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HOUSE BILL 177

50TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2011

INTRODUCED BY
Brian F. Egolf

AN ACT

RELATING TO THE ENVIRONMENT; AMENDING, REPEALING AND ENACTING
SECTIONS OF THE NATURAL RESOURCES TRUSTEE ACT; PROVIDING FOR
ACTIONS TO RECOVER DAMAGES FOR INJURY TO NATURAL RESOURCES;
PROVIDING FOR THE PROMULGATION OF RULES; PROVIDING LIMITATIONS.

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

SECTION 1. A new section of the Natural Resources Trustee
Act is enacted to read:

"[NEW MATERIAL] LEGISLATIVE FINDINGS.--The legislature
finds that:

A. the natural resources of the state of New Mexico
that are not owned by a private person are those assets of the
state that are held in trust by the state for the benefit of
the public;

B. the protection and the preservation of these

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1 natural resources promote the well-being of the people of this
2 state in the present and the future;

3 C. the release of injurious substances into the
4 environment of this state constitutes a threat to the natural
5 resources and the well-being of the people of this state; and

6 D. the state should recover damages for injury to
7 natural resources, regardless of whether such natural resources
8 have been or may be used or committed to use at any time and
9 regardless of whether the natural resources are at present
10 capable of being used."

11 SECTION 2. A new section of the Natural Resources Trustee
12 Act is enacted to read:

13 "[NEW MATERIAL] DEFINITIONS.--As used in the Natural
14 Resources Trustee Act:

15 A. "facility" means:

16 (1) any building, structure, installation,
17 equipment, pipe or pipeline, including any pipe into a sewer or
18 publicly owned treatment works, well, pit, pond, lagoon,
19 impoundment, ditch, landfill, storage container, motor vehicle,
20 rolling stock or aircraft; or

21 (2) any site or area where an injurious
22 substance has been deposited, stored, disposed of, placed or
23 otherwise come to be located;

24 B. "natural resources" includes land; minerals;
25 soils; sediments; geologic resources; air; surface waters;

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1 ground waters; drinking water supplies; aquifers; perennial,
2 seasonal and ephemeral drainages; arroyos; watersheds; biota;
3 fish; wildlife; supporting habitats; and vegetation not owned
4 by a private person; and

5 C. "restoration" means those actions necessary to
6 return an injured natural resource to its baseline condition as
7 measured in terms of the injured natural resource's physical,
8 chemical or biological properties and the services it
9 previously provided."

10 SECTION 3. A new section of the Natural Resources Trustee
11 Act is enacted to read:

12 "[NEW MATERIAL] LIABILITY FOR DAMAGES.--

13 A. Except as provided in Subsection E of this
14 section, with respect to any facility from which there is an
15 intentional or unintentional release of an injurious substance
16 into the environment, including a release within the facility,
17 the following persons shall be jointly and severally liable to
18 the state for all damages resulting from the release:

19 (1) the owner or operator of the facility at
20 the time of the release;

21 (2) any person who previously owned or
22 operated the facility during a time in which the injurious
23 substance was released, placed, disposed of or treated; and

24 (3) any person who by agreement or otherwise
25 arranged for release, placement, disposal or treatment of the

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1 injurious substance at the facility or arranged with a
2 transporter for transport of the injurious substance to or from
3 the facility whether or not the injurious substance was owned
4 or possessed by the person.

5 B. Damages owed to the state under this section
6 include:

7 (1) damages for injury to natural resources,
8 including the destruction or loss of natural resources;

9 (2) interim losses incurred after the release
10 of an injurious substance and before the completion of
11 restoration of the natural resources;

12 (3) residual losses remaining after completion
13 of restoration of the natural resources; and

14 (4) the reasonable costs of assessing the
15 injury resulting from the release of an injurious substance.

16 C. Damages owed to the state under this section may
17 be recovered regardless of prospective or ongoing remediation
18 efforts.

19 D. The amount of damages may be established by any
20 methodology that demonstrates:

21 (1) the cost of restoration or rehabilitation
22 of the injured natural resources to a condition where they can
23 provide the level of services and resource value available
24 before the release of the injurious substance;

25 (2) the cost of replacement or acquisition of

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1 equivalent natural resources capable of providing such services
2 and resource value;

3 (3) the value of the services and resources
4 lost to the public from the time of the release of the
5 injurious substance through the completion of the restoration,
6 rehabilitation or replacement of the natural resources or
7 acquisition of equivalent natural resources; and

8 (4) the cost of investigating, assessing and
9 collecting damages and enforcing the state's rights.

10 E. There shall be no liability under this section
11 for a release of an injurious substance if the release is in
12 compliance with a license or permit that is duly issued by the
13 state or the federal government and is in effect at the time of
14 the release."

15 SECTION 4. A new section of the Natural Resources Trustee
16 Act is enacted to read:

17 "[NEW MATERIAL] ACTION FOR DAMAGES--VENUE.--

18 A. The natural resources trustee, as plaintiff, may
19 bring a suit on behalf of the state against any person who is
20 liable, under the provisions of the Natural Resources Trustee
21 Act, for damages caused to the natural resources of the state
22 by a release of an injurious substance; provided that, before
23 initiating suit, the natural resources trustee shall make
24 reasonable efforts to conduct a cooperative assessment of the
25 nature and extent of the damages and of methods to achieve

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1 resolution of the natural resources trustee's claim in
2 cooperation with the responsible party and, upon initiating
3 suit, shall certify that, in the natural resources trustee's
4 judgment, the efforts have not succeeded in resolving the
5 claim.

6 B. Venue shall be in the district court for Santa
7 Fe county or in the district court for the county in which
8 damages were sustained."

9 SECTION 5. A new section of the Natural Resources Trustee
10 Act is enacted to read:

11 "[NEW MATERIAL] DOUBLE RECOVERY PROHIBITED.--There shall
12 be no double recovery under the Natural Resources Trustee Act
13 for damages to the same natural resources, including the costs
14 of damage assessment or restoration, rehabilitation or
15 replacement of the natural resources or acquisition of
16 equivalent natural resources, caused by the same release of
17 injurious substances."

18 SECTION 6. A new section of the Natural Resources Trustee
19 Act is enacted to read:

20 "[NEW MATERIAL] LIMITATION ON ACTIONS.--No claim may be
21 made under the Natural Resources Trustee Act for recovery of
22 damages unless the claim is made before the later of the
23 following:

24 A. five years after the date that the natural
25 resources trustee became aware of the nature and extent of the

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1 release of an injurious substance and the extent of injuries
2 caused by the release; or

3 B. January 1, 2018."

4 SECTION 7. A new section of the Natural Resources Trustee
5 Act is enacted to read:

6 "[NEW MATERIAL] PROMULGATION OF RULES.--

7 A. The natural resources trustee may adopt rules
8 consistent with the Natural Resources Trustee Act as necessary
9 to protect the natural resources of the state, including rules:

10 (1) defining and describing injurious
11 substances;

12 (2) defining and describing the manner of
13 proof of injury, damages and assessment costs; and

14 (3) prescribing procedures for assessing and
15 establishing claims.

16 B. No rule shall be adopted until after a public
17 hearing by the natural resources trustee or the trustee's
18 designee. Notice of the hearing shall be given at least sixty
19 days prior to the hearing date and shall state the subject, the
20 time and the place of the hearing and the manner in which
21 interested persons may present their views. The proposed
22 language amending any existing rule or any proposed new rule
23 shall be made available to the public as of the date that the
24 notice of the hearing is given. The notice shall also state
25 where interested persons may secure copies of any proposed

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1 amendment or new rule. The notice shall be published in a
2 newspaper of general circulation in the area affected.
3 Reasonable effort shall be made to give notice to all persons
4 who have made a written request for advance notice of hearings.

5 C. At the hearing, the natural resources trustee or
6 the trustee's designee shall allow all interested persons
7 reasonable opportunity to submit data, proposed changes to the
8 proposed rule, views or arguments orally or in writing and to
9 examine witnesses testifying at the hearing. Any person heard
10 or represented at the hearing shall be given written notice of
11 the action on the rule.

12 D. No rule or amendment or repeal thereof shall
13 become effective until thirty days after its filing under the
14 State Rules Act.

15 E. Any person who is or may be affected by a rule
16 adopted pursuant to this section may appeal to the district
17 court for Santa Fe county for further relief. All appeals
18 shall be upon the transcript made at the hearing and shall be
19 taken to the district court within thirty days after filing of
20 the rule under the State Rules Act. Upon appeal, the district
21 court shall set aside the rule only if it is found to be:

- 22 (1) arbitrary, capricious or an abuse of
23 discretion; or
- 24 (2) otherwise not in accordance with law."

25 SECTION 8. Section 75-7-2 NMSA 1978 (being Laws 1993,
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1 Chapter 292, Section 2, as amended) is amended to read:

2 "75-7-2. NATURAL RESOURCES TRUSTEE--OFFICE OF NATURAL
3 RESOURCES TRUSTEE.--

4 A. The "natural resources trustee" is created. The
5 trustee is appointed by and serves at the pleasure of the
6 governor pursuant to the provisions of the federal
7 Comprehensive Environmental Response, Compensation, and
8 Liability Act of 1980, as amended by the federal Superfund
9 Amendments and Reauthorization Act of 1986, the Federal Water
10 Pollution Control Act and any other applicable federal law and
11 the provisions of the Natural Resources Trustee Act. The
12 natural resources trustee shall act on behalf of the public as
13 trustee of natural resources within the state or belonging to,
14 managed by, controlled by or appertaining to the state,
15 including protecting and representing the state's interest
16 under applicable federal laws regarding injury to, destruction
17 of or loss of natural resources in the state.

18 B. The "office of natural resources trustee" is
19 created. The office shall be administratively attached to the
20 department of environment. The administrative head of the
21 office of natural resources trustee is the natural resources
22 trustee. For purposes of this subsection, the term
23 "administratively attached" means the same as specified in
24 Section 9-1-7 NMSA 1978."

25 SECTION 9. Section 75-7-3 NMSA 1978 (being Laws 1993,
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1 Chapter 292, Section 3, as amended) is amended to read:

2 "75-7-3. NATURAL RESOURCES TRUSTEE POWERS AND DUTIES.--

3 A. The natural resources trustee shall take all
4 actions necessary to carry out the responsibilities of the
5 natural resources trustee as provided in the federal
6 Comprehensive Environmental Response, Compensation, and
7 Liability Act of 1980, as amended by the Superfund Amendments
8 and Reauthorization Act of 1986, the Federal Water Pollution
9 Control Act and any other applicable federal law and the
10 provisions of the Natural Resources Trustee Act, including the
11 responsibility to:

12 (1) act on behalf of the public to protect New
13 Mexico's natural resources by recovering damages for injury to,
14 destruction of or loss of those resources;

15 (2) investigate injury to, destruction of or
16 loss of natural resources;

17 (3) determine the amount and cause of injury
18 to, destruction of or loss of natural resources;

19 (4) determine the liability of any person for
20 injury to, destruction of or loss of natural resources;

21 (5) assess and collect damages for injury to,
22 destruction of or loss of natural resources, including bringing
23 legal actions and collecting the costs of assessing and
24 collecting the damages; and

25 (6) expend money for the purposes set forth in

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1 the Natural Resources Trustee Act.

2 B. The natural resources trustee may:

3 (1) hire staff, in accordance with the
4 Personnel Act, to carry out the provisions of the Natural
5 Resources Trustee Act;

6 (2) contract with economists, consultants and
7 other experts; and

8 (3) accept gifts and grants to carry out the
9 provisions of the Natural Resources Trustee Act. Gifts and
10 grants accepted by the natural resources trustee shall be
11 deposited in the natural resources trustee fund.

12 C. The natural resources trustee may designate by
13 rule the following as injurious substances:

14 (1) a substance that is an air contaminant
15 pursuant to the Air Quality Control Act;

16 (2) a substance identified or listed as a
17 hazardous waste in the Hazardous Waste Act;

18 (3) a constituent listed by the federal
19 environmental protection agency as a hazardous waste in 40
20 C.F.R., Part 261, Subpart D;

21 (4) a hazardous constituent listed by the
22 federal environmental protection agency in 40 C.F.R., Part 261,
23 Appendix VIII;

24 (5) a solid waste exceeding the toxicity
25 characteristics listed by the federal environmental protection

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1 agency in Table 1 of 40 C.F.R. 261.24;

2 (6) a substance listed by the federal
3 environmental protection agency in 40 C.F.R., Part 264,
4 Appendix IX;

5 (7) a substance meeting the definition of
6 hazardous chemical in the Hazardous Chemicals Information Act;

7 (8) a substance that is a water contaminant
8 pursuant to the Water Quality Act;

9 (9) a substance that is a regulated substance
10 pursuant to the Ground Water Protection Act;

11 (10) oil of any kind or in any form, including
12 petroleum, fuel oil, sludge, oil refuse and oil mixed with
13 wastes; or

14 (11) a solid waste or combination of solid
15 wastes that because of its quantity, concentration or physical,
16 chemical or infectious characteristics may:

17 (a) cause, or significantly contribute
18 to, an increase in mortality or an increase in serious
19 irreversible, or incapacitating reversible, illness; or

20 (b) pose a substantial present or
21 potential hazard to human health or the environment when
22 improperly treated, stored, transported, disposed of or
23 otherwise managed.

24 ~~[G.]~~ D. The attorney general shall provide legal
25 counsel and representation to the natural resources trustee and

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1 the office of the natural resources trustee."

2 SECTION 10. Section 75-7-5 NMSA 1978 (being Laws 1993,
3 Chapter 292, Section 5, as amended) is amended to read:

4 "75-7-5. NATURAL RESOURCES TRUSTEE FUND.--

5 A. The "natural resources trustee fund" is created
6 in the state treasury. Money appropriated to the fund or
7 accruing to it through gifts, grants, fees, penalties, bequests
8 or any other source shall be delivered to the state treasurer
9 and deposited in the fund. Money recovered for the state by or
10 on behalf of the natural resources trustee shall be deposited
11 in the natural resources trustee fund. The fund shall be
12 administered by the natural resources trustee as a separate
13 account and may consist of subaccounts that the natural
14 resources trustee deems necessary to carry out the purposes of
15 the fund. Disbursements from the fund shall be made upon
16 warrants drawn by the secretary of finance and administration
17 pursuant to vouchers signed by the natural resources trustee or
18 the trustee's designated representative. Money in the fund
19 shall not revert to the general fund at the end of a fiscal
20 year.

21 B. Pursuant to the following criteria, money in the
22 natural resources trustee fund shall be used to carry out the
23 provisions of the Natural Resources Trustee Act by restoring,
24 replacing or acquiring natural resources [~~in an area where~~
25 ~~natural resources have been injured, destroyed or lost,~~

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1 ~~provided that money deposited in the fund because of injury to,~~
2 ~~destruction of or loss of natural resources in an area shall be~~
3 ~~disbursed to restore, replace or acquire natural resources in~~
4 ~~that same area]:~~

5 (1) if an expenditure from the fund is
6 necessary to comply with a court order or court-approved
7 settlement or to match federal funds, then, pursuant to
8 Sections 6-3-23 through 6-3-25 NMSA 1978, the natural resources
9 trustee may request a budget increase and, if approved, the
10 amount of the expenditure is appropriated;

11 (2) if money is received for reimbursement of
12 assessment costs, then the natural resources trustee may expend
13 money for injury assessment, and money is appropriated in that
14 amount for that purpose; ~~and]~~

15 (3) any other expenditures from the fund shall
16 be made only pursuant to appropriation by the legislature; and

17 (4) money deposited in the fund because of
18 injury to, destruction of or loss of natural resources in an
19 area shall be expended to restore, replace or acquire natural
20 resources in that same area; provided that the natural
21 resources trustee may undertake a restoration action outside
22 the area where the natural resources were injured, destroyed or
23 lost if, in the natural resources trustee's judgment, action
24 within the area would be infeasible or ineffective.

25 C. In addition to expenditures made pursuant to

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1 Subsection B of this section, money shall be appropriated
2 annually by the legislature from the general fund for the
3 purpose of providing for necessary personnel and other costs of
4 the natural resources trustee, the attorney general and the
5 office of natural resources trustee in carrying out the
6 provisions of the Natural Resources Trustee Act, including the
7 cost of investigation, assessment, collection or enforcement.

8 D. For purposes of this section, "assessment
9 costs" means the costs of restoration and the costs of
10 collecting, compiling and analyzing information, statistics or
11 data to determine damages for injuries to natural resources
12 pursuant to the Natural Resources Trustee Act.

13 E. Money in the natural resources trustee fund
14 shall be invested as other state funds are invested, and
15 interest and earnings from the fund shall not revert to the
16 general fund but shall be credited to the natural resources
17 trustee fund."

18 SECTION 11. REPEAL.--Section 75-7-4 NMSA 1978 (being
19 Laws 1993, Chapter 292, Section 4) is repealed.

20 SECTION 12. EFFECTIVE DATE.--The effective date of the
21 provisions of this act is July 1, 2011.