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## FISCAL IMPACT REPORT

**SPONSOR** Pettigrew/Scott/Dow      **ORIGINAL DATE** 02/02/21  
**LAST UPDATED** 02/05/21      **HB** 159/ec  
**SHORT TITLE** Rulemaking During Public Health Orders      **SB** \_\_\_\_\_  
**ANALYST** Glenn

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY21	FY22	FY23		
(\$45.0)	(\$134.0)	See Fiscal Implications		General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	See Fiscal Implications					

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB139, HJR6, SB74, SB295

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of the Governor (GOV)  
 Department of Health (DOH)  
 Taxation & Revenue Department (TRD)  
 Department of Transportation (NMDOT)  
 New Mexico Environment Department (NMED)  
 Office of the Attorney General (NMAG)  
 State Commission on Public Records (CPR)

### SUMMARY

#### Synopsis of Bill

House Bill 159 amends provisions governing rulemaking under the Public Health Emergency Response Act (PHERA) to prohibit agencies from promulgating rules that add to or alter the New Mexico Administrative Code (NMAC) when a public health order is in effect, unless the

proposed rule changes are authorized by the governor. The bill requires the governor, when authorizing additions or alterations to NMAC, to issue an executive order explaining the impact of proposed rule changes on the retail prices of goods and services; cost of business operations in industries affected by the changes; and overall regulatory climate for businesses seeking to grow or establish in or relocate to the state; and whether the changes are the least restrictive means to achieve their intended public health and safety objectives.

This bill contains an emergency clause and would become effective immediately upon signature by the governor.

### **FISCAL IMPLICATIONS**

Office of the Governor notes that the fiscal implications of the bill will depend on how many rules agencies propose to institute during a public health emergency. Nevertheless, the bill has the potential to create a significant additional workload for the office, which may, in turn, require hiring additional staff to assist with drafting, reviewing, and executing executive orders.

TRD states that the implementation cost of HB159 would be minimal, but the bill would increase the amount of time it takes to finalize regulations during a public health order.

NMED states that it is unclear what fiscal implications will result if the Governor's office experiences a delay in issuing the executive order required by the bill. In instances where a regulatory change is required by a federal agency, any delay could impact NMED's receipt of grant money from that federal agency.

CPR states that if HB159 is passed, and current public health orders remain in place until end of next fiscal year, then the bill will curtail rulemaking by agencies. It is anticipated that the decrease in rulemaking actions by agencies would result in a reduction of publishing fees collected in the amounts listed in the revenue table amount (calculated at \$3/columnar inch). The decrease in revenues assumes that public health orders will remain in place for the remaining of current fiscal year and for next fiscal year. Publishing fees go into the agency's revolving fund.

CPR's fixed costs are paid for out of the revolving fund. The potential decrease in publishing revenue out of revolving fund will significantly impact the agency's ability to function, operate, fulfill its mission and to administer the provisions of the State Rules Act.

### **SIGNIFICANT ISSUES**

Office of the Governor states that HB159 would limit state agencies' ability to respond to emergencies by creating an unnecessary step when promulgating and implementing rules and regulations under the PHERA. The office explains that the purpose of PHERA is to establish an effective plan to manage and respond to emergencies that may arise in the state. *See* NMSA 1978, § 12-10A-2. Currently, PHERA requires state agencies to promulgate and implement rules in consultation with the secretary of Department of Public Safety and secretary of Department of Health. PHERA does not require any additional oversight to the administrative rulemaking process because the state's response to an emergency must occur quickly and with sufficient flexibility to respond to changing circumstances. PHERA authorizes agencies to promulgate rules as needed, which is the most efficient way to mobilize required emergency plans. The requirements of HB159 would add unnecessary delay to the process of responding to emergency situations.

Office of the Governor notes that the State Rules Act specifically permits an agency to deviate

from the normal rulemaking process if the procedures would “cause an imminent peril to the public health, safety, or welfare.” NMSA 1978, § 14-4-5.6(A)(1) (2017). Office of the Governor states that HB159 conflicts with this provision by proposing additional oversight for agency rulemaking during an emergency.

According to office of the Governor, HB159 creates an additional and unnecessary task for a governor during a public health emergency. Because the governor is empowered by PHERA to declare a public health emergency, it is unlikely that an executive agency would issue rules or regulations responding to the emergency without the governor’s authorization. Additionally, the All Hazards Emergency Management Act requires all political subdivisions of the state during a declared state of emergency to “comply with and enforce all executive orders and rules made by the governor or under the governor’s authority pursuant to law.” NMSA 1978, § 12-10-10(A). Requiring the governor to issue an executive order approving of and explaining the listed impacts of each new rule would simply distract from the governor’s core duties of managing the state during a time of emergency and delay the process for implementing emergency rules that may be put in place to save the lives of New Mexicans.

HB159’s requirements apply to “an agency as defined in the State Rules Act.” This conflicts with Section 12-10A-17 of PHERA (redesignated in HB159 as Section 12-10A-17(A)), which requires specified agencies and “where appropriate, other affected state agencies” to promulgate rules necessary to implement PHERA. As currently worded, HB159 appears to affect any rule adopted by any state agency during a public health emergency, not just those rules adopted to implement and effectuate PHERA. To avoid any confusion or ambiguity concerning the bill’s scope, it might be changed to apply only to the agencies described in Section 12-10A-17 that adopt rules to implement and effectuate PHERA.

Assuming HB159 is intended to apply to all rules adopted by state agencies while a public health order is in effect, NMED notes that the Small Business Regulatory Relief Act already requires it to notify the Small Business Regulatory Advisory Committee if a proposed rule may have an adverse effect on small business. In contrast to that notice requirement, HB159 adds a hard stop prohibiting NMED from proceeding with rulemaking until the governor issues the required executive order. NMED states this would likely slow down the rulemaking process for all rules across all agencies, regardless of any connection between the rules and a public health emergency.

NMED further states that for rulemakings related to public health emergencies, additional delays caused by HB159 could result in increased risk to public health and the environment, including worker safety requirements, wastewater disposal compliance and safe drinking water resting.

Additionally, NMED administers a number of programs that implement federal programs for New Mexico, such those in the Air Quality Control Act and the Hazardous Waste Act. The United States Environmental Protection Agency (EPA) often requires states to make changes to these programs within set timeframes in order to retain primacy and grant funding. According to NMED, the additional requirements in HB159 may put New Mexico in jeopardy of losing its primacy for these programs, along with correlated funding, if it cannot timely enact federally-required rule changes. *See e.g.*, 42 U.S.C. § 7411(d)(2), granting authority to the EPA administrator to prescribe a plan pursuant to the Clean Air Act for existing sources performance standards where the state fails to submit a satisfactory plan.

## **ADMINISTRATIVE IMPLICATIONS**

TRD notes that New Mexico currently is functioning within the restrictions placed under public

health emergency orders implemented in response to the spread of Covid-19. TRD has a rule hearing scheduled for February 25, 2021 on incorporating 2021 legislative changes in the Corporate Income and Franchise Tax Act and the Uniform Division of Income for Tax Purposes Act. TRD also is working with outside contractors to put regulations in place, before July 1, 2021, for the 2019 legislative changes to the Gross Receipts and Compensating Tax Act and the Tax Administration Act regarding destination-based sourcing. Depending on when HB159 goes into effect, TRD may need to work with the Governor's Office on the issuance of an executive order meeting the bill's requirements before TRD finalizes the regulations currently in progress. TRD believes that delaying its timeline to put in place rules related to corporate income tax and gross receipts tax would be detrimental to both TRD and taxpayers.

NMED states that its staff will need to prepare additional paperwork identifying and addressing factors listed in HB159 factors and submit requests to the Governor's Office for executive orders during public health emergencies. This may jeopardize NMED's ability to quickly address public health emergencies through rulemakings. Additionally, the lack of firm timeframes for rulemakings and uncertainly created by the potentially broad scope of the bill would create administrative inefficiencies for NMED programs.

NMDOT states that HB159 would impose an additional step in the rulemaking process if a proposed rule is sought to be adopted during the pendency of a public health order. NMDOT notes that it is unlikely that the four criteria HB 159 requires to be addressed in an executive order would have any practical application to the administrative rules typically proposed by NMDOT. This is likely true of other agencies who might promulgate rules while a public health order is in effect that have no relation to the public health emergency and no effect on businesses or the state's economy. Consequently, the bill imposes a needless additional administrative burden on the rulemaking process for NMDOT and other state agencies.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB159 relates to HB139, SB74 and HJR6, which impose additional requirements for emergency declarations and public health orders. HB159 relates to SB295, which revises the system for executive allocations of emergency funding from the general fund.

### **TECHNICAL ISSUES**

NMDOT notes that HB159 does not distinguish between emergency rules and permanent rules or address the effect of its requirements on agency rulemaking under the State Rules Act. With respect to an emergency rule, HB159 does not specify when the required executive order is required to be issued. As for permanent rules, HB159 does not specify whether the findings of the executive order, or the fact that such an order has been issued, needs to be included in the notice of proposed rulemaking published in the New Mexico Register. If a public health order were issued after publication in the New Mexico Register, the need to obtain the executive order could require an agency to reschedule and republish the date for the public rule hearing. HB159 makes no reference to whether the executive order is required to be part of the agency rulemaking record.

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