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

SPONSOR Ulibarri **ORIGINAL DATE** 02/24/11 **LAST UPDATED** **HB**

SHORT TITLE Repeal Effectiveness of Certain Rules **SB** 459

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	NFI			

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates SB 190
Relates to HB 22, HB 69, SB 30, SB 91, HJR 3 and SJR 3

SOURCES OF INFORMATION
LFC Files

Responses Received From
Attorney General's Office (AGO)
Commission of Public Records (CPR)

No Response
New Mexico Environment Department (NMED)

SUMMARY

Synopsis of Bill

Senate Bill 459 repeals 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 budgets.

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 459), the AGO advises:

> SB 459 basically amounts to a legislative overrule of four rules adopted by the Environmental Improvement Board ("EIB"): (1) statewide cap on greenhouse gas emissions; (2) greenhouse gas reporting; (3) verification of reports; and (4) regional cap and trade program. The U.S. Supreme Court in *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983) held that every exercise of a legislative veto over agency action violates procedural requirements for lawmaking prescribed by Article I of the U.S. Constitution. A legislative veto occurs when Congress tries to invalidate agency action on its own (without the consent of the executive branch). On the federal level, the only way for Congress to invalidate an agency action is to enact a statute. *See id.* at 954-55. Nevertheless, SB 459 may invite legal challenge as an infringement upon the separation of powers as the power to implement statutes is an executive power. In the case of a legislative overrule, a party may argue that legislature has empowered the executive (the EIB) with the task of promulgating air pollution regulations. Invalidating rules passed pursuant to that authority may be challenged as an infringement on such authority.

The Office of General Counsel at the Department of Transportation (DOT) provided a similar legal analysis of the same separation of powers issue as to SB 91. That analysis is directed at a different rule which would be rendered ineffective under SB 91, but appears to apply to the repeals proposed in this bill (SB 459) 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 Department of Workforce Solutions (DWS) 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. 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.
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> 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).

And in analyzing a related bill, HJR 3, which amends 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 a 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.

The AGO, however, presented a different analysis of SB 190, which duplicates this bill:

> 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.

Similarly, in analyzing SB 91, which renders ineffective, subject to agency reconsideration, a number of promulgated rules including one concerning greenhouse gas emissions that would be repealed under this bill, the AGO advised:

> 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.

PERFORMANCE IMPLICATIONS

The CPR reports that SB 459 will have an impact on the compilation of the New Mexico Administrative Code (NMAC). Because of the emergency clause, the bill would take effect upon being signed by the Governor and, therefore, the rules would be repealed on the same date. One of the agency's key performance measures under the Accountability in Government Act states that the lag time between the effective date of a rule and its online availability in the NMAC should not be greater than 30 days. The NMAC website is updated once a month early each month, at which time all new rules, repeals, and amendments that took effect the previous month are loaded. For example: rules that go into effect in January are loaded onto the website early in February and those that go into effect in February are loaded early in March. Following the current practice of updating the NMAC, the rules that would be made ineffective by this bill would be removed from the NMAC the month following the effective date of the bill.

ADMINISTRATIVE IMPLICATIONS

Senate Bill 459 will have an impact on the compilation of the NMAC. The rules listed in the bill will need to be removed from the NMAC and that will require additional staff time.

DUPLICATION, RELATIONSHIP

This bill duplicates SB 190.

This bill also relates to HB 22, HB 69, and SB 30, relating to rules and rulemaking. 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 459 would repeal Rule 20.2.350. This bill (SB 459) also relates more generally, to HJR 3 and SJR 3, which propose constitutional amendments allowing legislative repeal of executive agency rules.

TECHNICAL ISSUES

The CPR notes that the bill adds a new section to the State Rules Act; however, it appears to be a temporary provision, which would normally either not be compiled or would be published as a note in the compilation.

AMENDMENTS

The CPR requests the bill give direction on how the rules being repealed are to be removed from the NMAC. Specifically, CPR suggests notices regarding the removed rules be published (in the interest of openness and transparency) in the New Mexico Register so the public would be aware of the action, since public notice of rule-making actions is an integral part of the regular rule-making process.

MD/bym