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HOUSE BILL 259

49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010

INTRODUCED BY

Ben Lujan

AN ACT

RELATING TO THE ENVIRONMENT; PROVIDING FOR A PRIVATE RIGHT OF ACTION TO ENFORCE CERTAIN STATUTES; ENACTING NEW SECTIONS OF THE OIL AND GAS ACT, THE ENVIRONMENTAL IMPROVEMENT ACT AND THE WATER QUALITY ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. A new section of the Oil and Gas Act is enacted to read:

"[NEW MATERIAL] PRIVATE RIGHT OF ACTION.--

A. Except as provided in Subsection C of this section, a person having an interest that is or may be adversely affected may commence a civil action on the person's own behalf against:

(1) any other person, including the state of New Mexico, a political subdivision thereof or any officer or

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1 agency of either, charging a violation of the Oil and Gas Act
2 or a rule, permit or order issued pursuant to that act; or

3 (2) the commission or the oil conservation
4 division of the energy, minerals and natural resources
5 department alleging a failure to perform any nondiscretionary
6 act or duty required by a provision of the Oil and Gas Act or a
7 rule promulgated pursuant to that act.

8 B. Venue for the action shall be determined in
9 accordance with the venue provisions of the Oil and Gas Act
10 applicable to the specific violation alleged.

11 C. No action may be commenced under Subsection A of
12 this section:

13 (1) unless the alleged violation or alleged
14 failure to perform a nondiscretionary act or duty relates to a
15 statute, rule, permit or order primarily concerned with
16 environmental protection, including, but not limited to,
17 statutes, rules, permits or orders concerned with:

18 (a) pits, closed-loop systems, below-
19 grade tanks and sumps;

20 (b) plugging and abandonment of wells;

21 (c) remediation;

22 (d) produced water;

23 (e) waste disposal; or

24 (f) surface waste management facilities;

25 (2) unless the plaintiff has given sixty days'

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1 written notice of the violation to the commission, the
2 division, the attorney general and any alleged violator of the
3 Oil and Gas Act, rule, permit or order; or

4 (3) if the commission or division has
5 commenced and is diligently prosecuting a civil action in a
6 court of this state or an administrative enforcement proceeding
7 to require compliance with the Oil and Gas Act, rule, permit or
8 order. In an administrative or court action commenced by the
9 commission or division, a person whose interest may be
10 adversely affected and who has provided notice pursuant to
11 Paragraph (2) of this subsection prior to the initiation of the
12 action may intervene as a matter of right.

13 D. In an action under this section, if the
14 commission or division is not a party, it may intervene as a
15 matter of right at any time in the proceeding. A judgment in
16 an action under this section in which the commission or
17 division is not a party shall have no binding effect on the
18 agency.

19 E. Whenever any action is brought under this
20 section, the plaintiff shall serve a copy of the complaint on
21 the commission and the division. No stipulated judgment shall
22 be entered in an action brought under this section if the
23 commission or division is not a party, unless the judgment is
24 entered at least forty-five days after the receipt of a copy of
25 the proposed stipulated judgment by the commission or division,

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1 during which time the commission or division may submit
2 comments on the proposed stipulated judgment to the court or
3 may intervene in the action as a matter of right.

4 F. In any action brought pursuant to this section,
5 the court may:

6 (1) issue an injunction against violation of
7 the Oil and Gas Act or any rule, permit or order that the court
8 finds to have been violated;

9 (2) issue an order to the commission or
10 division compelling performance of a nondiscretionary act or
11 duty required by the Oil and Gas Act or a rule promulgated
12 pursuant to that act;

13 (3) assess appropriate civil penalties, if
14 authorized by a specific provision of the Oil and Gas Act for
15 the violation; and

16 (4) award costs of litigation, including
17 reasonable attorney and expert witness fees, to the prevailing
18 party when the court determines the award is appropriate.

19 G. Except as otherwise provided in Subsection H of
20 this section, any civil penalties assessed under Paragraph (3)
21 of Subsection F of this section shall be deposited in the same
22 fund in which they would be deposited if the action had been
23 brought by the commission or division.

24 H. Notwithstanding the provisions of Subsection G
25 of this section, the court shall have discretion to order that

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1 any civil penalties assessed, not to exceed twenty-five
2 thousand dollars (\$25,000), be used in beneficial mitigation
3 projects that are consistent with the Oil and Gas Act or the
4 rule, permit or order alleged to have been violated and that
5 enhance the public health or the environment. Before
6 exercising this discretion, the court shall obtain written
7 comments on beneficial mitigation projects from the commission
8 or division.

9 I. Nothing in this section shall restrict the right
10 of any person or class of persons to any relief authorized by
11 any other law."

12 Section 2. A new section of the Environmental Improvement
13 Act is enacted to read:

14 "[NEW MATERIAL] PRIVATE RIGHT OF ACTION.--

15 A. Except as provided in Subsection C of this
16 section, a person having an interest that is or may be
17 adversely affected may commence a civil action on the person's
18 own behalf against:

19 (1) any other person, including the state of
20 New Mexico, a political subdivision thereof or any officer or
21 agency of either, charging a violation of any statute, rule or
22 permit the enforcement of which is delegated to the department,
23 or any order of the board or the secretary issued pursuant to a
24 statute or rule; or

25 (2) the department or the board alleging a

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1 failure to perform any nondiscretionary act or duty required by
2 an act or rule the enforcement of which is delegated to the
3 department or board.

4 B. Venue for the action shall be determined in
5 accordance with the venue provisions of any statute applicable
6 to the specific violation alleged.

7 C. No action may be commenced under Subsection A of
8 this section:

9 (1) unless the plaintiff has given sixty days'
10 written notice of the violation to the secretary, the attorney
11 general and any alleged violator of the statute, rule, permit
12 or order; or

13 (2) if the department has commenced and is
14 diligently prosecuting a civil action in a court of this state
15 or an administrative enforcement proceeding to require
16 compliance with the act, rule, permit or order. In an
17 administrative or court action commenced by the department, a
18 person whose interest may be adversely affected and who has
19 provided notice pursuant to Paragraph (1) of this subsection
20 prior to the initiation of the action may intervene as a matter
21 of right.

22 D. In an action under this section, if the
23 department is not a party, it may intervene as a matter of
24 right at any time in the proceeding. A judgment in an action
25 under this section in which the department is not a party shall

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1 have no binding effect on the department.

2 E. Whenever any action is brought under this
3 section, the plaintiff shall serve a copy of the complaint on
4 the secretary. No stipulated judgment shall be entered in an
5 action brought under this section if the department is not a
6 party, unless the judgment is entered at least forty-five days
7 after the receipt of a copy of the proposed stipulated judgment
8 by the secretary, during which time the department may submit
9 comments on the proposed stipulated judgment to the court or
10 may intervene in the action as a matter of right.

11 F. In any action brought pursuant to this section,
12 the court may:

13 (1) issue an injunction against violation of
14 any statute, rule, permit or order that the court finds to have
15 been violated;

16 (2) issue an order to the department or board
17 compelling performance of a nondiscretionary act or duty
18 required by an act or rule the enforcement of which is
19 delegated to the department or board;

20 (3) assess appropriate civil penalties, if
21 authorized by a specific statute for the violation; and

22 (4) award costs of litigation, including
23 reasonable attorney and expert witness fees, to the prevailing
24 party when the court determines the award is appropriate.

25 G. Except as otherwise provided in Subsection H of

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1 this section, any civil penalties assessed under Paragraph (3)
2 of Subsection F of this section shall be deposited in the same
3 fund in which they would be deposited if the action had been
4 brought by the department.

5 H. Notwithstanding the provisions of Subsection G
6 of this section, the court shall have discretion to order that
7 any civil penalties assessed, not to exceed twenty-five
8 thousand dollars (\$25,000), be used in beneficial mitigation
9 projects that are consistent with the act, rule, permit or
10 order alleged to have been violated and that enhance the public
11 health or the environment. Before exercising this discretion,
12 the court shall obtain written comments on beneficial
13 mitigation projects from the secretary.

14 I. In an action brought pursuant to this section to
15 enforce a provision of the Air Quality Control Act or a rule,
16 permit or order issued under that act, if jurisdiction to
17 enforce the act has been assumed by a local authority and if
18 the complaint arose within the jurisdiction of the local
19 authority, then, notwithstanding the definitions in Section
20 74-1-3 NMSA 1978, as used in this section:

21 (1) "board" means the local board created by
22 the local authority;

23 (2) "department" means the administrative
24 agency established by the local authority pursuant to Paragraph
25 (2) of Subsection A of Section 74-2-4 NMSA 1978; and

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1 (3) "secretary" means the director or
2 administrative head of the local agency.

3 J. Nothing in this section shall restrict the right
4 of any person or class of persons to any relief authorized by
5 any other law."

6 Section 3. A new section of the Water Quality Act is
7 enacted to read:

8 "[NEW MATERIAL] PRIVATE RIGHT OF ACTION.--

9 A. Except as provided in Subsection C of this
10 section, a person having an interest that is or may be
11 adversely affected may commence a civil action on the person's
12 own behalf against:

13 (1) any other person, including the state of
14 New Mexico, a political subdivision thereof or any officer or
15 agency of either, charging a violation of the Water Quality Act
16 or a rule, permit or order issued pursuant to that act; or

17 (2) the commission or a constituent agency
18 alleging a failure to perform any nondiscretionary act or duty
19 required by the Water Quality Act or a rule promulgated
20 pursuant to that act.

21 B. Venue for the action shall be determined in
22 accordance with the venue provisions of the Water Quality Act
23 applicable to the specific violation alleged.

24 C. No action may be commenced under Subsection A of
25 this section:

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1 (1) unless the plaintiff has given sixty days'
2 written notice of the violation to the commission, the
3 appropriate constituent agency, the attorney general and any
4 alleged violator of the act, rule, permit or order; or

5 (2) if a constituent agency has commenced and
6 is diligently prosecuting a civil action in a court of this
7 state or an administrative enforcement proceeding to require
8 compliance with the act, rule, permit or order. In an
9 administrative or court action commenced by a constituent
10 agency, a person whose interest may be adversely affected and
11 who has provided notice pursuant to Paragraph (1) of this
12 subsection prior to the initiation of the action may intervene
13 as a matter of right.

14 D. In an action under this section, if the
15 constituent agency is not a party, it may intervene as a matter
16 of right at any time in the proceeding. A judgment in an
17 action under this section in which a constituent agency is not
18 a party shall have no binding effect on the agency.

19 E. Whenever any action is brought under this
20 section, the plaintiff shall serve a copy of the complaint on
21 the commission and the appropriate constituent agency. No
22 stipulated judgment shall be entered in an action brought under
23 this section if the appropriate constituent agency is not a
24 party, unless the judgment is entered at least forty-five days
25 after the receipt of a copy of the proposed stipulated judgment

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1 by the agency, during which time the agency may submit comments
2 on the proposed stipulated judgment to the court or may
3 intervene in the action as a matter of right.

4 F. In any action brought pursuant to this section,
5 the court may:

6 (1) issue an injunction against violation of
7 the Water Quality Act or any rule, permit or order that the
8 court finds to have been violated;

9 (2) issue an order to the commission or
10 appropriate constituent agency compelling performance of a
11 nondiscretionary act or duty required by the Water Quality Act
12 or a rule promulgated pursuant to that act;

13 (3) assess appropriate civil penalties, if
14 authorized by a specific provision of the Water Quality Act for
15 the violation; and

16 (4) award costs of litigation, including
17 reasonable attorney and expert witness fees, to the prevailing
18 party when the court determines the award is appropriate.

19 G. Except as otherwise provided in Subsection H of
20 this section, any civil penalties assessed under Paragraph (3)
21 of Subsection F of this section shall be deposited in the same
22 fund in which they would be deposited if the action had been
23 brought by the appropriate constituent agency.

24 H. Notwithstanding the provisions of Subsection G
25 of this section, the court shall have discretion to order that

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1 any civil penalties assessed, not to exceed twenty-five
2 thousand dollars (\$25,000), be used in beneficial mitigation
3 projects that are consistent with the Water Quality Act or the
4 rule, permit or order alleged to have been violated and that
5 enhance the public health or the environment. Before
6 exercising this discretion, the court shall obtain written
7 comments on beneficial mitigation projects from the appropriate
8 constituent agency.

9 I. Nothing in this section shall restrict the right
10 of any person or class of persons to any relief authorized by
11 any other law."

12 Section 4. EFFECTIVE DATE.--The effective date of the
13 provisions of this act is July 1, 2010.