from the public. The executive agencies are constituent agencies of the boards and commissions which are comprised of individuals with some expertise in the realm of business, environment, or science, and can therefore digest the considerable amount of technical information needed to make informed decisions about rule adoptions.

While many state regulations are adopted by boards or commissions, all require public hearing that are widely noticed. Currently, interim legislative committees (e.g., the legislative interim Radioactive and Hazardous Materials Committee) routinely hold public hearings on environmental issues of their choosing, including matters subject to rule-making. As the legislative branch already has this authority vested in it, no additional oversight is needed or appropriate. To put this concept into law may subject the practice to scrutiny as an unconstitutional impingement on the separation of powers between the legislative and executive branches of government.

## **PERFORMANCE IMPLICATIONS**

The Supreme Court Law Library reports it is not a completely settled area of law; arguments could be made both contesting and affirming the validity of this proposed law. They further believe there may be a constitutional issue, and the Act may be challenged all the way up through the Supreme Court.

The EMNRD reports if SB 705 grants any control over rulemaking to the LCS or the Interim Committee, it will impede efforts of the affected agencies to carry out their statutory duties. If the LCS and interim committee do not have control over rulemaking, HB 705 creates a duplication of effort by requiring two public hearings, with one of those hearings before a body that has no authority to act.

Agencies are concerned the review process described in HB 705 may add delay, conflict and confusion to the rule making process that now exists. Further concerns are costs associated with duplicate hearings in terms of agency budget, resources, staff time, and meeting performance tar-

targets.

### **FISCAL IMPLICATIONS**

EMNRD reports HB 705 will create additional work for the LCS or interim committees to supervise rulemaking, and it makes no appropriation to the affected agencies that might be required to double their workload in rulemaking proceedings. NMED reports agencies are budgeted for conducting rulemaking hearings once, and lack the budget to conduct hearings twice.

### **ADMINISTRATIVE IMPLICATIONS**

The PED reports HB 705 will substantially lengthen the time necessary to promulgate a non-emergency rule. They believe this may impede the ability of an agency to operate pursuant to needed changes in rules and may ultimately be a public detriment.

The Supreme Court Law Library reports between 600 and 1600 rules being filed a year. The Supreme Court Law Library say there are no administrative implications for the judiciary, as this bill primarily amends the State Rules Act, from which the judiciary is exempt.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

In conflict or duplicates HB 574, Legislative Hearing on Certain Rules, enacts a requirement that any rule proposed by the State Engineer, Environmental Improvement Board, Water Quality Control Commission, Oil Conservation Commission (if the rule would regulate statewide or basin-wide oil and gas activities) must be reviewed before the appropriate interim committee of the New Mexico Legislative Council as specified. HB 574 also differs in that the hearing before the Legislative Council or the interim committee is automatic; under HB 705 hearings are held upon request by a legislator or the director of the legislative council.

Conflicts with HB 35 which seeks to eliminate duplicate hearings in front of the WQCC.

EMNRD says to the extent HB 705 gives control over rulemaking to the LCS or interim committee, in conflicts with New Mexico statutes granting rulemaking and enforcement authority to affected agencies.

### **TECHNICAL ISSUES**

The NMED says HB 705 provides no guidance to the LCS or interim committees concerning procedures for public notice and participation. In contrast to the Environmental Improvement Act, no guidance is given with respect to factors they must consider in approving or disapproving rules. HB 705 also provides no guidance as to any action the legislature may take with respect to a rule adoption, or what would happen if the legislature disagreed with the proposed rule.

The Supreme Court Law Library provides the following comments:

I.N.S. v. Chadha, (1983) held that legislative action with regard to executive function was unconstitutional. There are over 60 cases that have followed the Chadha reasoning, and less than 20 which have distinguished their factual patterns so as to make it inapplicable.

Section 2 of the bill creates a new section of the State Rules Act with subsection B say-

ing, “Concurrently with the publication of a proposed rule.” Currently most agencies are not required to publish their proposed rules. The PED reports executive branch agencies publish notices of proposed rulemaking in the State Registrar and in a newspaper of general circulation.

## **OTHER SUBSTANTIVE ISSUES**

The PED has the following comments:

Currently, executive branch agencies must publish the notice of proposed rulemaking in a newspaper of general circulation at least 30 days prior to the hearing date and must mail the notice hearing to all persons who have made a written request for advance notice of hearing at least 30 days prior to the hearing. HB 705, if enacted, will afford legislators 30 days from receiving notice of the proposed rulemaking action to request a legislative hearing, which must be held within 60 days of the request and which would be in addition to the public hearing conducted by the agency. This provision has the potential to add 60 days to the rulemaking process.

HB 705 requires a legislative hearing; it does not, however, address the role of the committee beyond hearing the matter. If the Legislature assumes approval or veto authority over the proposed rulemaking, the matter would require action of the full Legislature in accordance with the constitutional process for enacting laws. This would effectively negate any legislative delegation of rulemaking authority to an agency that is the subject of this bill.

The EMNRD has the following comments:

As written, the bill does not give the LCS or interim committee any power over the rule-making; it just provides for a public hearing before one of those bodies. Therefore, the bill creates a time-consuming and unnecessary layer of review. The agency promulgating the rule must hold a public hearing. If the LCS or interim committee wishes to monitor rulemaking, it can do so under current procedures by attending and participating in the agency’s public hearing, or by reviewing the transcripts or minutes.

If HB 705 is interpreted to give the LCS or interim committee the power to reject or amend rules, that will violate the separation of powers doctrine by giving a legislative committee control over an executive agency. The affected agencies were created by the legislature and delegated the power to adopt and enforce rules. Although the legislature has the power to revoke or expand that authority (within constitutional limits), whether the agency is exercising that authority correctly in a particular proceeding is a matter for the judicial branch to decide.

The NMED has the following comments:

HB705 is inconsistent with the direction being taken in other legislation to reduce the cost and burden of administrative hearings for the agency, the regulated community, and the interested public. HB35 addresses duplicative hearings under the Water Quality Act. Mandatory hearings are required under the Solid Waste Act, although these are not addressed in HB35. The Governor’s Performance Review identified both, however, as unnecessary and costly wastes of taxpayer money. The trend in New Mexico is to stream-

line government, not add additional layers of bureaucracy that could impede economic development.

EPA requires that certain rules be promulgated by states in order to maintain primacy. HB 705 could jeopardize primacy in air, surface water permitting, underground storage tanks, hazardous waste, and drinking water if rulemaking is delayed or disapproved by the legislature for political reasons.

### **ALTERNATIVES**

The Supreme Court Law Library suggests the legislature could make the Administrative Procedures Act applicable to state agencies. This would make proposed rules accessible to all New Mexicans via the NM Register. Then without any further legislation, any interim committee could request “on their own” a public hearing on the topic, not on the rule, or individual members could attend the agency’s public hearing.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?**

The current rulemaking requirement with respect to notice and hearing will remain in effect.

AHO/yr