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FISCAL IMPACT REPORT

ORIGINAL DATE 02/10/13
 SPONSOR Louis LAST UPDATED 03/05/13 HB 429/aHENRC/aHJC
 SHORT TITLE Environmental Private Right of Action SB _____
 ANALYST Weber

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		\$300.0	\$300.0	\$600.0	Recurring	General Fund or Other State Funds

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Energy, Minerals and Natural Resources Department (EMNRD)
 New Mexico Environment Department (NMED)

SUMMARY

Synopsis of HJC Amendment

The House Judiciary Committee amendment to House Bill 429 strikes HENRC amendments 3, 8 and 13. This leaves the court the option of awarding reasonable costs of litigation.

Synopsis of HENRC Amendment

The House Energy and Natural Resources Committee amendment to House Bill 429 does the following:

1. On page 3, line 8, strike ", a political subdivision thereof".
2. On page 3, line 9, strike "either" and insert in lieu thereof "the state, but not including any political subdivision of the state".
3. On page 5, line 15, strike "may" and insert in lieu thereof "shall" and after "award", insert "the prevailing party".
4. On page 5, line 17, after the first "the", insert "state, the".
5. On page 5, line 20, after "the", insert "state,".
6. On page 6, line 22, strike ", a political subdivision thereof".

7. On page 6, line 23, strike "either" and insert in lieu thereof "the state, but not including any political subdivision of the state other than an administrative agency established by a local authority pursuant to Paragraph (2) of Subsection A of Section 74-2-4 NMSA 1978".
8. On page 8, line 12, strike "may" and insert in lieu thereof "shall" and after "award", insert "the prevailing party".
9. On page 8, line 14, after the first "the", insert "state, the".
10. On page 8, line 15, after "the", insert "state, the".
11. On page 10, line 3, strike ", a political subdivision thereof".
12. On page 10, line 4, strike "either" and insert in lieu thereof "the state, but not including any political subdivision of the state".
13. On page 11, line 19, strike "may" and insert in lieu thereof "shall" and after "award", insert "the prevailing party".
14. On page 11, line 21, after "the", insert "state, the".
15. On page 11, line 23, after "the", insert "state,".

A political subdivision is removed as a possible defendant for an injured party.

In addition, the amendment makes a variety of language changes that do not change the purpose of the original bill.

Synopsis of Original Bill

House Bill 429 (HB 429) amends the Oil and Gas Act and adds new material to the Environment Improvement Act and Water Quality Act to create a private right of action as noted below:

a person who is injured in fact, economically or otherwise, or who is imminently threatened with injury, economically or otherwise, 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 agency of either, charging a violation of the noted Acts or a rule, permit or order issued pursuant to that act; or
- (2) the appropriate agency or division alleging a failure to perform any substantive and nondiscretionary act or duty required by a provision of the Act or a rule promulgated pursuant to that act.

No action may be commenced under Subsection B of this section:

- (1) unless the plaintiff has given sixty days' written notice of the violation to the appropriate parties, the attorney general and any alleged violator of the Act or a rule, permit or order. However, where the violation of the statute, rule, permit or order complained of constitutes an immediate threat to the health or safety of the plaintiff or would immediately and irreversibly impair a legal interest of the plaintiff, an action under this section may be brought immediately after notification of the proper parties; or
- (2) if the appropriate party has commenced and is diligently prosecuting a civil action in a court of this state or an administrative enforcement proceeding to require compliance with the Act or a rule, permit or order. In an administrative or court action commenced by the commission or division, a person who has standing pursuant to Subsection B of this

section and who has provided notice pursuant to Paragraph (2) of this subsection prior to the initiation of the action may intervene as a matter of right.

Whenever any action is brought, the plaintiff shall serve a copy of the complaint on the appropriate party. No stipulated judgment shall be entered in an action brought under this section unless the judgment is entered at least forty-five days after the receipt of a copy of the proposed stipulated judgment, during which time comments may be submitted on the proposed stipulated judgment to the court or may intervene as a matter of right. In any action brought the court may award reasonable costs of litigation, including expert costs and attorney fees, although some exceptions are noted.

Except as otherwise provided, any civil penalties assessed shall be deposited in the same fund in which they would have been deposited if the action had been brought by offending party.

The court shall have discretion to order that civil penalties \$25,000.

FISCAL IMPLICATIONS

It is impossible to know with certainty the costs these new provisions will generate but Oil Conservation Division estimates that it will need one additional attorney as an FTE to respond to and defend suits brought against it and its officers and employees under the private action provisions that the bill inserts in the Oil and Gas Act and in the Water Quality Act, of which it is a constituent agency. Also, the attorney will have to be provided with a travel budget since the Oil and Gas Act provision allows suit in venues other than Santa Fe County. Furthermore, the State will incur deposition costs. It is estimated that at least the following additional operations budget will be required:

One additional attorney (salary and benefits)	\$101,804
Travel, deposition and miscellaneous costs	<u>50,000</u>
	\$151,804

This estimate is extrapolated onto the other agency directly involved to produce the \$300,000 annual expense shown in the table above. The monies will come from the general fund or other state funds depending on availability and specific agency or division involved in the civil action. Depending on the complexity of the cases, there could be considerable additional expense particularly for expert witnesses. These are not included since there is no way to predict in advance the frequency of such requirements.

SIGNIFICANT ISSUES

The EMNRD offers the following information:

HB 429 creates a broad group of potential plaintiffs by allowing any person who is injured or threatened with injury, “economically or otherwise”, to sue. This vague standard may allow parties with various allegations of non-economic injuries to sue operators or the State for damages or an injunction. Compare this standard with the recent Court of Appeals decision where the Court rejected an appeal by an industry group because they had failed to show that they were actually “adversely affected” by a rule adopted under the Water Quality Act. *NM Cattle Growers Assoc. v. NM Water Quality Control Comm’n*, No. 31,191 (N.M. Ct. App. Dec. 26, 2012).

The NMED offers the following details;

An agency usually has discretion whether or not to enforce a law. This discretion is typically exercised in service to important public principles. Among other things, an agency may weigh:

- 1) Impacts to the public generally in contrast to impacts to a single individual;
- 2) The importance of a particular legal principal to be established;
- 3) The strength of the evidence of the violation;
- 4) The likelihood of success of further voluntary efforts to achieve compliance;
- 5) The clarity of the law or rule to be enforced based on the facts and circumstances presented in each case; and,
- 6) Fair and consistent treatment of its regulated community for similar conduct.

An agency's discretion becomes even more important when budgets are constrained by economic difficulties, as they are now.

HB 429 allows a person who has been injured to commence a civil action charging a violation of any statute, rule or permit which is delegated to the Department to enforce, including orders of the Environmental Improvement Board ("Board"), or orders of the Secretary of the Department. This civil action could be brought against the state of New Mexico, any of its political subdivisions, or any officer or agency. The person is also authorized to bring a civil action against the Department or the Board alleging a failure to perform any substantive and nondiscretionary duty required by law which is delegated to the Department or Board. The NMED has several concerns about HB 429.

The authorization for civil suits under HB 429 is very broad. To illustrate, in order to bring a civil action on a person's own behalf, the person must be "injured in fact, either economically or, otherwise, imminently threatened with injury." There is no requirement that the person allege, much less prove, that the injury suffered is caused by the any violation of a Department law or rule.

To the extent that it could be argued that the need to prove causation is implied, there are areas of environmental law, such as toxic torts, where proof of causation can be extremely complex. Just litigating to establish causation can be very lengthy and burdensome, often devolving into a war of experts. HB 429 makes no appropriation to cover such costs which could be substantial.

Civil actions could be brought by a business competitor, alleging that the Department's failure to enforce a particular law or rule against another competitor led to economic damages due to an unfair competitive advantage of one regulated business over another. The violation need not be significant and the litigation need not vindicate the public interest. It is not true to say that all enforcement of the law vindicates the public interest. If every violator of a speed limit was prosecuted but murders went unpunished, it would not vindicate the public interest. Similarly in HB 429, there is no provision to limit the use of this private right of action for litigation that has nothing to do with protecting the public interest.

The Department may not enforce a particular regulatory provision because experience has shown that the provision is unclear to regulatees, there is a legal problem with the provision, or clarification is needed in the form of guidance or further rulemaking. Litigation through a private right of action could result in interpretations of such problematic provisions which create

more problems than they solve and may necessitate appeals, further distracting the Department from carrying out its statutory mission.

The cost of providing a defense for public entities against these civil actions is not addressed by HB 429; these costs could be substantial and will, in one way or another, be borne by the public. The litigation proposed to be authorized by HB 429 would draw resources away from other Department activities and could affect the ability of the Department to fulfill its statutory duties and federal grant requirements.

The civil actions authorized by HB 429 are unnecessary for several reasons. First, if someone is injured by conduct which violates a law or rule, a tort action for negligence per se is already available without any need to file a civil action against the Department or public officials. NMRA 13-1421. In such cases, which already occur, Department employees are periodically asked to testify about their inspections, reports and findings. It is not necessary to add a civil action against the Department to allow an injured person to recover for his or her injury.

Second, HB 429 authorizes a civil action alleging a “failure to perform any substantive and nondiscretionary act or duty required by an act or rule.” Citizens can already bring mandamus actions against public officials under Section 44-2-1 to -14 to require enforcement of legally required duties. It is not necessary to authorize a private right of action to achieve enforcement of nondiscretionary duties.

Third, in many cases, the Department enforces laws pursuant to a delegation of authority from a federal agency (e.g., the United States Environmental Protection Agency). If the Department fails to enforce, the federal agency retains the right to enforce in place of the Department and could withdraw federal funds for failure to perform. Thus, there is already a significant incentive for the Department to fulfill those obligations without the need for a private right of action.

Finally, persons who are dissatisfied with the Department’s action in any particular case can and do bring such concerns to the Secretary or the Governor. Sometimes concerns are brought by other elected officials on behalf of their constituents. Such concerns are taken seriously and are a far more prompt and cost-effective method of addressing allegations of failure to enforce the law than litigation will ever be.

MW/svb:blm