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FISCAL IMPACT REPORT

ORIGINAL DATE 3-3-09
 SPONSOR Ingle LAST UPDATED 3-5-09 HB _____
 SHORT TITLE Legislative Votes on Executive Rules, CA SJR 16
 ANALYST Ortiz

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Relates to HJR6, HB45, SB18 and SB65

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General’s Office (AGO)
 Energy Minerals and Natural Resources (EMNRD)
 Environment Department (NMED)
 Public Education Department (PED)
 Commission of Public Records (CPR)
 Aging and Long-Term Services (ALTSO)

SUMMARY

Synopsis of Bill

Senate Joint Resolution 16 propose to amend the New Mexico constitution by adding a new section making rules and regulation adopted by an executive agency to have the force and effect of a law but not be equal in status to statutory law. It allows the legislature to nullify administrative regulation or rule of an executive agency by passing a resolution by the majority of both the house and senate.

SIGNIFICANT ISSUES

All responding agencies express concern that SJR16 blurs the separation of powers. Specifically, as stated by the AGO, the concepts of “separation of powers” and the “non-delegation” doctrine are fundamental concepts in the United States Constitution, implemented to

keep the different branches of government distinct in order to prevent abuse of power. See Articles I, II, and III U.S. Constitution. Those concepts were included in the New Mexico Constitution when it was submitted for congressional and presidential approval pursuant to Sections 3 and 4 of the “Enabling Act for New Mexico”, 36 Statutes at Large 557, Chapter 310(1910). Article VI of the United States Constitution requires members of state legislatures to be “bound by Oath or Affirmation to support this [Federal] Constitution”. The provisions of the joint resolution may also violate that provision, if construed as an unlawful usurpation and delegation of Executive Branch authority by the State Legislature.

At best, notes the AGO, the provisions of the joint resolution would be construed along with the “separation of powers” doctrine set forth in Article III, Section 1 of the New Mexico Constitution, and the “non-delegation” doctrine arising from that section. See *State ex rel. Schwartz v. Johnson*, 120 N.M. 820, 907 P.2d 1001 (1995). See also *Cobb v. State Canvassing Bd. of New Mexico* 140 NM 77, 140 P.3d 498 (2006) where the New Mexico Supreme Court stated: “It is this principle of separation of powers and the limitations on the Legislature's ability to transfer its power to other departments that is the basis of the no delegation doctrine.” The joint resolution does not amend Article III, Section 1. It is unclear how its constitutional amendments would be reconciled with that section.

State agencies are generally required to comply with statutory procedures when enacting, amending, or repealing rules. Those procedures allow for public notice, publication, filing, etc. See the State Rules Act, NMSA 14-4-1 et seq. for example. It is unclear as to the legal effect of the notice of the “annulment” by legislative committee of a rule adopted by a state agency. See *Rivas v. Board of Cosmetologists*, 101 N.M. 592, 686 P.2d 934, (1984).

Aside from those legal issues, adds the AGO, requiring legislative committees to review and approve state agency rules and regulations will have the likely effect of:

- (1) lengthening the process of rule enactment;
- (2) it may delay or prohibit the enactment of rules required by other state laws;
- (3) it may create uncertainty about the status of a rule (is there a time period for the legislature to act);
- (4) it may create confusion about implementation for the stakeholders and the enforcement agencies.

It appears to the Commission of Public Records that some of the text of the resolution comes from the states of Idaho and Iowa. It should be noted that the definition of rule in both of those states differs from that in New Mexico. The definition of rule in New Mexico includes the requirements of one executive branch agency to another; the definitions in Idaho and Iowa do not. Currently in New Mexico, there are a number rules promulgated by one executive agency that affect only other state agencies. These rules include record retention schedules, state building requirements, governmental information technology standards, and rule formatting requirements, to name a few. There could be a separation of powers concern if the legislature were to annul a rule that was strictly internal to the executive branch.

PERFORMANCE IMPLICATIONS

EMNRD explains that passage of SJR16 affects an agency’s ability to ensure long-term compliance with federal mandates or develop long-term planning. As an example, several programs in the Energy, Minerals, and Natural Resources Department (EMNRD) rely on fees for

funding programmatic activities. Nullification of any rules containing fee provisions would remove funding mechanisms from these programs and would render the agency unable to comply with the statutes, pursuant to which the rule was promulgated. Additionally, many rules adopted by EMNRD are required by federal law, and compliance with federal requirements, including funding requirements, would be jeopardized by nullification.

ADMINISTRATIVE IMPLICATIONS

This resolution could have an impact on the compilation of the New Mexico Administrative Code and the publication of the New Mexico Register. CPR explains that existing rules that are annulled would need to be removed from the Administrative Code and that could require additional staff time. There is also a question of whether notices of prohibited or annulled rules would need to be published in the New Mexico Register so the public would be aware of the action.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

According to CPR, Senate Joint Resolution 16 would appear to be very similar to a substitute adopted by the HVEC for HJR 6. That substitute, the adoption of which was confirmed by HVEC staff, is not reflected in the Locator or Bill Finder and no final copy is available to this agency for review. Based on discussion during consideration of the substitute for HJR 6 proposed by the HVEC, there would appear to be several differences, with one in particular being the vote required for nullification. Senate Joint Resolution 16 calls for a *majority of all members of the senate and House of Representatives*; the language proposed in the HVEC substitute for HJR 6 appeared, again based on HVEC discussions, to require a three-quarters vote of the full membership of each house.

SJR16 relates to HB45 and SB18 in that all add requirements to the current rulemaking process. Paragraph 1 of Subsection B of Section 2 of SB65 mandates that the Information Technology and Telecommunications joint interim legislative committee review the rules of the Department of Information Technology before the rules are published.

TECHNICAL ISSUES

CPR points out that the subject title of the resolution conflicts with the content. The title states the legislature may enact laws to prohibit rules from taking effect but the content says the legislature may annul existing rules. EMNRD recommends that on page 1, lines 12 and 13, replace “ENACT LAWS THAT PROHIBIT REGULATORY RULES OF THE EXECUTIVE BRANCH FROM TAKING EFFECT IF NULLIFIED” with “NULLIFY RULES OF THE EXECUTIVE BRANCH AT ANY TIME”.

It is not clear if the vote required to nullify a rule is a majority of the entire legislature or a majority of each house - presumably it is a majority of each house but there might possibly be some question. On page 1, lines 24 and 25, replace “all the members of the senate and house of representatives” with “the members in each of the senate and the house of representatives”.

The word “regulation” is used a number of times in the resolution. As noted in the Legislative Drafting Manual, “*rule*” is the defined term in both the *Uniform Statute and Rule Construction Act* and the *State Rules Act* to mean a rule, regulation, order, standard or statement of policy.

The Legislative Drafting Manual advises the use of “rule” instead of “rules and regulations” or “regulation.” CPR suggests removing the instances of the term “regulation” and leaves the term “rule.”

OTHER SUBSTANTIVE ISSUES

According to ENMRD, an agency is generally prohibited from having “ex parte” contacts with the parties and must make its decision on a record that all parties can contribute to, and can later use to challenge the decision. The Legislature allows lobbying and ex parte contacts and has no record on which it must base its decision. Thus, this amendment is fundamentally at cross-purposes with the due process requirements of Article II, Section 18, of the New Mexico Constitution and of the Administrative Procedures Act.

ALTERNATIVES

The Uniform Law Commission (ULC) has spent the last five years working on a revised Model State Administrative Procedure Act that should be finished before the end of 2009. Article 7 of the current draft version of the Model Act deals specifically with legislative review of rules. The members of the drafting committee working on the revision have studied many states and examined the issues associated with this subject. The Commission of Public Records suggests waiting until the Model State Administrative Procedure Act is finished to see what best practices are suggested.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The legislature will still be able to trump an adopted regulation by passage of a law by a majority of all the members of the senate and House of Representatives.

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