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

SPONSOR Leavell **ORIGINAL DATE** 02/04/11 **LAST UPDATED** 02/04/11 **HB**

SHORT TITLE Repeal Effectiveness of Some Rules **SB** 190

ANALYST Daly

Relates to HB 22, HB 69, SB 30, SB 91, HJ 3 and SJR 3.

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

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

(Parenthesis ( ) Indicate Expenditure Decreases)

SOURCES OF INFORMATION
LFC Files

Responses Received From
Attorney General's Office (AGO)

No Response
New Mexico Environment Department (NMED)

SUMMARY

Synopsis of Bill

Senate Bill 190, if enacted, would repeal four regulations adopted by the Environmental Improvement Board in 2010 concerning greenhouse gas emissions.

This bill contains an emergency clause.

FISCAL IMPLICATIONS

The costs of any revisions to the Administrative Code, and additional rule-making, if any, which the agency may choose to undertake should this bill become law, would be within the normal duties and responsibilities of the agencies involved, and thus should be covered by the agencies' existing budget.

SIGNIFICANT ISSUES

There have been differing legal analyses submitted on this and related proposed legislation concerning the separation of powers issue presented when the legislative branch seeks to render ineffective or repeal rules promulgated by executive branch agencies under the statutory authority it originally conferred on the agency. Set forth below are those analyses.

As to this bill (SB 190), the AGO advises:

> There is some question about whether the legislature has authority to repeal regulations enacted by an administrative agency in the executive branch, but it appears that the answer to that question is "yes." While administrative agencies reside in the executive branch, their rule-making authority is granted by the Legislature. Additionally, the Legislature has authority to regulate the emission of greenhouse gases on its own initiative.

In addition, the AGO has now advised as to SB 91. SB 91 proposes legislation to render ineffective, subject to agency reconsideration, a number of promulgated rules including one concerning greenhouse gas emissions that would be repealed under this bill:

> There are no significant legal issues. The New Mexico legislature always has the power to "veto" a rule by passing a bill that is approved by a majority vote in both houses of the legislature and signed by the Governor.

However, in analyzing a related bill, HJR 3, which proposes an amendment to the New Mexico constitution (which would require approval of the voters) allowing the legislature to nullify an administrative regulation or rule adopted by an executive agency by resolution passed by the majority of both houses, the AGO reported:

> Attempts in other states to enact statutes providing for a "legislative veto" of rules and regulations adopted by administrative agencies have been subject to challenge under those states' constitutions. A challenge usually alleges that a statute authorizing the state's legislature to repeal or nullify an administrative rule amounts to a legislative intrusion into the executive rulemaking function in violation of separation of powers principles or to an impermissible attempt by the legislature to make laws contrary to the procedures governing the enactment of statutes in the state's constitution.
>
> By authorizing the legislature to nullify agency rules and regulations in the New Mexico constitution rather than in a law, HJR 3 undercuts the potential for a successful challenge on state constitutional grounds.

The AGO analysis on HJR 3 goes on to comment:

> Although HJR 3 avoids the common state constitutional issues raised by legislative veto statutes, its practical effect on agencies may lead to other legal challenges. By overturning a rule, the legislature, in effect, will be

> overriding the statutory authority it originally conferred on the agency. This potential for a legislative veto may create uncertainty within the agency and among members of the public about an agency's authority and limit the agency's effectiveness. HJR 3 also may make the rulemaking process more cumbersome and inhibit agencies from promulgating rules even when they are consistent with the agency's statutory authority.

Additionally, the Office of General Counsel at the Department of Transportation (DOT) provided a legal analysis of the same separation of powers issue in the DOT analysis of SB 91. The analysis set out here is directed at a different rule which would also be rendered ineffective under SB 91, but appears to apply to the repeal proposed in this bill (SB 190) as well:

> SB 91 does not seek to repeal NMSA 1978, § 13-4-11 of the Public Works Minimum Wage Act, which is clearly a permissive legislative act. Instead, it seeks to repeal the regulations that were authorized by, and implemented as a result of, the Act. This aspect of SB 91 may not be constitutional.
>
> The Department of Workforce Solutions is a department within the executive branch. NMSA 1978, § 926-4. While the legislature may repeal the Public Works Minimum Wage Act, it cannot repeal regulations promulgated by the executive branch. The separation of powers doctrine, as embodied in the New Mexico Constitution, prohibits one government branch from exercising powers "properly belonging" to another. *N.M. Const. art. III, § 1*. Repealing regulations issued by the executive branch would represent an unconstitutional encroachment of the legislative branch into the executive branch. See *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 23, 125 N.M. 343, 961 P.2d 768. While no New Mexico case law specifically addresses the issue presented by SB 91, it is well settled in New Mexico that the separation of powers doctrine originates on the Federal level and New Mexico's constitution provides for a similar separation of powers clause mirroring the Federal constitution. *Bd. of Educ. v. Harrell*, 118 N.M. 470, 483, 882 P.2d 511, 524 (1994). Therefore, Federal case law on the issue has precedential value.
>
> In an analogous case, *Immigration and Naturalization Serv. v Chadha*, 462 U.S. 919 (1983), the United States Supreme Court considered the constitutionality of "the legislative veto," a then commonly-used practice authorized in 196 different Federal statutes at the time. Legislative veto provisions authorized Congress to nullify by resolution a disapproved-of action by an agency of the executive branch. The Court found that congressional action overturning an INS decision constituted an unconstitutional legislative encroachment into the executive branch. See also *Bowsher v. Synar*, 478 U.S. 714 (1986) ("congressional control over the execution of the laws . . . is constitutionally impermissible"); *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. __, 130 S. Ct. 3138 (2010) (Act invalidated because it would, in effect, vest legislative power over executive officers and in doing so would infringe on the executive power vested in the President).

RELATIONSHIP

This bill relates to HB 22, HB 69, and SB 30, relating to rules and rulemaking. It also relates to HJR 3 and SJR 3, which propose constitutional amendments allowing legislative repeal of executive agency rules. This bill also is related to SB 91, to the extent that SB 91 would render ineffective, subject to agency reconsideration, Rules 20.2.350.1 through 20.2.350.400, while this bill (SB 190) would repeal Rule 20.2.350.

MD/bym:svb