

New Mexico’s system for allocating emergency funding has not been updated in decades and has shown itself to be insufficient to handle the unprecedented emergency situations the state has faced in the past several years. In 2020, the Covid-19 pandemic exposed a system with unclear language open to different interpretations and lacking sufficient accountability and transparency.

During the 2020 interim and 2021 legislative session, the Legislature sought to resolve these issues through legislation, appropriations, and cooperation with the executive. Unfortunately, these efforts were largely unsuccessful: no proposed legislation amending the system passed in the 2021 session, disaster appropriations have been exhausted, and while the executive has halted some of the practices the Legislature objected to, it has continued or resumed others.

In 2022, as in 2020, New Mexico faces a level of disaster unanticipated by the existing law, this time in the form of a particularly destructive fire season that already includes the two largest fires in the state’s history.

Statutory Framework and Implementation of Existing Emergency Funding System

General Emergency Funding System. Sections 12-11-23 through 25 NMSA 1978 provide a mechanism for the governor to allocate emergency funding in increments of up to \$750 thousand for each “eligible and qualified applicant” impacted by a declared emergency the governor has deemed “beyond local control and requiring the resources of the state.” This funding is to be drawn from “surplus unappropriated money in the general fund,” although such money generally does not exist. Section 6-4-2.3 NMSA 1978 allows for the use of the appropriation contingency fund (ACF) “in the event there is no surplus of unappropriated money in the general fund and in the amount authorized by the legislature.”

In FY19, FY20, FY21, and FY22, executive order allotments exceeded the funds available in the ACF, and the Department of Finance and Administration (DFA) allotted funding to agencies from the general fund operating reserve. Concerns regarding this practice are outlined in further detail later in this document.

Emergency Funding for the National Guard. Section 20-1-6 NMSA 1978 requires the state to pay for all expenditures necessary for the governor to call the New Mexico National Guard into service (often referred to as “state active duty”). These expenses will be paid by the state treasurer using “any money available in the state treasury not otherwise appropriated.” If the expenditures approach \$1 million, the governor must review anticipated expenses and, if it is “necessary and prudent in order to provide for the public defense,” may approve additional expenditures from the general fund. If sufficient funds are not available and it is necessary to suppress insurrection or to provide for the public defense, the governor may create an indebtedness under Article 9, Section 7, of the New Mexico Constitution.

AGENCY: Department of Homeland Security and Emergency Management

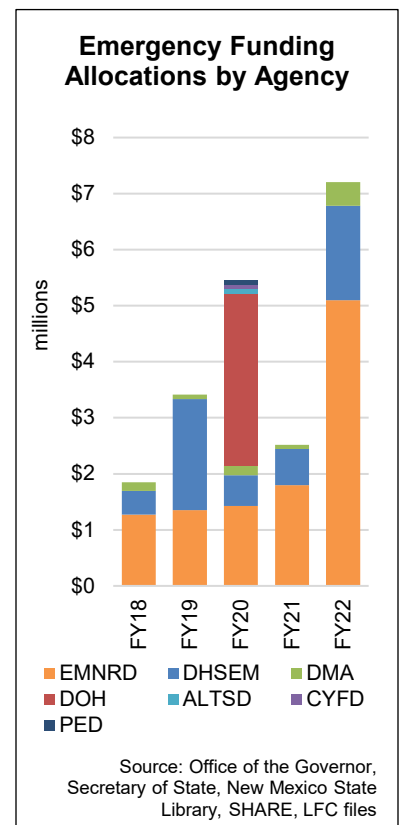
DATE: July 19, 2022

PURPOSE OF HEARING: Provide an overview of the state’s emergency funding system, past proposals to amend the emergency declaration and funding system, and an update on executive order funding allocations and expenditures.

WITNESS: Ellen Rabin, Fiscal Analyst, LFC

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EXPECTED OUTCOME: Informational



**Terminology:
Allocation vs. Allotment**

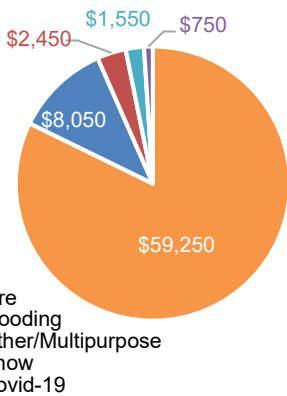
For purposes of this brief, *allocation* signifies the governor's direction (generally made through an executive order) that certain funds be made available for a disaster, while *allotment* signifies the actual transfer of funds to the recipient. Historically, funds have sometimes been allotted months or even years after they were initially allocated.

Executive Orders. While nothing in these statutes requires the governor to declare an emergency via executive order, it has been the executive's longstanding practice to do so. A typical executive order describes the emergent situation, states that the situation is beyond local control and requires the resources of the state, declares an emergency to exist, references relevant statutory authority, and identifies the amount of funding to be allocated, the recipient agency, and the allowable uses of the funding. When funding is intended to be used by an agency for the benefit of specific local entities, the order will identify those entities, and it appears these are considered as the applicants for that funding. Executive orders allocating funding to the national guard under Section 20-1-6 NMSA 1978 sometimes do not declare an emergency, as it is not required by that statute.

Funding Recipients. Traditionally, executive order funding has been directed to the Department of Homeland Security and Emergency Management (DHSEM), the Department of Military Affairs (DMA), and the Energy, Minerals and Natural Resources Department (EMNRD), although several additional agencies received funding during the Covid-19 pandemic. In addition to funding for specific emergencies, DMA and DHSEM both receive \$750 thousand in executive order funding near the beginning of each fiscal year for nonspecific, potential emergency purposes. A 2006 LFC program evaluation finding that "some executive orders are being used as a vehicle to fund non-disaster, non-emergency activities that should be planned and included in the base budget" remains true in 2022.

Executive order funding does not revert at the end of the fiscal year and may carry over for many years. After an agency determines all relevant expenditures have been completed, remaining executive order balances are typically reverted to their source fund at the end of the fiscal year in which they are closed.

**Purpose of FY22
Emergency Funds
(in thousands)**



Source: Office of the Governor, Secretary of State, SHARE, LFC files

Status of Highlighted Issues in Emergency Funding System

The primary statute allowing the executive to allocate emergency funding has changed little in the past 67 years, despite the changing nature of emergencies and the contemporary structure of state finances. In response to the Covid-19 pandemic, the executive allocated disaster funding in amounts far in excess of the \$750 thousand limitation and began drawing from a source not authorized to provide emergency funds, all without notification to the Legislature or reporting on expenditures. The Legislative Council hired outside counsel to investigate the legality of these actions and requested reports from Legislative Council Service and LFC staff on legal and financial impacts.

The council chose not to pursue legal action against the executive but to encourage the Legislature and executive to work together to develop a new emergency funding system. In advance of the 2021 legislative session, LFC endorsed Senate Bill 295, which would have revised the system for executive allocations of emergency funding from the general fund by clarifying the emergency or disaster situations for which such funding may be allocated, restricting the allowable funding sources and amounts that may be allotted, and establishing

**Executive Order Status by Fiscal Year
as of July 12, 2022
(in thousands)**

FY	Number of Orders	Number of Funding Orders	Total Funds Allotted	Total Funds Unexpended/Unencumbered
FY15	20	10	\$13,375.0	\$4,411.6
FY16	30	23	\$18,750.0	\$150.1
FY17	31	17	\$11,975.0	\$1,299.3
FY18	31	27	\$18,465.0	\$1,191.1
FY19	48	30	\$34,116.0	\$5,907.1
FY20	74	34	\$54,470.8	\$8,688.5
FY21	71	34	\$25,200.0	\$5,429.1
FY22	139	100	\$72,050.0	\$43,058.9
FY23	1	1	\$750.0	\$671.6
Total	445	276	\$249,151.8	\$70,807.3

Source: Office of the Governor, Secretary of State, New Mexico State Library, SHARE, LFC files

requirements for reporting on allocations and expenditures. This bill ultimately did not pass.

The governor issued 139 executive orders in FY22, the most orders issued since prior to FY11, allocating \$72.1 million in emergency general fund appropriations, including \$59.3 million specifically allocated for wildfire response.

Allocation Amounts

Current statute limits emergency allocations to \$750 thousand per entity per emergency, but for years that limit has fallen short of the needs for fire suppression and matching requirements for federal emergency funds. The executive has routinely managed this limit by issuing a series of identical orders for \$750 thousand on the same day, effectively allocating millions to address a single disaster although there have also been a handful of orders allocating amounts in excess of \$750 thousand. Because of the extraordinary emergency costs related to the Covid-19 pandemic, the governor issued several orders that outright exceeded the limit, including orders allocating \$10 million and \$20 million to the Department of Health.

In August 2021, outside counsel hired by the Legislative Council reported the governor’s interpretation of statute to allow allocations of more than \$750 thousand was incorrect. Since that time, the executive has not issued any single order in excess of that maximum. However, the executive has employed the prior practice of issuing multiple identical orders on the same day to provide amounts totaling far more than \$750 thousand, including issuing 28 orders allocating a total of \$21 million to EMNRD on May 5, 2022.

SB295 sought to increase the limit to \$5 million per executive order per event, which may still be desirable to create an effective limit.

Funding Sources

The current system of emergency funding did not anticipate allotments on the scale seen over the past several years, and no mechanism is in place to provide emergency funds in the event the ACF is depleted. As a result, when ACF balances were insufficient to cover disaster allotments in FY19, FY20, FY21, and FY22, the executive, possibly illegally, used general fund operating reserves to cover the allotments. Moneys are appropriated to the operating reserve and are therefore not “unappropriated”. Unlike with the ACF, statute does not provide for the executive to draw from the operating reserve sufficient unappropriated money is unavailable.

To address this issue, SB295 proposed to codify the ACF as the primary source of funding for disasters, and if the balance of the ACF were insufficient, the governor could access up to a total of \$20 million from the general fund operating reserve with approval from the Board of Finance.

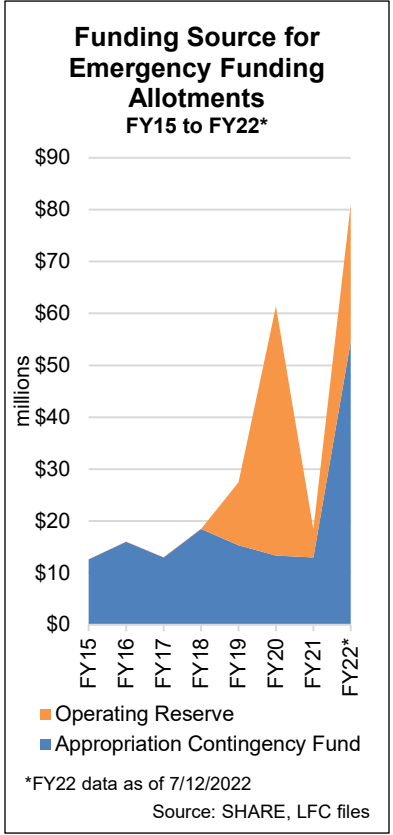
Although SB295 was unsuccessful, during the 2021 legislative session, the Legislature appropriated an additional \$50 million to the ACF to provide what it believed to be sufficient funding to preclude use of the operating reserve. However, while these funds were sufficient to cover emergency needs in the second half of FY21 and most of FY22, ACF general fund balances were depleted by June 2022, and the executive again began allotting funds from the operating reserve. In June, \$26.4 million was allotted from the operating reserve for emergency funding. In

**Issue Status:
Allocation Amounts**

Issue: The executive issued executive orders allocating amounts above the \$750 thousand statutory maximum.

Status: Resolved
The executive has ceased issuing orders in excess of \$750 thousand.

Next Steps: Consider codifying a higher maximum allocation and prevent multiple allocations to the same agency for the same purpose to circumvent this limit.



**Issue Status:
Funding Sources**

Issue: The executive allotted emergency funds from the general fund operating reserve, which it appears to have no statutory authority to do.

Status: Not Resolved

Although the executive began allotting funds from the ACF after the legislature appropriated more money to that fund, those funds were depleted in FY22, and \$26.4 million was allotted from the operating reserve.

Next Steps: Consider clarifying statute and codifying ACF as the source of allowable emergency funding.

**Issue Status:
Reversions**

Issue: Emergency funds are not reverted in a timely manner.

Status: Not Resolved

As of July 12, \$70.2 million in funds allotted since FY15 remained unexpended and unencumbered, including \$13 million allotted prior to FY20.

Next Steps: Consider requiring emergency funds to revert after a reasonable period of time and require available alternate funding sources be used to reimburse the general fund for emergency costs.

**Covid-19 Emergency
Funding Recipients*
(dollars in thousands)**

Agency	Funds Allotted	Funds Remaining
DOH	\$30,750.0	\$4,965.8
CYFD	\$750.0	\$306.7
PED	\$750.0	\$92.2
ALTSD	\$750.0	\$31.3
Total	\$33,000.0	\$5,395.9

*Includes only agencies that do not traditionally receive emergency funds.
Note: Data is as of 7/12/2022.

Source: SHARE, LFC files

total, the executive has allocated \$92.9 million from the operating reserve for emergency funding over the past five years.

Reversions

Emergency funds allocated by executive order are not required to revert at the end of the fiscal year and often take years to fully expend, challenging the concept the need is truly emergent. Records show EMNRD, DHSEM, and DMA all carry balances tied to executive orders issued a decade or more ago. Emergency funds are generally not reverted until several years after they have been issued; for example, FY21 reversions to the ACF from DHSEM included funds from orders issued in 2015, 2016, 2017, and 2018. The operating reserve has seen only one reversion of emergency funds to date, an FY21 reversion of \$97.5 thousand from a 2018 order. Lack of reversion requirements also make creates unpredictability in revenues, making it difficult for the Legislature to determine what will be available for future emergencies and if additional appropriations are needed.

One common reason for late reversions is due to the complex nature of emergency response in coordination with other governmental entities. For example, if the fire involved federal, tribal, or other states' land, those parties will negotiate cost sharing for fire suppression expenses after the fact. EMNRD reports these negotiations may take two to five years to resolve, and the department may receive reimbursements from the other parties involved or be required to pay additional invoices as a result. In these cases, remaining executive order funding cannot be reverted until cost-sharing negotiations have been resolved and all invoices paid, with potential outstanding claims from other parties a liability to the department. DHSEM is often allocated funding for emergency response efforts in other states under the Emergency Management Assistance Compact; reimbursements from those states are reverted, but this often takes some time.

Agencies that received emergency funding in FY20 due to the Covid-19 pandemic have not reverted any of those funds, despite considerable balances and alternative federal funding sources that have since been made available. In 2020, LFC found DOH used emergency funding from the operating reserve for the same purposes as federal Covid-19 relief funds. DOH still has almost \$5 million in FY20 emergency funds unexpended.

SB295 would have required that funding to revert if it was not expended by the end of the fiscal year following the year it was allotted. This ensures emergency funding is available until the Legislature has the opportunity to meet and appropriate funding for longer-term disaster mitigation, if necessary. Additionally, if federal or other nonstate funds were received to remediate the same disaster, the bill would have required the ACF or operating reserve be reimbursed by a corresponding amount of allotted funds.

Emergency Funding Uses

The term "disaster" is defined three times in the Disaster Acts, but none of these definitions explicitly apply to Sections 12-11-23 through 25 NMSA 1978. All three definitions require an enemy attack and a state of martial law. The emergency funding statutes state an intention of establishing a source of emergency funding for natural disasters, but the closest definition to be found in these sections is the requirement the money "shall be expended for disaster relief for any disaster declared by the governor to be of such magnitude as to be beyond local control and requiring the resources of the state." The 2006 LFC program evaluation of the

Department of Public Safety’s Office of Emergency Management recommended the Legislature amend the statutes to clarify their intent and align the definitions of disaster and emergency to federal definitions.

Without a clear definition of disaster or emergency, executive orders can interpret this very broadly, which allows the executive to cite the potential of emergencies and disasters as rationale for declaring an emergency and allocating funding, providing essentially recurring funding (this is sometimes referred to as “standing” funding). The 2006 evaluation recommended such funding be included in the normal budget process,” but such a requirement has never been enacted.

Between FY17 and FY21, the governor issued an executive order every year providing \$750 thousand to DHSEM for general emergency purposes. Such orders were not issued for FY22 or FY23 so far. If such funding is needed, it could be added to DHSEM’s operating budget. Similarly, while the scope of New Mexico’s fire season may vary from year to year, the occurrence of fires is virtually guaranteed, and budgeting recurring funds to cover these costs (which could be supplemented by emergency funding during a particularly bad fire season) would seem reasonable; however, EMNRD’s fire-suppression expenditures are primarily funded via executive order. Additionally, EMNRD’s emergency funds are not only used to manage current fires but also to pay costs related to past fires and support repositioning and readiness in areas with high fire danger.

SB295 would have established a clear definition of disaster to ensure this funding is only used for truly emergent situations for which no alternate funding mechanisms are available. It is possible EMNRD and DHSEM would not have been able to supplement their annual operating budgets with executive order funding under the revised definition proposed by this bill, which could impact those agencies’ operating budgets. While unforeseen expenditures, such as an unexpectedly large fire season, could still have qualified as an emergency and would still have received funding under the bill, the Legislature may have needed to provide additional funding in the agencies’ budgets to ameliorate the bill’s impact to their operating budgets.

Reporting

Under existing law, the Legislature is not formally notified of the allocation or allotment of emergency funds, the source or sources from which they are being drawn, or the balance of the relevant funding source or sources. Such notification would be prudent to ensure the Legislature has sufficient information available when making appropriations during the legislative session. Most concerningly, not all executive orders are posted (or posted promptly) to the Governor’s or Secretary of State’s website, making it impossible for the Legislature to be aware of this spending. For example, executive order 2021-070, allocating \$750 thousand to

Allotments and Reversions by Fund (in thousands)

FY	Appropriation Contingency Fund		General Fund Operating Reserve	
	Allotted	Reverted	Allotted	Reverted
FY15	\$12,625.0	\$7,708.5	\$0.0	\$0.0
FY16	\$16,000.0	\$2,182.5	\$0.0	\$0.0
FY17	\$12,975.0	\$4,563.7	\$0.0	\$0.0
FY18	\$18,465.0	\$4,764.4	\$0.0	\$0.0
FY19	\$15,322.4	\$14,722.4	\$12,143.6	\$0.0
FY20	\$13,312.1	\$8,344.0	\$48,087.9	\$0.0
FY21	\$12,958.4	\$11,724.0	\$5,462.4	\$97.5
FY22*	\$54,601.7	\$0.0	\$26,448.3	\$0.0
FY23**	\$0.0	\$0.0	\$750.0	\$0.0
Total	\$156,259.6	\$54,009.5	\$92,892.2	\$97.5

*Data as of 7/12/2022; does not include full FY22 adjustment period.
**YTD as of 7/12/2022.

Source: Office of the Governor, Secretary of State, New Mexico State Library, SHARE, LFC files

Issue Status: Emergency Funding Uses

Issue: Agencies use emergency funding allocations to supplement their operating budgets for recurring costs.

Status: Partially Resolved
DHSEM did not receive “standing” funding in FY22 or FY23 to date, but EMNRD still uses emergency funding as the primary source of funds for wildfire suppression.

Next Steps: Consider clarifying the definition of “disaster” for emergency funding purposes and adding recurring wildfire suppression funding to EMNRD’s base budget.

Terminology: Definition of Disaster

SB295 would have defined *disaster* as “an unforeseen occurrence or circumstance of such severity as to require the assistance of the state to save lives and protect property and public health and safety and requiring the immediate expenditure of money that is not within the available resources of a requesting state agency, political subdivision or an Indian nation, tribe or pueblo located in whole or in part in New Mexico and, if such expenditure is subject to appropriation, cannot reasonably await appropriation by the next regular session of the legislature.”

**Issue Status:
Reporting**

Issue: The executive does not formally notify the Legislature of the allocation or allotment of emergency funds or provide relevant information regarding the sources and uses of those funds.

Status: Not Resolved

The state has no formal system in place for this, and executive orders are not published in a reliable or timely manner.

Next Steps: Consider requiring the executive to report relevant information on emergency allocations and allotments.

DHSEM to respond to snow squalls in Taos County, was issued at the end of December 2021, and funds were allotted in June 2022; however, as of July 12, the order had not been published.

SB295 proposed a notification system for the allocation of emergency funds. Within five days of issuing an executive order to allocate funds, the bill would have required the governor to notify LFC and the Legislative Council Service of the disaster, amount allotted, intended recipients of the funds, funding sources, projected uses of the funds, and any potential reimbursements or federal matching funds that could be leveraged through those dollars. The bill also would have required quarterly reporting of the expenses made against the allotments and any balances remaining.