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## FISCAL IMPACT REPORT

**SPONSOR** Keller and Taylor      **ORIGINAL DATE** 02/07/11  
**LAST UPDATED** 03/18/11      **HB** \_\_\_\_\_

**SHORT TITLE** Rulemaking Requirements      **SB** 30/aSRC/aSFL#1

**ANALYST** Daly

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>	NFI	*	*	*	Recurring	General Fund et al.

(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 costs and operating expenses. See Fiscal Implications below.

Conflicts with HB 22, HB 345, HB 360, HB 409, SB 67, SB 104 and SB 235  
 Relates to SB 67, SB 91, SB 104, SB 489, SJR 3, HB 579 and HJR 3

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- NM Department of Agriculture (NMDA)
- Administrative Office of the District Attorney (AODA)
- Attorney General's Office (AGO)
- Taxation & Revenue Department (TRD)
- Public Employees Retirement Association (PERA)
- Commission on Public Records (CPR)
- State Personnel Office (SPO)
- Regulation & Licensing Department (RLD)
- Public Regulation Commission (PRC)
- Medical Board (MB)
- Gaming Control Board (GCB)
- Department of Game & Fish (DGF)
- Energy, Minerals & Natural Resources (EMNRD)
- Aging & Long Services Department (ALTSO)
- Human Services Department (HSD)
- Department of Workforce Solutions (DWS)
- Department of Health (DOH)
- NM Environment Department (NMED)
- Children, Youth & Families Department (CYFD)
- Department of Public Safety (DPS)
- Public Education Department (PED)
- Higher Education Department (HED)

## SUMMARY

### Synopsis of SFL Amendment #1

The Senate Floor amendment #1 to Senate Bill 30 adds an additional section to the State Rules Act. The new section bars any agency from promulgating rules relating to 1) a cap on emissions of greenhouse gases; 2) requirements for reporting greenhouse gas emissions for a cap and trade program dealing with greenhouse gases; 3) requirements for verification of reports of greenhouse gas emissions for a cap and trade program dealing with greenhouse gases; and 4) the adoption or creation of a cap and trade program.

### Synopsis of SRC Amendment

The Senate Rules Committee amendment to Senate Bill 30 adds an emergency clause.

### Synopsis of Original Bill

Senate Bill 30 is the product of a task force formed in 2010 and is endorsed by the Economic and Rural Development Committee. It provides a detailed, uniform process for the state agency rulemaking process. SB 30 amends the State Rules Act to include a requirement for agencies to provide:

- an annual regulatory agenda of the rules it expects to promulgate in a fiscal year;
- a preliminary outline of a proposed rule prior to public notice;
- a rule drafting committee, if appropriate, to draft the rule;
- more comprehensive public notice;
- the minimum requirements for public participation and comments during the rulemaking;
- a rulemaking record available through the sunshine portal; and
- a concise explanatory statement for the agency's reasons for adopting the proposed rule; including the agency's reasons for not accepting substantial arguments made in testimony and comments.

SB 30 also allows a limited option for emergency rules, limits the ability of an agency to change a proposed rule before filing and establishes time limits for the adoption of a rule change. SB 30 also amends existing sections of the State Rules Act to add definitions necessary for the rulemaking process and to coordinate the new process with existing rule filing requirements.

A detailed description of the provisions of SB 30 is set forth in the report of the task force which is an attachment to this FIR.

## FISCAL IMPLICATIONS

The additional procedures required for an agency to adopt new rules and rule changes may increase its costs. For example, MB estimates that since additional text would need to be posted or published, its costs for just this activity could double (FY 10 costs were approximately \$1250). Many other agencies anticipate a need for additional staff, but are unable to quantify the costs of the additional workload because they have had no experience complying with the additional procedural requirements.

The CPR is directly impacted by SB 30's requirement that an agency file a concise explanatory statement with each new rule, amendment or repeal. The agency would have to develop both the process and means of filing and retaining the documents. This function would be new for the agency and is not without continuing costs, although the exact fiscal impact is difficult to determine. Clearly, it will increase workload and require some continuing operational costs such as supplies and printing.

### **SIGNIFICANT ISSUES**

SB 30 is intended to provide a uniform process for the consideration of new rules, changes to or repeal of existing rules, while increasing the opportunities for the public to learn about and participate in the rulemaking process including notice that occurs prior to any formal rule proposal. Currently, each agency has its own process for adopting rules, which may be outlined in a statute or by agency rule or policy. The Administrative Procedures Act, NMSA 1978, Sections 12-8-3 to -7, provides a basic process for adopting rule changes but these procedures apply to hardly any agencies. SB 30 will establish a process that applies to all state agencies, including state boards, commissions, departments, institutions and officers, except the judicial and legislative branches.

SB 30 is the product of a Task Force that was formed in 2010 to investigate the feasibility of adopting uniform administrative laws, including those within the revised Model State Administrative Procedures Act. The Task Force started with rulemaking procedures and SB 30 is a result of the Task Force efforts. The Task Force, which was comprised of legislators, industry representatives, community group representatives and state agencies, presented its results to the Legislative Regulatory Process interim subcommittee.

Many of the rulemaking requirements in SB 30 are currently followed by most state agencies, but SB 30 also adds many more requirements to the State Rules Act for state agencies to follow. These include developing an annual regulatory agenda which must be updated regularly, providing a preliminary outline for a possible rulemaking before the formal rulemaking process begins, using the state's sunshine portal and a variety of other means to provide information to the public (including relevant legislative committees), allowing the agency to use a rule drafting committee to develop consensus on rule changes and providing a written statement that explains the agency's action in adopting any rule changes. These changes increase the opportunities for the public to become aware that an agency is considering a rule change and to become involved in the process.

### **PERFORMANCE IMPLICATIONS**

Several agencies express concern that the additional time necessary to complete a rule-making may impact compliance with federally funded programs that require state rule updates to conform with federal statutory or rule changes. Additionally, agencies anticipate increased staff time devoted to rulemaking, which at the very least would result in decreased resources available for other agency work.

### **ADMINISTRATIVE IMPLICATIONS**

Most of the agencies commenting on SB 30 believe this bill will generally make rulemaking more complicated for agencies due to the number of new procedural requirements for agencies.

These requirements will likely 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. Agencies will likely continue to propose rule changes when needed to comply with changes in federal or state laws. Rulemakings designed to clarify existing rules may become less numerous.

Having additional steps for agencies to follow may also provide additional causes to challenge agency actions in court for failing to follow all the required steps in the process.

HSD cautions that the requirement to distribute rulemaking information to district and field offices would require it to distribute to approximately 50 field offices throughout the state. That distribution would require staff time and resources and may further increase and complicate already long wait times for persons seeking public assistance such as SNAP (food stamps), Medicaid or child support services in HSD field offices.

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

SB 30 conflicts with House Bill 22 in these ways:

- Both bills define “rule” and “rulemaking” but define the terms differently.
- Both bills amend the format, filing and distribution section with different wording.
- Section 14 of SB 30 conflicts with Section 3 of HB 22. Each bill amends NMSA 1978 Section 14-4-5 in a different manner. HB 22 amends and augments that section, while SB 30 deletes the language concerning emergency rules in light of its creation (in Section 9) of a new section which addresses emergency rules specifically.

SB 30 conflicts with SB 67 and SB 104 to the extent that SB 67 and SB 104 allow an agency head to direct that a rulemaking be conducted under the Administrative Procedures Act.

SB 30 conflicts with HB 360 in two ways: first, HB 360 does not contain an emergency clause; second, HB 360 has been amended by the House Business and Industry Committee to expand the distribution of rulemaking information to the public by adding a provision requiring that information be provided to all libraries that are part of the state library system.

SB 30 also conflicts with HB 345, State Agency Proposed Rule Statutory Citation, HB 409, State Agency Rule Economic Impact Statements, and SB 325, Agency Citation of Rulemaking Authority.

SB 30 relates to SB 67 and 104 to the extent that an agency rulemaking in which a hearing officer is to be used would be conducted by a hearing officer from the administrative hearing office created in those bills.

### **TECHNICAL ISSUES**

AODA notes that while Section 5(D) allows an agency to change the deadline for submitting comments or the date of a rule hearing, it does not specify how many days notice must be given to the public. Additionally that subsection does not specify whether that notice must meet the requirements of the defined phrase “provide to the public”.

CPR expresses concern that deletion of “policy” from the definition of “rule” in Section 1 could lead to agencies circumventing the required rule-making process by use of that deleted term, as it has in the past. Adding an exclusion for internal policies may help clarify the term.

### **OTHER SUBSTANTIVE ISSUES**

CPR supports the provisions in Section 9 regarding emergency rules. It advises that the absence in current law of a universally applicable limitation on the use of emergency rules, or a requirement that a full rulemaking process occur after the initial adoption, has led to improper use of “emergency” rules that become permanent upon filing without any public notice, input or hearing.

A number of agencies have noted conflicts between SB 30 and their governing statutes (e.g. NMSA 1978, Section 8-8-15(D) requires PRC to take final action on a proposed rule within 18 months of notice of proposed rulemaking, as opposed to the two year period provided in Section 11(B) of SB 30). Under NMSA 1978, Section 12-2A-10(C), SB 30 appears to be a comprehensive revision of law on the subject of rule-making and so SB 30 would govern, but adding language clarifying the controlling nature of SB 30 might be helpful in avoiding future confusion.

DGF urges expansion of the criteria for emergency rules to include environmental emergencies and imminent threats to environmental health, safety or welfare. Due to increased threats to native wildlife resources due to human movement of diseases and pathogens across biogeographic regions. Additionally, DGF advises that the 180 day limit on emergency rules could potentially conflict with future migratory bird rules which must be put in place following after the federal fish and wildlife agency approval of each annual season, which because that approval typically occurs just prior to the start of each season, DGF must adopt its rules under emergency rule procedures. The 180 day life of an emergency rule under SB 30 could cut short migratory bird seasons, resulting in the loss of license-holders’ hunting opportunities and the related license revenue to the state.

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

Agencies will continue to follow existing procedures for the promulgation of rules as provided by statutes, rules or agency policy.

### **POSSIBLE QUESTIONS**

Under Section 13, will the concise explanatory statement need to be maintained by CPR as part of the rule?

MD/bym:svb

# **ADMINISTRATIVE PROCEDURES ACT TASK FORCE REPORT TO THE INTERIM REGULATORY PROCESS SUBCOMMITTEE**

## **Task force**

- SJM 7 Senator Keller and Representative Martinez
- Lt Governor Denish
- Review model Administrative Procedures Act and make recommendations

## **Model Administrative Procedures Act**

- Final version now available
- Major Components
  - Public Access to Agency Law and Policy
  - Rulemaking
  - Adjudication
  - Judicial Review
  - Rules Review
  - Office of Administrative Hearings

Task Force Focus on rulemaking and office of administrative hearings

Draft bill: Model APA is used as basis for proposed amendments to the New Mexico State Rules Act **Unanimously Approved by all Task Force Members**

Objectives: Enhance uniformity of agency rule adoption processes and increase public participation earlier in the rulemaking process to increase transparency and responsiveness without slowing or further complicating an already cumbersome process.

## **Members**

- Eric Vasquez - Office of the Lieutenant Governor, Senior Policy Analyst
- Kelly O'Donnell, Ph.D. – Regulation and Licensing Department, Superintendent
- Senator Tim Keller
- Ben Lujan – House Speaker
- Representative Rick Miera – Speaker Lujan's designee
- Senator John Ryan
- Patricia Herrera – Taxation and Revenue Department
- John Martinez – State Records Center and Archives, Director Administrative Law Division
- Tracy Hughes – New Mexico Environment Department, General Counsel
- Jim Noel – Energy, Minerals and Natural Resources, Cabinet Secretary
- Bill Brancard – Energy, Minerals and Natural Resources, General Counsel
- Felicia Orth – Environmental Improvement Board and Water Quality Control Commission, Hearing Officer
- Norm Becker - Vice Chair of the Chamber's Small Business/Entrepreneurial Planning Council & President and CEO of New Mexico Mutual Group
- Celina Jones - Administrative Office of the Courts
- Allison Smith – Association of Commerce and Industry

- Anthony (“TJ”) Trujillo – Small business representative
- Doug Meiklejohn – New Mexico Environmental Law Center
- Dorene Kuffer – New Mexico Legal Aid
- Stuart Bluestone – Office of the New Mexico Attorney General
- Phil Baca -- Office of the New Mexico Attorney General
- Dean Kevin Washburn and Eileen Gauna – UNM Law School

## **PROPOSED AMENDMENTS TO THE STATE RULES ACT**

### **Broaden and clarify public notice requirements**

Defines the term “provide to the public” to include

- (a) posting on the agency website
- (b) posting on the New Mexico sunshine portal;
- (c) Making available in the agency’s district, field and regional offices
- (d) Distribution by mail or electronic mail
- (e) Distribution to the Legislative Council for distribution to appropriate interim and standing legislative committees.

And may also include as necessary and appropriate:

- (a) distribution in languages other than English;
- (b) distribution to agencies of local and Tribal governments;
- (c) distribution to community, interest group, and trade publications;
- (d) distribution to public facilities (such as community centers and libraries)
- (e) distribution to radio and television outlets for use in PSA’s
- (f) publication in a newspaper of general circulation,

### **Clarify Intent of Rules and Modernize Filing Process**

#### 14-4-3 Filing Rules

- Filings must include a “concise explanatory statement”
- Electronic copy of rules mandatory, paper copy optional
- State records administrator can make non-substantive corrections for spelling, grammar and formatting.

### **Notify Public of Agency Intentions**

#### 14-4-3.1 Annual Regulatory Agenda

- Published annual on or before 6/30 by any agency currently undertaking or planning to undertake the rulemaking process.
- Must include:
  - List of pending rulemakings
  - Current status of all ongoing rulemakings
  - Any rulemakings expected for the upcoming fiscal year
  - Agencies are not required to adhere to agenda.

### **Provide Detailed Outline of Proposed Rulemaking to Public in Advance**

#### 14-4-3.2 Preliminary Outline

- Outline of specific rulemaking that includes:
  - Subject matter of proposed rule
  - Statutory authority for rulemaking
  - Purpose of the rulemaking
  - Agency adopting the rule
  - Procedure and deadlines for providing public input on the *drafting* of the proposed rule.
  - Expected timeline for adoption
  - Agency contact information

### **Solicit Stakeholder Assistance with Rule Drafting**

#### 14-4-3.3 Rule Drafting Committee

- Semi-formalizes the informal “negotiated rulemaking” process that many agencies already undertake for their more complicated and/or potentially contentious rules
- Agency may appoint a committee of outside stakeholders that consults with the agency on the substance of the proposed rule
- Agency shall reach out to inform the public of the formation of the committee
- Agency shall seek balance in representation on the committee
- Process for becoming involved with the committee shall be included in the annual regulatory agenda.
- Committee shall hold public meetings.

### **Maintain Record of Rulemaking Process**

#### 14-4-3.4 Agency Record

- Agencies must maintain a rulemaking record for each proposed rule it proposes to adopt.
  - Available for public inspection at agency central office
  - Available for public display on the sunshine portal.
  - Must contain:
    - Copy of all publications in the New Mexico register.
    - Copy of any technical information that was relied upon in formulating the rule
    - Official transcript or recording of public hearings.
    - Summary of proceedings prepared by hearing officer.
    - Copies of all comments and other material received by the agency during the public comment period and at the public hearing;
    - Copies of the rule and concise explanatory statement.
    - Corrections made by the state records administrator.

### **Record of Agency Intent**

#### 14-4-3.5 Concise Explanatory Statement.

Provided by the agency to the public at the time an agency adopts a rule:

- Date of adoption



- Statutory authority authorizing the rule;
- Findings required by a provision of law
- Agency reasons for adopting the proposed rules as well as *reasons for not accepting substantive arguments made in opposition to the rule.*
- Reasons for any substantive changes between the text of the proposed rule at the time of the notice and the text of the rule as adopted.

## **Clarify Emergency Rulemaking**

### **14-4-3.6 Emergency Rule**

- Only in cases of:
  - (1) Imminent peril to the public health, safety or welfare;
  - (2) Loss of funding for an agency program, or
  - (3) Violation of federal or state law.
- Criteria must be made available to the public before the rule is adopted
- Take effect immediately upon filing with the state records center and archives.
- Cannot permanently amend or repeal an existing rule.
- Remains in effect until a permanent rule takes effect under the normal rulemaking process.
- Expires if no permanent rule is adopted within 180 days from the effective date of the emergency rule,
- If an expired emergency rule temporarily amended or repealed an existing rule, the rule shall revert to what it was immediately before the emergency rule took effect.

### **14-4-3.7 Variance Between Proposed And Final Action.**

Must be a “logical outgrowth” of the action proposed in the notice.

### **14-4-3.8 Time Limit on the Adoption of a Proposed Rule.**

- Agency must take action on a proposed rule within two years of publication of notice of proposed rulemaking in the New Mexico Register

## **Increase Uniformity of Hearing Procedures Across Agencies**

### **14-4-4.1. Default procedural rules for hearings**

- Makes the hearing process more uniform and predictable across agencies while maintaining agency flexibility:
  - AG shall adopt default procedural rules for agency rulemaking hearings.
  - Agency may follow different procedures but these must be adopted by rule.

## **Office of Administrative Hearings**