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FISCAL IMPACT REPORT

LAST UPDATED _____

SPONSOR Ferrary/Lujan **ORIGINAL DATE** 01/23/23

SHORT TITLE Natural Resources Trustee Changes **BILL NUMBER** House Bill 91

ANALYST Sanchez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*

(dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
ONRT Legal Services	No fiscal impact	No fiscal impact	\$200.0	\$200.0	Recurring	General Fund
NMED Legal Services	No fiscal impact	\$357.1	\$283.1	\$640.2	Recurring	General Fund
Total	No Fiscal Impact	\$357.1	\$483.1	\$840.2	Recurring	General Fund

*Amounts reflect most recent version of this legislation.

Sources of Information

LFC Files

Responses Received From

Office of Natural Resources Trustee (ONRT)
 Environment Department (NMED)
 New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of House Bill 91

House Bill 91 amends Section 74 NMSA 1978 (Environmental Improvement) to add language permitting the natural resources trustee to pursue natural resource damage claims related to the release of contaminants under state law, including the Air Quality Control Act (Section 74-2-12 NMSA 1978), the Hazardous Waste Act (Section 74-4-10 NMSA 1978), and the Water Quality Act (Section 74-6-10 NMSA 1978).

HB91 amends the “Natural Resources Trustee Act (Section 75-7-1 NMSA 1978) to add a new section 4, which states:

- A. the people of the state, including future generations, have the right to a clean and healthy environment, including pure water, clean air, healthy ecosystems, and a stable climate, and to the preservation of the natural, cultural, scenic, and healthful qualities of the environment;
- B. the natural resources of the state are assets held in trust for the benefit of the people of

the state, including future generations;

C. the protection and preservation of natural resources promote the well-being of the people of this state, including future generations; and

D. the release of injurious substances into the environment constitutes a threat to natural resources and the well-being of the people of this state.

HB91 further amends the Natural Resources Trustee Act to add definitions for “assessment costs,” “facility,” “injurious substance,” “natural resources,” and “restoration.” The definition of “injurious substance, gives ONRT more latitude to pursue natural resource injury claims for the release of substances not currently defined as “hazardous” under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as the “Superfund Act” including petroleum products and per- and polyfluoroalkyl substances (PFAS).

HB91 amends Section 75-7-2 NMSA 1978, to add language giving ONRT the power to recover damages for the destruction or loss of natural resources, including “for past releases with a continuing and present injury to natural resources” and gives ONRT the authority to “adopt and enforce rules for the assessment and collection of fines for natural resources damages resulting from the release of petroleum-based injurious substances”.

HB91 amends Section 75-7-4 NMSA 1978, to grant ONRT the power to sue on “behalf of the state for damages caused by the release of an injurious substance” and set forth the process by which ONRT must assess damages to natural resources. The amended section also specifies the venue for claims and assigns responsibility for the release of injurious substances to include:

A. current facility owners;

B. previous facility owners (if the release took place during their period of ownership);

C. those who arrange for the release, placement, disposal, or treatment of injurious substances; and

D. those who accepted the substance for transport.

HB91 amends Section 75-7-5 NMSA 1978, to remove the language specifying that ONRT shall restore, replace, or acquire natural resources only in the area where the injury, destruction, or loss occurred. In addition, the bill adds language allowing for the acquisition of natural resources outside of the area where the damage occurred if doing so in the affected area is deemed infeasible or ineffective.

This bill does not contain an effective date, and as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed.

FISCAL IMPLICATIONS

HB91 would increase the number of potential natural resource damage claims to include those covered under state law and not just the federal Superfund Act. ONRT contends this would likely increase the number of new cases and increase the agency’s staffing needs. For example, the agency currently has five full-time employees and did not estimate the specific needs for additional funding but did include \$200 thousand in recurring general fund appropriations likely related to the costs of administering the small spill fee schedule.

NMED is concerned HB91 would require significant legal resources to determine existing conflicts between the current state and federal environmental laws, permitting regulations, and statutory authorities.

SIGNIFICANT ISSUES

In its analysis, the Office of the Natural Resources Trustee (ONRT) explained that HB91 would allow the pursuit of claims for injuries to the state’s natural resources that are not possible under existing statutes. In addition, the proposed legislation will expand ONRT’s ability to restore more water, habitat, and other resources.

NMAG’s analysis of HB91 included the following:

Some categories of “injurious substances,” as provided in the proposed definition section at paragraph C are defined by narrative standards which necessitate analysis to determine whether a particular substance meet the definition. For example, under paragraph (C)(2), an injurious substance includes:

A hazardous waste substance, including any solid waste or combination of solid wastes that because of their quantity, concentration or physical, chemical or infectious characteristics may: (a) cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or (b) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

This raises the question of whether the determination of whether the narrative criteria are met is made by the Natural Resource Trustee, or by reference to existing determinations. In the above case, the U.S. EPA has identified hundreds of chemicals in a complex taxonomy of “listed” hazardous wastes under a similar statutory definition under the federal Resource Conservation and Recovery Act, and NMED has generally adopted those lists by reference. It is not clear whether the definition above is meant to be limited to these regulatory lists, or to any substance the Trustee finds meets the criteria. This could lead to possible disputes and litigation.

ADMINISTRATIVE IMPLICATIONS

In its analysis, the Office of the Natural Resources Trustee (ONRT) expressed concerns HB91 would increase its need for additional legal representation due to the requirements that it promulgate regulations according to the State Rules Act. ONRT further stated HB91 would require additional legal representation from the Attorney General’s Office to represent the agency in any state-based claims.

NMED expressed uncertainty about the costs associated with increased coordination with ONRT when determining whether to take legal action against responsible parties for natural resource damage. While performance goals do not measure the performance of NMED’s office of general counsel, increased workload, without increased funding, may result in delays in other critical performance metrics that require assistance from the NMED legal team.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

HB91 duplicates Senate Bill 112.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

In its analysis, the Office of the Natural Resources Trustee (ONRT) expressed that if HB91 is not enacted, the Trustee's authority will remain restricted to only pursuing claims under the Superfund Act and other federal natural resources laws, which it contends do not adequately protect New Mexico's natural resources.

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