

LFC Requester:

Emily Hilla

AGENCY BILL ANALYSIS  
2024 REGULAR SESSION

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

Check all that apply:

Original   X   Amendment \_\_\_\_\_  
Correction \_\_\_\_\_ Substitute \_\_\_\_\_

Date Prepared: 02/01/2024

Bill No: HB 267

Sponsor: Rep. Armstrong, et. al.

Short Title: AGENCY RESPONSE TO  
RULES COMMENTS

Agency Name and Code Number: 305 – New Mexico  
Department of Justice

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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	<b>FY24</b>	<b>FY25</b>	<b>FY26</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:  
 Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

*This analysis is neither a formal Opinion nor an Advisory Letter issued by the New Mexico Department of Justice. This is a staff analysis in response to a committee or legislator’s request. The analysis does not represent any official policy or legal position of the NM Department of Justice.*

**BILL SUMMARY**

House Bill 267 will require every state agency when conducting a rulemaking to provide a written response to each public comment received during the public comment period and public rule hearing.

**FISCAL IMPLICATIONS**

No fiscal impacts to this office.

**SIGNIFICANT ISSUES**

HB 267 poses a number of legal concerns and practical questions, listed below.

Language of HB 267 does not adequately define expectations added under new Section 14-4-5.3(D) of what the exact obligations are of an agency in responding to public comment. It is unclear what a response that is “fact-specific to the concerns of the comment” exactly means, and whether a simple acknowledgment of the concerns would satisfy the requirement or if an agency must respond in favor or opposition to the comment. Similarly, the requirement that the agency response “address the impact of the comment on the rule to be promulgated” is not defined sufficiently to avoid interpretation concerns and consistency across the hundreds of entities with rulemaking authority. It is also not contemplated whether agencies could omit having to provide response to public comments that are simply supportive of a proposed rule.

Current state law already requires agencies to respond in writing to certain public comment. Under the state’s Default Procedural Rule for Rulemaking, every agency must issue a Concise Explanatory Statement that includes, among other information, the agency’s “reasons for not accepting substantive arguments made through public comment” when adopting rules. 1.24.25.14(F)(7) NMAC. This procedural rule is contemplated under the State Rules Act, which directed the Attorney General to develop and promulgate procedural rules that set minimum requirements and process for public rulemakings. While agencies can adopt their own procedural rules, they must provide as much process and public participation as what is provided under the Attorney General’s Default Procedural Rule, which would include addressing public comment in the Concise Explanatory Statement required in Part 1.24.25.14(F)(7) NMAC.

If the intent of HB 267 is not to explain why an argument made through public comment isn’t

being considered (as is currently required in law), but instead to acknowledge and provide some sort of analysis of each public comment received, regardless of whether such comment is well received or accepted in whole or in part, much clarity is needed in the language of the bill in order to ensure proper interpretation and adherence by agencies.

HB 267 appears to suggest that written responses to public comment might be required contemporaneously during the public comment period or public rule hearing, which requires clarification and would present serious legal and practical concerns. HB 267, Section 2 amends Section 14-4-5.3, NMSA 1978, that addresses process and requirements of receiving public comment and conducting a rule hearing. Subsection A, a paragraph focused on the obligations of an agency's public comment period, would be amended to require an agency "respond in writing to each public comment", suggesting that such response occur during the public comment period. Furthermore, HB 267 proposes a new Subsection D(3), requiring agency responses "address the impact of the comment on the rule *to be* promulgated." (emphasis added). Unlike an agency providing reasons for not accepting arguments made through public comment in the Concise Explanatory Statement as part of adopting a final rule, this language in HB 267 – *to be promulgated* – is prospective and implies that an agency would be expected to respond in writing to comments *during* the public comment period or as part of the public rule hearing.

Requiring contemporaneous responses to public comment during a public rulemaking, as opposed to the existing process of a response in a concise explanatory statement with the adoption of the rule, would be impractical for agencies and would not be possible for public bodies without likely violating the Open Meetings Act. First, the purpose of public participation in rulemakings under the State Rules Act is to provide notice and opportunity for the public to provide feedback to proposed rules before they are adopted. A Notice of Proposed Rulemaking is required by law to provide a summary, purpose, authority, any technical information used as a basis for a proposed rule, and instructions on how to provide public comment. *See* §14-4-5.2, NMSA 1978. Public comment received is then reviewed and the agency issues a decision with a Concise Explanatory Statement that includes findings required by Section 14-4-5.5 and Rule 1.24.25.14(F) NMAC. Responding to public comment in real-time during the public comment period would prove challenging for any agency and would deviate from the organized process of a structured public comment period and public hearing followed by a Concise Explanatory Statement addressing all public comment together at one time in a single organized final decision at the conclusion of the rulemaking. Furthermore, it would not be possible for a public body subject to the Open Meetings Act to issue contemporaneous responses during a public comment period without deciding on each and every response as a quorum during a notice public meeting with agenda.

HB 267 requirement that each agency response to public comments received be published in the State Register would pose several practical concerns and may be impossible to follow for public comment received verbally during a public rule hearing. The State Rules Act and corresponding Default Procedural Rule already provide information on how to obtain a record of the rulemaking, which is required to be posted to the agency's website, sunshine portal, offices, and shared via email to interested parties. Public comment (and any correspondence filed in response) would necessarily be part of the rulemaking record and available to the public. Requiring what could be hundreds of pages of public comment responses to be published in the State Register would create unnecessary administrative burden on agencies and would be contrary of the intent of existing language that even allows agencies the discretion to "publish in full or in part" when the proposed rules may be considered too voluminous to justify the expense of formal, written publication in the official State Register.

## **PERFORMANCE IMPLICATIONS**

The Department of Justice may be required to amend the Default Procedural Rule on Rulemaking, NMAC 1.24.25, it was required to promulgate pursuant to NMSA 1978 § 14-4-5.8. The agency would encounter the challenges identified above in navigating how best to amend the default rule to comport with the changes of HB 267.

## **ADMINISTRATIVE IMPLICATIONS**

The Department of Justice provides general counsel to nearly 80 public bodies in the state, many of which have rulemaking authority. It would take considerable effort to coordinate a consistent approach to providing legal advice to public bodies on the requirements of HB 267 given the issues identified above.

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

Relation to House Bill 124 in that both will propose changes to the State Rules Act but neither will affect the other.

## **TECHNICAL ISSUES**

No known technical issues

## **OTHER SUBSTANTIVE ISSUES**

N/A

## **ALTERNATIVES**

Adding requirements regarding agency consideration and response to public comment could be done by adding specific requirements of what must be included in a Concise Explanatory Statement, under Section 14-4-5.5. This would address a number of the issues raised above.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status quo following the Default Procedural Rule for Rulemaking.

## **AMENDMENTS**