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FISCAL IMPACT REPORT

ORIGINAL DATE 02/24/11

SPONSOR Egolf LAST UPDATED _____ HB 177

SHORT TITLE Recovery of Damages for Injury to Resources SB _____

ANALYST Hoffmann

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB84 and HB157.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)

The Attorney General's Office provides the following disclaimer: "This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion letter. This is a staff analysis in response to the agency's, committee's or legislator's request."

Energy, Minerals and Natural Resources Department (EMNRD)

Office of the Resources Trustee (ONRT)

SUMMARY

Synopsis of Bill

House Bill 177 would amend the Natural Resources Trustee Act (Act) to expand the scope of the Act by authorizing the Natural Resources Trustee to pursue actions on behalf of the state to recover damages for injury to publicly owned natural resources resulting from the release of injurious substances into the environment that are not in compliance with a license or permit issued by the state or federal government that is in effect at the time of the release. Currently the Act authorizes the Natural Resources Trustee to take all actions necessary to carry out the responsibilities of the Natural Resources Trustee as provided in the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the Federal Water Pollution Control Act, and any other applicable federal laws. House Bill 177 includes as natural resources land, minerals, soils, geological resources, air, surface and ground waters, drinking water

supplies, aquifers, drainages, arroyos, biota, fish, wildlife, and supporting habitats, and vegetation not owned by a private person.

Damages are allowed for injury to natural resources including destruction or loss of natural resources, interim losses before restoration, residual losses remaining after restoration, and reasonable costs of assessing the injury. Restoration is defined as actions necessary to return an injured natural resource to its baseline condition. The bill also repeals a provision of existing law referring to compensation for natural resource injury obtained under federal law. The bill removes language that required the Natural Resources Trustee to restore, replace, or acquire natural resources in an area where the resources had been destroyed or lost and it allows the Natural Resources Trustee to undertake restoration action outside that area if action within the area would be infeasible or ineffective.

The bill provides the Natural Resources Trustee with rulemaking authority and provides specific direction pertaining to which substances may be classified as injurious to natural resources, including substances already identified in state or federal environmental legislation. The bill also refers to oil in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes, as well as toxic wastes that may be hazardous to human health as potentially injurious.

The AGO states the bill is modeled closely after the federal Comprehensive Environmental Response Compensation Liability Act (“CERCLA” or “Superfund”).

FISCAL IMPLICATIONS

Money recovered by the Natural Resources Trustee will be deposited in the Natural Resources Trustee Fund.

The Attorney General is charged with providing legal representation to the ONRT. The office is concerned that HB177 may increase the volume and hence the expense of natural resource damages claims prosecuted by the Attorney General’s Office. It is unlikely that litigation expenses could be recovered from responsible parties.

SIGNIFICANT ISSUES

House Bill 177 states that unless the release of the injurious substance was in compliance with a government issued permit, damages for an intentional or unintentional release are declared to be the liability of the owner or operator of a facility at the time of the release; any person who previously owned or operated the facility during a time in which the injurious substance was released, placed, disposed, or treated; and any person who arranged for release, placement, transport, disposal, or treatment of the substance. The bill defines facility as a site or area where an injurious substance is deposited or disposed of, including buildings, pipelines, treatment works, wells, pits, ponds, ditches, landfills, vehicles, and storage containers. Given that liability applies regardless of whether the release was intentional or unintentional, and House Bill 177 does not provide that the owner or operator of a facility must be aware that an injurious substance is located on the property, a government entity, such as the State Parks Division or the State Land Office, could own or acquire property where an injurious substance has been buried and is not known to the current owner. The government entity could then potentially be held liable for the unknowing release of the injurious substance.

The AGO added the following comments.

As noted above, HB177 creates a state law cause of action that largely mirrors existing federal law. There are two very important justifications for creating state law authority for natural resource damages claims:

1. Under federal law, ambiguous regulatory language and narrow language in the case law have created confusion about liability for injury to groundwater. Establishing a state law cause of action will create more certainty and allow fair recovery for injuries to New Mexico's groundwater.

2. Federal law establishes a cumbersome process for the resolution of natural resource damages claims. Under this federal law process, claims can take many years to resolve. The experience in other states has shown that a streamlined state-law process dramatically increases the efficient resolution of natural resource damages claims.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB 177 conflicts with HB 84 and HB 157 which amend portions of the Natural Resource Trustee statutes to effect a merger of the Office of the Natural Resource Trustee into a large agency that includes the Environment Department. .

The AGO also notes that HB 84 and HB 157 provide that the functions of the ONRT will be performed within a newly formed Natural Resources and Environment Department. However, the provision of a state law cause of action for natural resource damages claims does not conflict with either bill.

TECHNICAL ISSUES

The AGO calls attention to the following points.

1. Section 1 of HB 177, stating legislative findings, states in Paragraph A, that the legislature finds that “the natural resources of the state of New Mexico that are not owned by a private person are those assets of the state that are held in trust by the state for the benefit of the public[.]” Additionally, natural resources are defined to include only listed resources “not owned by a private person.” The bill should make clear that holding various types of rights regarding natural resources does not constitute ownership of the resource itself. For example, the holding of water rights by a private person does not constitute ownership of water.

2. In the finding quoted in the preceding paragraph, the use of the word, “those,” (line 22 of page 1 of HB 177) is unclear and seems to serve no purpose.

3. Section 4B of HB 177 provides that in an action brought by the trustee under the Natural Resources Trustee Act, venue is to be in the district court for Santa Fe County or in the district court for the county in which damages were sustained.” However, due to the possible migration of injurious substances, damages may be sustained in more than one county.

OTHER SUBSTANTIVE ISSUES

The AGO states that in addition to creating state law authority for pursuit of natural resource damages claims, HB 177 gives the Natural Resources Trustee limited authority to promulgate rules to govern such claims and provides for notice, hearing, and appeal rights. The rulemaking authority is limited to defining “injurious substances,” defining the methods for proof of injury and assessment of damages, and setting forth the procedures for pursuing claims. This rulemaking authority tracks closely with the rulemaking authority granted to and exercised by the Department of Interior under CERCLA. The authority to define “injurious substances” is generally limited to substances that are already designated as hazardous under specific existing state or federal laws.

The ONRT adds the provisions in HB 177 neither add nor detract from state environmental statutes requiring cleanup of polluted sites, permitting, or enforcement of standards. Cleanup of sites proceeds independently of recovery of resource damages. The ONRT is the only State agency authorized to assess natural resource injury, collect damage settlements and required to use settlements for restoration of natural resources.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The EMNRD and ONRT state the Natural Resources Trustee will continue to seek compensation for damage pursuant to the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the Federal Water Pollution Control Act, and any other applicable federal laws.

JCH/bym