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

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

**SHORT TITLE** Suspend Effectiveness of Some Rules **SB** 91

**ANALYST** Daly

## ESTIMATED ADDITIONAL BUDGET IMPACT (dollars in thousands)

| | FY11 | FY12 | FY13 | 3 Year Total Cost | Recurring or Non-Rec | Fund Affected |
|---|---|---|---|---|---|---|
| **Total** | ($18,700.0)* | $0.0 | $0.0 | ($18,700.0)* | Recurring | PSCOF, *LGOB, SB-9, HB-33 |

(Parenthesis ( ) Indicate Expenditure Decreases)
*Based on PSFA information. See Fiscal Implications below.

Relates to HB 22, HB 63, HB 69, SB 30, SB 190, HJR 3 and SJR 3.

**SOURCES OF INFORMATION**
LFC Files

Responses Received From
Commission on Public Records (CPR)
General Services Department (GSD)
State Personnel Office (SPO)
Department of Workforce Solutions (DWS)
New Mexico Environment Department (NMED)
Public School Finance Authority (PSFA)
Attorney General's Office (AGO)

**SUMMARY**

Synopsis of Bill

Senate Bill 91 if enacted would make ineffective, subject to agency reconsideration, a number of rules that have already gone through the State's rulemaking process. Specifically, SB 91 would nullify Rules 20.2.350.1 through 20.2.350.400 NMAC (adopting a cap-and-trade program for greenhouse gases); Rules 20.2.1, 20.2.2, 20.2.70 and 20.2.72 NMAC (which adopt a cap on greenhouse gas emissions); Rules 20.2.88.1 through 20.2.88.112 NMAC, (which adopt clean car standards for the state); Rules 20.11.104.1 through 20.11.104.112 NMAC (which adopt clean car standards for Albuquerque and Bernalillo county); and, Rules 11.1.2.11 and 11.1.2.12 through 11.1.2.13 NMAC, adopted by the labor and industrial commission in 2010 (which adopt requirements for establishing prevailing wage and fringe benefit rates for public works projects). The bill requires the adopting agencies to start its rulemaking process from the beginning.

This bill contains an emergency clause.

## FISCAL IMPLICATIONS

From PSFA:

**Note:** ***Fiscal analysis is limited to effects on public school construction projects only. The analysis provided by PSFA in regard to SB33 (2009 Legislature), which changed the method of determining wage rates from survey to collective bargaining agreements (CBAs), estimated the impact to school construction at $32.6M annually based on CBAs at the time. At this point in time, the NMDWS rules and proposed rates have been challenged and have yet to go into effect.***

The fiscal impact in FY11 assumes half of the annual impact. The fiscal impact in FY12 and beyond assumes no change in law as to the method of calculating wage rates and that new rules and subsequent calculation of wages remain unchanged.

The total fiscal impact of using collective bargaining agreements (CBAs) to set the prevailing wages for public works projects in NM is difficult to determine as it will vary by type of project and the categories of labor required to perform the work.

Based on the 2011 wage rates developed under the proposed rules using collective bargaining agreement wage information it is estimated that there will be an 8.7 percent increase in the Type "B" – General Building classification of construction typical of most school building projects over the 2009 wages developed under the previous wage survey method. Type "A" – Streets, Highway, Utility & Light Engineering classifications for projects such as site work, fields and parking lots at schools will increase by over 31.1 percent. Based on estimated annual expenditures of state and local school construction sources of $523 million subject to wage rates, there will be an annual fiscal impact of up to $37.4 million.

A 2002 report *The Effects of the Exemption of School Construction Projects from Ohio's Prevailing Wage Law* conducted by the Legislative Service Commission reported that the exemption of school construction from the State's collective bargaining method of determining prevailing wages had an overall savings of 10.7 percent (see attached).

A 1999 report from the State of Alaska estimates that using collective bargaining agreements in lieu of surveys increased rates of different labor classifications by 2% to 10.5%.

And from Environment Department:

The fiscal implications of this bill would eliminate fees currently received by the Albuquerque-Bernalillo County Environmental Health Department for 20.2.11 NMAC, Emission Standards for New Vehicles in Bernalillo County. This regulation requires automobile manufacturers to pay fees annually for implementation of the regulation. Since the regulation would be suspended until reconsideration, Albuquerque-Bernalillo County could be required to refund manufacturer fees already submitted to the Department.

20.2.88 NMAC, the companion regulation to 20.2.11 NMAC that applies throughout the state except in Bernalillo County and on tribal lands, was revised in 2010 to waive all requirements

until 2016; therefore no fees are received by the New Mexico Environment Department for this regulation and the regulation is not being implemented.
The Greenhouse Gas Reduction Program in 20.2.100 NMAC does not go into effect until 2013, and then only goes into effect if 20.2.350 NMAC is not in place and a federal program is not in place. Fiscal impacts of suspending this regulation are difficult to estimate.

There is significant fiscal impact of resources by agencies required to reconsider rulemaking, including technical and economic analyses, public outreach and staff time to prepare rulemaking; however, due to the complex rulemaking process, it is difficult to estimate these costs. The development of 20.2.350 NMAC required hundreds of hours for analysis and outreach, in addition to a 2-week hearing process. 20.2.88 NMAC required months of analysis and outreach and the hearing duration was over 40 hours.

If the bill does not remove references to changes in 20.2.70 NMAC, it is possible that the bill could suspend implementation of changes to 20.2.70 NMAC adopted by the Environmental Improvement Board in 2010 that implement a federally required greenhouse gas permitting rule known as the "Greenhouse Gas Tailoring Rule". Should these changes be suspended, it could result in federal implementation of permitting requirements and loss of federal grant.

## 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.

The AGO has now submitted an analysis on this bill (SB 91). It states:

> 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.

The AGO also provided legal analysis in a related bill, SB 190, proposing to repeal a number of already promulgated rules, including one of the greenhouse gas emissions rules that would be rendered ineffective under this bill. As to 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.

On the other hand, 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.
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> 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 this bill (SB 91). The analysis set out here is directed at one rule which would be rendered ineffective under this bill, but appears to apply to all the rules proposed to be rendered ineffective under this bill (SB 91) 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.
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> 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**

Relates to HB 22, HB 69, SB 30, HJR 3 and SJR 3, all relating to rules, rulemaking, and legislative review of agency rules. It also relates to HB 63, which would repeal the existing statutory requirement regarding use of collective bargaining agreements to establish prevailing wages for various trades involved in public works construction projects. It also relates to SB 190, which would repeal one of the greenhouse emissions rules that would be rendered ineffective under this bill.

MD/bym:svb