F I S C A L I M P A C T R E P O R T

SPONSOR Gentry **ORIGINAL DATE** 02/21/11 **LAST UPDATED** **HB** 396

SHORT TITLE Court Appeals of Agency Decisions **SB**

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	NFI	*	*	*	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

*****It is not possible to quantify the fiscal impact of this bill, so costs are indeterminate, but there will be additional cost and operating expenses. There may be some savings as well. See Fiscal Implications below.

SOURCES OF INFORMATION
LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Administrative Office of the District Attorney (AODA)
Attorney General's Office (AGO)
Energy, Minerals and Natural Resources Department (EMNRD)
New Mexico Environment Department (NMED)
New Mexico Corrections Department (NMCD)
Department of Transportation (DOT)

SUMMARY

Synopsis of Bill

House Bill 396 creates a comprehensive scheme for appealing decisions of administrative agencies to the district court. It expands the scope of judicial review of agency decisions, and removes the requirement that appeals by authorized by a separate, specific statute.

In particular, the bill:

- Allows appeals under this framework from agency rules and proposed rules;
- Expands standing to include individuals who are likely to be aggrieved if irreparable harm might result from a delayed appeal;

- Defines in greater detail the criteria the district court uses in determining whether to reverse, remand or set aside an agency decision, including whether the agency committed a procedural error or committed an abuse of discretion, or if the action is unwarranted under the facts;
- Allows a party to seek and the court to grant a stay of the agency action if there is a likelihood that the party will prevail, that the party will suffer irreparable harm unless the stay is granted, or there will be substantial harm to other interested parties or to the public interest as a whole;
- Removes the requirements that the action being appealed must be a ruling that as a practical matter resolves all issues arising from a dispute and that all administrative remedies have been exhausted;
- Increases the time for appeals to within one year for agency rules or within 30 days for other agency actions; and
- Restricts its application to state governmental entities.

FISCAL IMPLICATIONS

The AOC reports that HB 396 has the potential to significantly increase the administrative appeals filed with the district courts. Since appeals are taken in the county where the agency maintains its principal office, the AOC anticipates the first judicial district court is likely to receive a disproportionately high percentage of any increase in case filings. The NMED anticipates a need for additional legal staff resources to handle appeals in district courts around the state. The NMCD warns that granting the right to appeal employee and union grievance proceedings likely will result in compensation awards against the Department. On the other hand, DOT reports that in-house agency counsel would be able to take over representation of most agency final actions in district court from outside contract counsel, and no additional staffing would be required. Particularly as to procurement disputes, DOT predicts a savings of approximately $1 million per year by using in-house agency counsel for this type of district court appeals. Thus, it is difficult to predict with any accuracy the actual fiscal impact of this bill.

SIGNIFICANT ISSUES

Inclusion of Proposed Rules

The AOC first points out that expanding judicial review to a proposed rule may raise a constitutional issue if it in any way interferes with the executive rulemaking or public input process. Is also advises that such review may also result in a court's issuing an advisory opinion, which are generally prohibited. The EMNRD comments that if a proposed rule could be challenged in court prior to adoption of a final rule, rulemaking proceedings could be tied up in court actions for extended periods of time which would prevent the agency from implementing a law as directed by the Legislature.

No Exhaustion of Administrative Remedies

More broadly, the AGO advises that HB 396:

> eliminates the existing definition of "final decision" requiring exhaustion of administrative remedies, along with the existing requirement that the common law

> definition of "finality" apply to actions that may be reviewed under this statute. It adds a broad definition of "final agency action" as any act of an agency that "imposes an obligation, promulgates a rule, grants or denies a right, confers a benefit or issues a decision…" This significant change creates an ambiguity that may allow challenges to agency actions to be taken at any level of agency decision making. For example, an initial determination that a party does not qualify for a benefit could be appealed directly to district court because it "denies a right" despite the fact that there are avenues of appeal to higher levels of the agency or to a board or commission.

The AOC addresses this same concern in this manner:

> Courts have consistently ruled that plaintiffs must exhaust available administrative remedies before appealing to the courts. New Mexico courts have ruled that under the exhaustion of administrative remedies doctrine, when relief is available from an administrative agency the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts. Until administrative remedies are exhausted, a lawsuit is premature and must be dismissed. The exhaustion doctrine exists because the interests of justice are best served by permitting the agency to resolve factual issues within its particular expertise.

Expansion of Standing Requirement and Standard of Review

The AGO also suggests that the expansion of the traditional doctrine of standing to those that are likely to be aggrieved may invite litigation over projected or imagined possibilities of injuries that might never actually occur as opposed to the current standard which requires actual injury. Additionally, the AGO predicts increased litigation under HB 396's new, lower standard of review ("abuse of discretion" and unwarranted by the facts"), which allows less deference to the administrative agencies, board and commissions who have expertise in the particular subjects upon which they act. Further, the AGO argues that the addition of "error of procedure" as a specific grounds for reversal also lowers the standard of review because it may eliminate a court's discretion to weigh the harm caused by the error and determine it was harmless.

Removal of Review of Local Government Decisions

The EMNRD reports that, by restricting application to state entities and removing decisions or actions of local public bodies or officers from the appeal process set out here, the bill creates a conflict with, and thus creates a gap in coverage as to, other existing statutes that require appeals from local public bodies be brought under this law in its current form. The EMNRD cites as an example NMSA 1978, § 3-39-23, requiring all appeals from actions under the Municipal Airport law be brought pursuant to the section being amended here.

District Court Review of Environment-Related Agency Decisions

The NMED notes that by allowing appeals of state agency rulemakings and other decisions to the district court , HB 396 conflicts with other statutes that provide these appeals are to be heard by the Court of Appeals: final air quality compliance order actions from NMED, § 74-2-9; final solid waste permitting and compliance order actions from NMED, § 74-9-30; final hazardous waste permitting, compliance order and rulemaking actions from NMED, § 74-4-14; final permitting, compliance order and rulemaking actions from the Water Quality Control

Commission (WQCC), NMSA 1978, § 74-6-7; and final permitting and rulemaking actions from the Environmental Improvement Board (EIB), NMSA 1978, §§ 74-1-9, 74-2-9. The EMNRD adds to this list decisions of the Coal Surface Mining Commission, § 69-25A-30.

The NMED provides some background in arguing against transfer of these environmentally-related appeals to the district court:

> When Section 39-3-1.1 (the law being amended by HB 396) was enacted in the late 1990's and placed judicial review of many administrative agency actions in the district courts instead of in the Court of Appeals, NMED had discussions with the courts and stakeholders and a consensus developed that because appeals of environmental matters are legally complex, technically complicated, and can have statewide impact, such appeals are best left with the Court of Appeals. That appellate court is in a better position to consider and decide complex cases and to establish precedent for the state as a whole. Under this bill, appeals from any agency action including those concerning environmental matters would be filed in the district court for the county in which the agency maintains its principal office or any hearing was held. Therefore, district courts around the state could end up deciding environmental appeals. The district courts do not necessarily have the resources or expertise to address environmental appeals. The Court of Appeals remains the better judicial forum to address environmental appeals.

Expansion of Time to Appeal Rule-making

The NMED also expresses concern about expanding the time for appealing from an agency rule from 30 days to one year:

> Extending the time to appeal a rulemaking to this extent would create substantial problems in implementing any rule. Most rules are effective upon publication in the New Mexico Register or soon thereafter. Once a rule is effective, state agencies begin to implement rules. For NMED, this often means requiring regulated entities to establish new conditions or requirements of operation. While any appeal of a rulemaking creates uncertainty in the implementation of new rules, extending the period for appeal to one year substantially increases this time of uncertainty. This is particularly the case for rules that do not become effective, by their own terms, for some period after filing and promulgation.

Stays of Agency Decisions

Further, the NMED provides this comment on the standards under which a stay of a rule or other agency action may be granted:

> Generally, a party must make a strong showing in order to stay an agency action pending appeal because the agency action is presumed valid until overturned. The general standard to obtain a stay of any agency action pending appeal requires a showing that the moving party will prevail on the merits, that the party will suffer irreparable harm, and that the public interest will not be harmed.
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> HB 396 proposes to substantially weaken the standard for obtaining a stay by including additional less stringent standards -- a showing of substantial harm to interested persons

> or harm to the public interest – and by allowing the grant of a stay if only one of the standards is met. Most appeals of agency actions are unsuccessful. Therefore, staying agency action pending appeal should continue to require a strong showing on the merits and a strong showing of harm before a presumptively valid agency action is stayed pending the duration of appeal, which may take 6 to 18 months.

Expansion of Right to Appeal

Additional issues arise under the broad definition of "final agency action" contained in this bill. The NMCD expresses concern that:

> By expanding the scope of review and the decisions which can be appealed from, the bill is likely to force NMCD to compensate and reinstate terminated employees, compensate suspended employees, and compensate or otherwise provide relief to employees who have filed union or employee grievances. Although NMCD does not promulgate rules, this definition is so broad as to significantly impact NMCD. NMCD does discipline employees, who currently must appeal to the State Personnel Board or to an arbitrator in accordance with the applicable Collective Bargaining Agreement (CBA), and it does deny or grant employee and union grievances. Under current law, employee grievance denials cannot be appealed to any court or administrative agency and union grievance denials are subject to arbitration only under the rules or provisions contained in the CBA. If this bill passes, it would very broadly allow anyone aggrieved or likely to be aggrieved by an employee discipline or failure to discipline, union grievance denial or granting and employee grievance denial or granting to proceed immediately to district court on appeal. This will circumvent and conflict with the State Personnel Board rules, the CBA grievance procedure and remedies, and NMCD's employee grievance policy and procedure (which is an internal grievance procedure under which the granting or denial of the grievances does not authorize anyone to appeal to a court or anywhere else).

On the other hand, the DOT asserts this bill will be beneficial in the area of procurement decisions. It advises:

> HB 396 would provide for judicial review of final agency procurement decisions, which would save millions of taxpayer dollars by cutting back on the costs of contract counsel. Since 2005, DOT has averaged in excess of $1 million per fiscal year in legal fees and costs defending procurement actions. Currently, procurement related disputes are subject to resolution by government agencies which may be re-litigated *de novo* in state district court. The bill would subject such decisions to judicial review in the first instance. In such cases, a district court judge would ensure that the agency decision was supported by evidence and was neither arbitrary nor capricious. Passage of the bill would ensure expeditious and fair resolution of procurement disputes while eliminating protracted and expensive litigation.

PERFORMANCE IMPLICATIONS

The EMNRD points out that agencies will have to spend more staff time and resources litigating agency actions even when they have not yet reached a final decision because final agency action is defined to include any decision that is issued as a result of an administrative proceeding or imposes an obligation. If an agency issued a decision on a motion that did not decide the final

outcome of an adjudication or permit hearing, a party could appeal that decision to the district court. In addition, the Department notes that if agency staff must spend more time litigating an action, they will have less time to perform their other responsibilities, which may delay issuance of permits to other persons or entities, benefit determinations, and other duties and responsibilities assigned to each agency by the Legislature.

TECHNICAL ISSUES

1. The NMED calls attention to a conflict between different provisions of the bill which set forth inconsistent standards for issuance of a stay: Section 2(E) provides that a final agency action may be stayed under the same circumstances as those that allow for reversal (page 4, line 7), while Section 2(H) allows for a stay upon a showing that there is a likelihood of prevailing on the merits, irreparable harm to a party, substantial harm to other interested persons or harm to the public interest (page 5, lines 9-19).

2. The EMNRD points out another conflict: Section 1 amends the State Rules Act to allow appeal of a proposed rule pursuant to Section 39-3-1.1, but the new definition of "final agency action" being added to that Section only refers to promulgation of a rule, which generally may be understood to mean a rule as finally adopted.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The EMNRD states that the existing law (NMSA 1978, Section 39-3-1.1) will continue to apply to appeals of final agency decisions when placed under its scope by a specific statutory reference. Other final agency decisions may be appealed pursuant to a petition for writ of certiorari or other action authorized by the courts. Decisions of local public bodies and their officials will remain subject to this law when placed there by specific statutory reference.

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