

1 SENATE BILL 677

2 **52ND LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2015**

3 INTRODUCED BY

4 Cisco McSorley

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10 AN ACT

11 RELATING TO THE ENVIRONMENT; PROVIDING FOR A PRIVATE RIGHT OF
12 ACTION TO ENFORCE THE PROVISIONS OF CERTAIN ACTS; PROVIDING FOR
13 PROCEDURES; ENACTING NEW SECTIONS OF THE ENVIRONMENTAL
14 IMPROVEMENT ACT AND THE WATER QUALITY ACT; AMENDING AND
15 ENACTING SECTIONS OF THE NMSA 1978.

16
17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

18 SECTION 1. Section 70-2-29 NMSA 1978 (being Laws 1935,
19 Chapter 72, Section 20, as amended) is amended to read:

20 "70-2-29. ACTIONS FOR DAMAGES--INSTITUTION OF ACTIONS FOR
21 INJUNCTIONS BY PRIVATE PARTIES.--

22 A. Nothing [~~in this act~~] contained or authorized in
23 the Oil and Gas Act and no suit by or against the commission or
24 the oil conservation division of the energy, minerals and
25 natural resources department and no penalties imposed or

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1 claimed against any person for violating any statute of this
2 state with respect to conservation of oil and gas, or any
3 provision of [~~this~~] the Oil and Gas Act or any rule, regulation
4 or order issued [~~thereunder~~] pursuant to that act, shall impair
5 or abridge or delay any cause of action for damages [~~which~~]
6 that any person may have or assert against any person violating
7 any statute of this state with respect to conservation of oil
8 and gas or any provision of [~~this~~] the Oil and Gas Act or any
9 rule, regulation or order issued [~~thereunder~~] pursuant to that
10 act. Any person so damaged by the violation may sue for and
11 recover such damages as [~~he~~] the person may be entitled to
12 receive. [~~In the event the division should fail to bring suit~~
13 ~~to enjoin any actual or threatened violation of any statute of~~
14 ~~this state with respect to the conservation of oil and gas, or~~
15 ~~of any provisions of this act, or of any rule, regulation or~~
16 ~~order made thereunder, then any person or party in interest~~
17 ~~adversely affected by such violation, and who has notified the~~
18 ~~division in writing of such violation or threat thereof and has~~
19 ~~requested the division to sue, may, to prevent any or further~~
20 ~~violation, bring suit for that purpose in the district court of~~
21 ~~any county in which the division could have brought suit. If,~~
22 ~~in such suit, the court holds that injunctive relief should be~~
23 ~~granted, then the division shall be made a party and shall be~~
24 ~~substituted for the person who brought the suit, and the~~
25 ~~injunction shall be issued as if the division had at all times~~

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1 ~~been the complaining party.]~~

2 B. Except as provided in Subsection C of this
3 section, a person who is injured in fact, economically or
4 otherwise, or who is imminently threatened with injury,
5 economically or otherwise, may commence a civil action on the
6 person's own behalf against:

7 (1) any other person, including the state of New
8 Mexico, or any officer or agency of the state, but not
9 including a political subdivision of the state, charging a
10 violation of the Oil and Gas Act or a rule, permit or order
11 issued pursuant to that act; or

12 (2) the commission or the oil conservation
13 division of the energy, minerals and natural resources
14 department alleging a failure to perform any substantive and
15 nondiscretionary act or duty required by a provision of the Oil
16 and Gas Act or a rule promulgated pursuant to that act.

17 C. No action may be commenced under Subsection B of
18 this section:

19 (1) unless the alleged violation or alleged
20 failure to perform a substantive and nondiscretionary act or
21 duty relates to a statute, rule, permit or order primarily
22 concerned with environmental protection, including statutes,
23 rules, permits or orders concerned with:

24 (a) pits, closed-loop systems, below-grade
25 tanks and sumps;

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- 1 (b) plugging and abandonment of wells;
- 2 (c) remediation;
- 3 (d) produced water;
- 4 (e) waste disposal; or
- 5 (f) surface waste management facilities;

6 (2) unless the plaintiff has given sixty days'
7 written notice of the violation to the commission, the oil
8 conservation division of the energy, minerals and natural
9 resources department, the attorney general and any alleged
10 violator of the Oil and Gas Act or a rule, permit or order.
11 However, where the violation of the statute, rule, permit or
12 order complained of constitutes an immediate threat to the
13 health or safety of the plaintiff or would immediately and
14 irreversibly impair a legal interest of the plaintiff, an
15 action under this section may be brought immediately after
16 notification of the proper parties; or

17 (3) if the commission or division has commenced
18 and is diligently prosecuting a civil action in a court of this
19 state or an administrative enforcement proceeding to require
20 compliance with the Oil and Gas Act or a rule, permit or order.
21 In an administrative or court action commenced by the
22 commission or division, a person who has standing pursuant to
23 Subsection B of this section and who has provided notice
24 pursuant to Paragraph (2) of this subsection prior to the
25 initiation of the action may intervene as a matter of right.

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1 D. Whenever any action is brought under this section,
2 the plaintiff shall serve a copy of the complaint on the
3 commission and the oil conservation division of the energy,
4 minerals and natural resources department. No stipulated
5 judgment shall be entered in an action brought under this
6 section if the commission or division is not a party, unless
7 the judgment is entered at least forty-five days after the
8 receipt of a copy of the proposed stipulated judgment by the
9 commission or division, during which time the commission or
10 division may submit comments on the proposed stipulated
11 judgment to the court or may intervene as a matter of right.
12 The plaintiff in the action shall be responsible for providing
13 the proposed stipulated judgment to the commission and the
14 division.

15 E. In any action brought pursuant to this section,
16 the court may award the prevailing party reasonable costs of
17 litigation, including expert costs and attorney fees, except
18 that, in an action against the state, the commission or the oil
19 conservation division of the energy, minerals and natural
20 resources department, no costs of litigation, expert costs or
21 attorney fees shall be awarded against the state, commission or
22 division.

23 F. Except as otherwise provided in Subsection G of
24 this section, any civil penalties assessed shall be deposited
25 in the same fund in which they would have been deposited if the

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1 action had been brought by the commission or the oil
2 conservation division of the energy, minerals and natural
3 resources department.

4 G. Notwithstanding the provisions of Subsection E of
5 this section, the court shall have discretion to order that any
6 civil penalties assessed, not to exceed twenty-five thousand
7 dollars (\$25,000), be used in beneficial mitigation projects
8 that are consistent with the Oil and Gas Act or the rule,
9 permit or order alleged to have been violated and that enhance
10 the public health or the environment. Before exercising this
11 discretion, the court shall obtain written comments on
12 beneficial mitigation projects from the commission or the oil
13 conservation division of the energy, minerals and natural
14 resources department."

15 SECTION 2. A new section of the Environmental Improvement
16 Act is enacted to read:

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

18 A. Except as provided in Subsection B of this
19 section, a person who is injured in fact, economically or
20 otherwise, or who is imminently threatened with injury,
21 economically or otherwise, may commence a civil action on the
22 person's own behalf against:

23 (1) any other person, including the state of New
24 Mexico, or any officer or agency of the state, but not
25 including a political subdivision of the state other than an

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1 administrative agency established by local authority pursuant
2 to Paragraph (2) of Subsection A of Section 74-2-4 NMSA 1978,
3 charging a violation of any statute, rule or permit, the
4 enforcement of which is delegated to the department or any
5 order of the board or the secretary issued pursuant to a
6 statute or rule; or

7 (2) the department or the board alleging a
8 failure to perform any substantive and nondiscretionary act or
9 duty required by an act or rule the enforcement of which is
10 delegated to the department or board.

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

13 (1) unless the plaintiff has given sixty days'
14 written notice of the violation to the secretary, the attorney
15 general and any alleged violator of the statute, rule, permit
16 or order. However, where the violation of the statute, rule,
17 permit or order complained of constitutes an immediate threat
18 to the health or safety of the plaintiff or would immediately
19 and irreversibly impair a legal interest of the plaintiff, an
20 action under this section may be brought immediately after
21 notification of the proper parties; or

22 (2) if the department has commenced and is
23 diligently prosecuting a civil action in a court of this state
24 or an administrative enforcement proceeding to require
25 compliance with the Environmental Improvement Act or a rule,

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1 permit or order. In an administrative or court action
2 commenced by the department, a person who has standing pursuant
3 to Paragraph (1) of this subsection prior to the initiation of
4 the action may intervene as a matter of right.

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

16 D. In any action brought pursuant to this section,
17 the court may award to the prevailing party reasonable costs of
18 litigation, including expert costs and attorney fees, except
19 that, in an action against the state, the department or the
20 board, no costs of litigation, expert costs or attorney fees
21 shall be awarded against the state, the department or the
22 board.

23 E. Except as otherwise provided in Subsection F of
24 this section, any civil penalties assessed shall be deposited
25 in the same fund in which they would have been deposited if the

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1 action had been brought by the department or board.

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

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

18 (1) "board" means the local board created by the
19 local authority;

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

23 (3) "secretary" means the director or
24 administrative head of the local agency."

25 SECTION 3. A new section of the Water Quality Act is

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1 enacted to read:

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

3 A. Except as provided in Subsection B of this
4 section, a person who is injured in fact, economically or
5 otherwise, or who is imminently threatened with injury,
6 economically or otherwise, may commence a civil action on the
7 person's own behalf against:

8 (1) any other person, including the state of New
9 Mexico, or any officer or agency of the state, but not
10 including a political subdivision of the state, charging a
11 violation of the Water Quality Act or a rule, permit or order
12 issued pursuant to that act; or

13 (2) the commission or a constituent agency
14 alleging a failure to perform any substantive and
15 nondiscretionary act or duty required by the Water Quality Act
16 or a rule, permit or order promulgated pursuant to that act.

17 B. No action may be commenced under Subsection A of
18 this section:

19 (1) unless the plaintiff has given sixty days'
20 written notice of the violation to the commission, the
21 appropriate constituent agency, the attorney general and any
22 alleged violator of the statute, rule, permit or order.

23 However, where the violation of the statute, rule, permit or
24 order complained of constitutes an immediate threat to the
25 health or safety of the plaintiff or would immediately and

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1 irreversibly impair a legal interest of the plaintiff, an
2 action under this section may be brought immediately after
3 notification of the proper parties; or

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

13 C. Whenever any action is brought under this section,
14 the plaintiff shall serve a copy of the complaint on the
15 commission and the appropriate constituent agency. No
16 stipulated judgment shall be entered in an action brought under
17 this section if the appropriate constituent agency is not a
18 party, unless the judgment is entered at least forty-five days
19 after the receipt of a copy of the proposed stipulated judgment
20 by the agency, during which time the agency may submit comments
21 on the proposed stipulated judgment to the court or may
22 intervene in the action as a matter of right. The plaintiff in
23 the action shall be responsible for providing the proposed
24 stipulated judgment to the agency.

25 D. In any action brought pursuant to this section,

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1 the court may award to the prevailing party reasonable costs of
2 litigation, including expert costs and attorney fees, except
3 that, in an action against the state, the commission or a
4 constituent agency, no costs of litigation, expert costs or
5 attorney fees shall be awarded against the state, commission or
6 constituent agency.

7 E. Except as otherwise provided in Subsection F of
8 this section, any civil penalties assessed shall be deposited
9 in the same fund in which they would have been deposited if the
10 action had been brought by the appropriate constituent agency.

11 F. Notwithstanding the provisions of Subsection E of
12 this section, the court shall have discretion to order that any
13 civil penalties assessed, not to exceed twenty-five thousand
14 dollars (\$25,000), be used in beneficial mitigation projects
15 that are consistent with the Water Quality Act or the rule,
16 permit or order alleged to have been violated and that enhance
17 the public health or the environment. Before exercising this
18 discretion, the court shall obtain written comments on
19 beneficial mitigation projects from the appropriate constituent
20 agency."

21 SECTION 4. EFFECTIVE DATE.--The effective date of the
22 provisions of this act is July 1, 2015.