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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 2/28/19

**SPONSOR** Ivey-Soto **LAST UPDATED** \_\_\_\_\_ **HB** \_\_\_\_\_

**SHORT TITLE** Rule Promulgation & Expiration **SB** 621

**ANALYST** Daly

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

|              | FY19 | FY20    | FY21    | 3 Year<br>Total Cost | Recurring or<br>Nonrecurring | Fund<br>Affected       |
|--------------|------|---------|---------|----------------------|------------------------------|------------------------|
| <b>Total</b> |      | >\$58.0 | >\$58.0 | >\$116.0             | Recurring                    | General/Other<br>Funds |

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Commission of Public Records (CPR)  
 Department of Health (DOH)  
 New Mexico Attorney General (NMAG)  
 New Mexico Environment Department (NMED)

### SUMMARY

#### Synopsis of Bill

Senate Bill 621 rewrites the definition of what is or is not a rule. It also sets out an automatic rule expiration process and schedule for all agencies. Lastly, the bill codifies the right to petition for rulemaking by the public.

1. Rules Definition Change: The definition of rule in SB621 replaces, in pertinent part, “any rule, regulation, or standard” with an “administrative interpretation or application” of federal or state law. The bill also inserts the terms “judicial or quasi-judicial” disposition in describing what is not considered a rule.
  
2. Automatic Rules Expiration: All rules automatically expire 12 years after adoption. Agencies are allowed to readopt rules at any time. For all rules adopted prior to July 1, 2018, the state records administrator (SRA) must establish a schedule for agencies under which rules will expire within 12 year period, provided that: no more than 20 percent of agency rules expire in same fiscal year; no rule expires any earlier than 12 years, unless requested; no rule adopted prior to July 1, 2017 expires prior to July 1, 2022, unless

requested; and all rules adopted prior to July 1, 2018 shall expire no later than June 20, 2032. Based on that schedule, the SRA must note in each rule its expiration date.

3. Public Petition for Rulemaking: The process by which the public is allowed to petition an agency or public body for rulemaking is codified. The bill takes the process set out in NMAG's default rule, see 1.24.25.10 NMAC, and places it in statute, and also establishes an affirmative duty on agencies to either grant a petition or issue a written statement explaining its reason for denial.

The effective date of this bill is July 1, 2019.

## FISCAL IMPLICATIONS

CPR reports the operating budget impact is unknown at this time; depending on the number of rules that expire and are re-adopted by any number of agencies, it may need additional staff. No estimates are provided. NMED notes that repromulgating existing rules will result in costs, including publication charges and fees for any nonstate technical experts who may need to testify at rule-making hearings. DOH provides one example of costs incurred in agency rulemaking: the hearing officer fees for an average DOH rule hearing can cost the agency anywhere from \$4,000 to upwards of \$12,000, depending on the complexity of the rule and the number and length of the hearings. DOH has more than 100 administrative rules. Assuming 100 rules would have to be replaced in a 12-year renewal cycle, and assuming a \$7 thousand cost to each promulgation, the cost to NMDOH would be approximately \$58 thousand per year for hearing officer fees (8.333 rules/year at \$7 thousand), and additional costs each year for publication and notice fees. That figure is reflected in the budget impact table, along with the ">" sign, representing unknown increased costs to other rulemaking agencies.

## SIGNIFICANT ISSUES

Change in Definition. Responding agencies express confusion over the new definition provided for "rule". Both NMAG and CPR comment that it is unclear if that definition expands or limits what agency action constitutes a rule. As NMAG explains:

By effectively removing the phrase "any rule, regulation or standard" and replacing it with "an administrative interpretation or application of federal or state law," the bill adds ambiguity where the law previously was clear. If the intent was to provide that rules must be specifically authorized by a statute or federal law, this is already established law. See *City of Las Cruces v. Pub. Employee Labor Relations Bd.*, 1996-NMSC-024, ¶ 5, 121 N.M. 688, 690, 917 P.2d 451, 453 (holding that, "Whether a rule has the force of law depends on whether the rule was promulgated in accordance with the statutory mandate to carry out and effectuate the purpose of the applicable statute.").

According to CPR:

On its face, using the term "...administrative interpretation or application of..." would seem to expand agency actions that would fall under this definition. However, keeping the existing rulemaking terms (... "issued, promulgated, amended, renewed or repealed by"... ) cut against an expansive interpretation. This confusion in drafting may lead to agency uncertainty as to what actions need to go through rulemaking process. This

confusion will adversely affect public understanding of what needs to be formal rule, as opposed to other informal actions being taken by agencies.

NMED warns that SB621's extremely broad definition of a rule could be construed to require an agency conduct a rulemaking every time its counsel advises staff regarding the meaning of a federal or state statute, or construed as meaning an agency is conducting a rulemaking every time it implements a state law by approving a permit.

Automatic Expiration after 12 Years. CPR first asks whether an amendment of a rule would reset the 12 year clock. Similarly, NMAG notes that NMAC is divided into Title, Chapter, Part, and then even further sub-units, which could lead to difficulties insofar as determining *which* rules expire twelve years later. Even a small change to a particular Part could be a new "rule," meaning that determining which rule expires on which date could be difficult and lead to confusion.

DOH provides this comment concerning the impact of automatic expiration, which:

raises the potential that, if an agency did not complete the proposed new rulemaking process to readopt an existing rule prior to expiration, the agency's rules would effectively be repealed without a replacement. Particularly for those agencies such as DOH that work in areas of public health and safety, the potential for rules to be abolished without a replacement could pose serious health and safety risks. Additionally, the automatic expiration of agency rules could cause an agency to lose federal funds when rules required to be adopted by federal law become invalidated.

NMED suggests an alternative approach by calling attention to the provision in the Small Business Regulatory Relief Act that requires rules promulgated after 2005 be reviewed every five years to ensure that they continue to minimize economic impacts on small businesses while implementing the state objectives of the laws pursuant to which the rules were adopted. See Section 14-4A-6, NMSA 1978. Rather than rules expiring every 12 years and having to be re-promulgated, NMED believes it would be less burdensome and more efficient to expand the five-year review to consider factors such as whether the rule still accomplishes the purpose for which it was adopted, or needs to be amended to address new technological developments.

Public Petitions for Rulemaking and Expiration Schedule. DOH asserts that the process for reviewing and acting on public petitions for rulemaking could become a significant burden for an agency since petitions could propose changes to or repeals of existing rules that have already had public hearings, as well as suggest new rules, regardless of the reasonableness of the proposal. The agency will be required to evaluate each request, decide to grant or deny the petition, and issue a concise written statement explaining its reason for denial. Further, to the extent the rulemaker is a commission or other public body with more than one member, all such action would have to be conducted in a properly noticed public meeting.

NMAG points out that a gap exists in Section 3 regarding the expiration dates of rules for rules adopted between July 2, 2018, and June 30, 2019. SRA's expiration schedule only covers rules adopted prior to July 1, 2018, while the effective date of the bill (which imposes the 12 year expiration) is July 1, 2019. It suggests that the resulting ambiguity for rules adopted between July 2, 2018, and June 30, 2019 could be resolved by changing all "July 1, 2018" dates to "July 1, 2019."

## PERFORMANCE IMPLICATIONS

As reported by NMED, agencies will be required to re-promulgate rules at least every 12 years. Rulemaking requires substantial time and resources, and will divert agency staff and resources from their responsibilities in implementing their enabling statutes. NMED asserts that, rather than focusing resources on operating state parks; permitting oil and gas wells and facilities, mines, geothermal wells, and timber harvests and ensuring compliance with those permits; developing and overseeing abandoned mine reclamation; and conducting or administering forest health projects and renewable energy projects, it will have to divert resources to re-promulgate rules that are needed to implement its enabling legislation whether or not new technology or changes in natural resource extraction or management necessitate a rule change.

MD/gb