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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/05/10

SPONSOR Lujan, B LAST UPDATED \_\_\_\_\_ HB 259

SHORT TITLE Private Action To Enforce Enviro Statutes SB \_\_\_\_\_

ANALYST Haug

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

|              | FY10            | FY11            | FY12               | 3 Year<br>Total Cost | Recurring<br>or Non-Rec | Fund<br>Affected |
|--------------|-----------------|-----------------|--------------------|----------------------|-------------------------|------------------|
| <b>Total</b> | \$0.0 - \$500.0 | \$0.0 - \$500.0 | \$0.0 -<br>\$500.0 | \$0.0 -<br>\$1,500.0 | Recurring               | General<br>Fund  |

(Parenthesis ( ) Indicate Expenditure Decreases)

\* See Fiscal Implications for this estimate range of potential costs.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Energy, Minerals and Natural Resources Department (EMNRD)

New Mexico Environment Department (NMED)

### SUMMARY

#### Synopsis of Bill

House Bill 259 amends the Oil and Gas Act, the Environmental Improvement Act and the Water Quality Act to provide for a private right of action (“citizen suit”) to enforce those Acts. The private right of action extends not only to enforcement against the individuals and companies subject to those Acts, but also to enforcement against the state of New Mexico and the relevant agencies, divisions, boards and commissions that administer those Acts.

House Bill 259 adds the private right of action to environmental protection laws such as the Environmental Improvement Act and the Water Quality Act. Because the Oil and Gas Act addresses the prevention of waste and the protection of correlative rights as well as environmental issues, House Bill 259 specifies that the alleged violation or alleged failure to perform under the Oil and Gas Act must relate to a statute, rule, permit or order primarily concerned with environmental protection. (Section 1.C(1))

A person who has an interest that is or may be adversely affected may bring a civil action on that person’s own behalf against any other person, including the state of New Mexico, a political subdivision thereof or any officer or agency of either, for a violation of the Act, or a rule, permit or order issued pursuant to the Act. A person who has an interest that is or may be adversely affected may also bring a civil action against the relevant agency, division, board or commission

alleging a failure to perform any nondiscretionary act or duty required by the Act or a rule promulgated pursuant to that Act.

To bring an action, the person must give 60-days prior written notice of the violation to the relevant state entity, the attorney general and any alleged violator. No action is allowed if the relevant state entity has commenced and is diligently prosecuting a civil action or an administrative proceeding to require compliance. If an enforcement action is initiated by the state agency, a person whose interest is affected and who has given proper notice prior to the initiation of the action may intervene as a matter of right. (section 1.C(3))

In any action brought under House Bill 259, the court may issue an injunction against the violation, issue an order to the relevant state entity compelling performance of a nondiscretionary act or duty, assess civil penalties and award costs of litigation to the prevailing party including reasonable attorney and expert witness fees. Civil penalties are to be deposited in the same fund in which they would have been deposited if the action had been brought by the relevant state entity, or in the court's discretion penalties not to exceed \$25,000 may be used in beneficial mitigation projects.

## **FISCAL IMPLICATIONS**

The EMNRD states that its experience with 2 other statutory citizen suit provisions indicates that such suits may be rare. If citizen suits are initiated, EMNRD may incur costs to defend against claims, to pay the costs of litigation that might be awarded to a prevailing private litigant, or to pay penalties that may be assessed.

NMED reports that depending on the number of suits filed, House Bill 259 may have a fiscal impact on NMED. Department resources will be needed to bring actions to preempt a citizen's suit or to defend a suit brought against NMED. Additionally, if litigation costs are awarded, this may also have a fiscal impact on NMED.

## **SIGNIFICANT ISSUES**

According to the EMNRD:

The intent of citizen suit legislation, such as HB 259, is to allow private rights of action to enforce environmental laws, or to spur government action, when the government fails to take action against a violation of the law. Federal environmental laws generally contain citizen suits provisions and New Mexico's two major mine regulatory laws include citizen suit provisions. NMSA 1978, Section 69-25A-24 (Surface Mining Act) and Section 69-36-14 (Mining Act). Both laws allow for EMNRD to be sued. These provisions, which have been in place since 1979 and 1993 respectively, have rarely been used. There are no records of any citizen suits under the Surface Mining Act and only two under the Mining Act. Neither suit resulted in any judgments against the State.

The proposed citizen suit provision in HB 259 for the Oil and Gas Act may overlap with an existing private right of action under that Act. NMSA 1978, Section 70-2-29, provides for a private right of action to seek an injunction and damages for any actual or threatened violation of the Act or a rule or order issued pursuant to that Act. While Section 70-2-29 seems to be aimed at violations of statutes pertaining to the conservation

of oil and gas that cause damages to the party, the language of 70-2-29 is broad enough to include claims under other Oil and Gas Act provisions, such as environmental protection, and also allows for injunctive relief as does HB 259.

HB 259 also creates a private right of action to sue the relevant state entity for failure to perform any nondiscretionary act or duty required by the relevant Act or a rule promulgated pursuant to that Act, and recover reasonable litigation costs if the suit is successful. The right to sue to compel a state entity to perform a nondiscretionary act or duty already exists in common law: a party may petition the court for a writ of mandamus directing the state entity to do something it is obligated by law to do. The problem for a litigant seeking relief under either HB 259 or through mandamus is that courts are reluctant to find that an act or duty is nondiscretionary. This is especially true when the agency fails to take enforcement action; enforcement decisions are by their nature discretionary actions.

The NMED states:

Most federal environmental statutes, such as Clean Water Act - 33 USCA §1365, Comprehensive Environmental Response Compensation Act - 42 USCA §9659, Air Pollution Prevention - 42 USCA §7604 and others, have citizen suit provisions.

Under House Bill 259, citizens who are affected by pollution will be able to sue the state, political subdivision or officer of the state. Though implied in other language in House Bill 259 (page 6, line 22-23 “if the department is not a party”), it is not clear that the responsible party may be sued directly. “Person” does not specifically include the entity that may have caused the contamination. Suggested amendments are below.

At times, the public believes NMED is not doing enough to enforce the environmental laws. HB 259 will allow the public to compel NMED to do more. Further, House Bill 259 will allow the public party who has provided notice of intent to sue to intervene as a matter of right in an enforcement action.

State agencies may become liable for the costs of litigation. Agencies have no budget or funding to pay litigation costs that may be awarded by a judge. Some of the programs that are covered by House Bill 259 are funded by federal grants and permit fees. These funding sources can not be used to pay litigation costs, so the unknown cost of litigation may make budgeting difficult.

Enforcement actions for air quality (NMSA 1978, §74-2-12), solid waste (NMSA 1978, §74-9-36), hazardous waste (NMSA 1978, §74-4-10), petroleum storage tanks (NMSA 1978, §74-4-10), and radiation (NMSA 1978, §74-3-11) are brought under the specific authority in each of the governing acts instead of the Environmental Improvement Act. Administrative enforcement authority in the Environmental Improvement Act is limited to drinking water and liquid waste. NMSA 1978, §74-1-10.B. It could be argued that the private right of action is not applicable to the Air Quality Act, the Radiation Control Act, Hazardous Waste Act, and the Solid Waste Act.

**TECHNICAL ISSUES**

The NMED proposes the following amendments:

Page 1, line 24, after “person” insert “who is alleged to be in violation of a rule, regulation, order or permit issued under this act, or”

Page 1, line 24, strike “including”

Page 5, line 19, after “person” insert “who is alleged to be in violation of a rule, regulation, order or permit issued under this act, or”

Page 5, line 19, strike “including”

Page 9, line 13, after “person” insert “who is alleged to be in violation of a rule, regulation, order or permit issued under this act, or”

Page 9, line 13, strike “including”

GH/mt