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FISCAL IMPACT REPORT

SPONSOR McSorley ORIGINAL DATE 3/4/15
 LAST UPDATED _____ HB _____

SHORT TITLE Private Right of Action SB 677

ANALYST Armstrong

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Unknown	Unknown	Unknown	Recurring	General Fund and Other State Funds

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General’s Office (AGO)

New Mexico Environment Department (NMED)

Administrative Office of the Courts (AOC)

Energy, Minerals and Natural Resources Department (EMNRD)

SUMMARY

Synopsis of Bill

Senate Bill 677 amends the Oil and Gas Act’s provision regarding a private right of action for injunctive relief and establishes a private right of action under both the Environmental Improvement Act and Water Quality Act. The bill provides that a private action may not be brought if the applicable state agency is prosecuting a civil or administrative action, although a person with standing under SB 677 may intervene in any such action as a matter of right.

Under SB 677, if a person is injured or threatened with injury there is a private right of action under these three acts against (1) any person, including the state of New Mexico, or any officer or agency of the state, but not including a political subdivision of the state, based violation of the applicable statute or rule or permit thereunder and (2) the applicable state agency or board for failure “to perform any substantive and nondiscretionary act or duty” under the applicable act or rules thereunder. The bill provides that actions brought under the Air Quality Control Act may also be brought against local agencies established to administer and perform NMED’s duties under the act. The bill provides that actions under the Oil and Gas Act must stem from violations concerned with (a) pits, closed-loop systems, below-grade tanks and sumps; (b) plugging and

abandonment of wells; (c) remediation; (d) produced water; (e) waste disposal; or (f) surface waste management facilities.

The plaintiff must give 60 days' notice of the suit to the Attorney General and alleged violator except if the violation constitutes an immediate health or safety threat or would immediately and irreversibly impair a legal interest of the plaintiff. A plaintiff must serve the applicable agency with a complaint, and a stipulated judgment may not be entered if the agency is not a party unless it is entered at least 45 days after the proposed stipulated judgment by the agency. Reasonable costs, including attorney fees and expert costs, may be awarded to a prevailing plaintiff. Finally, the Court has discretion to assess civil penalties up to \$25,000 to be used in "beneficial mitigation projects" that are consistent with the applicable act, rule, permit or order violated.

FISCAL IMPLICATIONS

EMNRD, NMED, and AGO would be required to defend any lawsuits brought against state agencies under SB 677. This would require an underdetermined amount of staff resources, and could require the hiring of additional staff. The bill does not provide an appropriation to cover such costs, meaning they would be need to be absorbed by agency operating budgets.

NMED analysis raises the concern that the agency may be unable to pay the upfront costs of defense for some of these actions without compromising its statutory missions. Much of the agency's oversight programs receive significant federal revenues which have limitations on how they may be spent. Specifically, federal funds cannot be used to pay for a defense of state law.

SIGNIFICANT ISSUES

The major issue is whether private rights of action will facilitate enforcement of environmental laws, or will interfere with such enforcement by burdening EMNRD, NMED, and other agencies responsible for securing environmental compliance with the necessity of responding to private suits. SB 677 also 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. NMED analysis notes that private citizens are already permitted to file civil actions to abate environmental nuisances that create harm to public health, safety, and welfare.

There is a concern among agencies that the bill would result in unnecessary litigation of violations that could otherwise be resolved through defined administrative regulation due to the effectiveness of seeking voluntary compliance rather than the agency issuing a compliance order or filing suit. According to NMED, a simple notice of violation resolves the problem (avoiding or reducing litigation) and results in more prompt compliance in a significant number of cases. However, the bill does require plaintiff's to provide notice of the alleged violation 60 days before filing suit unless the violation constitutes an immediate health or safety threat or would immediately and irreversibly impair a legal interest of the plaintiff. Still, determining what claims fall within this exemption would likely require substantial litigation.

Currently, under the Oil and Gas Act, any person may bring suit to enjoin any actual or threatened violation if EMNRD's Oil Conservation Division (OCD) fails to do so after being

notified of such violation or threat. If the court grants injunctive relief, then OCD is substituted for the plaintiff as if it had originally brought the suit. However, under SB 677, these provisions are removed and replaced with those described above, making the private right of action consistent under that act, the Environmental Improvement Act, and the Water Quality Act.

SB 677 provides courts with discretion to order that not more than \$25 thousand of any civil penalties assessed be used in beneficial mitigation projects, and requires the court, before exercising this discretion, to obtain written comments on beneficial mitigation projects from the appropriate agency. However, the bill does not place any affirmative duty upon an agency to provide the comments to the court, does not provide a time frame for the provision of the written comments, nor does it provide guidance to the court or the agency as to what would constitute sufficient comments enabling the court to move forward with an order directing civil penalties assessed to be used in appropriate beneficial mitigation projects.

AOC analysis notes the proposed language tracks the private right of action language from various federal environmental statutes such as the Clean Air Act and Clean Water Act. Such language is often used by interest groups to test regulatory actions in the courts.

OTHER SUBSTANTIVE ISSUES

SB 677 allows a private right of action if a person is “imminently threatened with injury” and authorizes suits based on failure to perform “any substantive and nondiscretionary act or duty” of an agency or official. What constitutes an “imminent” threat or a “substantive” act could be the subject of much litigation.

POSSIBLE QUESTIONS

How could the potential for frivolous claims brought under the bill’s provisions be reduced to protect state agencies while maintaining the private right of action which provides a public oversight tool?

JA/bb