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FISCAL IMPACT REPORT

ORIGINAL DATE 01/25/13

SPONSOR Kane LAST UPDATED _____ HB 259

SHORT TITLE Recover Damages for Natural Resource Injuries SB _____

ANALYST McCoy

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY13	FY14		
NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Environment Department (NMED)/Office of Natural Resources Trustee (ONRT)
Attorney General's Office (AGO)

SUMMARY

Synopsis of Bill

House Bill 259 (HB259) would amend the Natural Resources Trustee 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 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. HB 259 defines 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. In HB 259 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 and restoration is defined as actions necessary to return an injured natural resource to its baseline condition.

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.

HB 259 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. HB 259 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.

FISCAL IMPLICATIONS

Funds recovered by the Natural Resources Trustee will still be deposited in the Natural Resources Trustee Fund. According to the Attorney General’s Office (AGO), the Attorney General is charged with providing legal representation to the Office of Natural Resources Trustee (ONRT) in pursuit of natural resource damages, so HB 259 may increase the volume of natural resource damages claims prosecuted by the AGO. There may be an additional cost for the NMED and ONRT to develop and promulgate new rules, but that cost is minimal.

SIGNIFICANT ISSUES

Currently the Natural Resources Trustee Act (Section 75, Article 7 NMSA 1978) 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. Both the AGO and the NMED note HB 259 is modeled closely after the federal Comprehensive Environmental Response Compensation Liability Act (CERCLA).

HB 259 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 NMED points out, HB 259 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.

The NMED notes the rulemaking authority created in HB 259 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 NMED also states the provisions in HB 259 neither add nor detract from state environmental statutes requiring cleanup of polluted sites, permitting, or enforcement of standards. The NMED notes, 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.

According to the NMED, HB 259 does not make clear that holding various types of rights regarding natural resources does not constitute ownership of the resource itself and ownership does not necessarily constitute trusteeship. The NMED notes, under current law the state is regarded as trustee for natural resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the state.

According to the AGO, there are two justifications for creating state law authority for natural resource damages claims:

- Under federal law, ambiguous regulatory language and narrow language in the case law have created confusion about liability for injury to ground water. Establishing a state law cause of action will create more certainty and allow fair recovery for injuries to New Mexico's ground-water.
- 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 can significantly increase the efficient resolution of natural resource damages claims.

TECHNICAL ISSUES

The AGO identified the following issues with HB 259:

1. HB 259 does not address whether it covers past releases or only prospective releases. Past releases may cause continuing and present injury to natural resources. Legislation is presumed to be prospective, unless it is clear that the legislation is to be applied retroactively. If the intent of the legislation is to apply to past releases and/or past releases with continuing and present injury to natural resources, then the bill should state so expressly.
2. In the finding quoted in the preceding paragraph, the use of the word, "those," (page 1, line 22) is unclear and seems to serve no purpose.
3. Section 4.B 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. Therefore, the reference to "the county" should be replaced with "a county."
4. In Section 7.B, the provisions regarding publication of notice of proposed rulemaking, provide for notice to be published in the New Mexico Register as well as newspapers of general circulation in the area affected.
5. Section 7.E's reference to the "transcript" of the hearing should refer to the "record" of the hearing, which would include the transcript, all exhibits, all pleadings, and all other documents and materials from the hearing.
6. Section 2.B of HB 259 defines "natural resources" as listed resources "not owned by a private person." The bill should make clear that holding a right to use or extract 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.
7. Section 9, amending Section 75-7-3, lists substances the ONRT may identify as "injurious substances" by rule. This list is overly broad and duplicative. The Attorney General's Office would be glad to work with legislative staff to refine the list.

8. Appeal of trustee final rules is to the district court under Section 7.E. Most appeals relating to environmental statutes are to the Court of Appeals because of the complicated nature of the subject matter.

MTM/bm