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FISCAL IMPACT REPORT

ORIGINAL DATE 2/18/19
LAST UPDATED _____ **HB** 471 _____

SPONSOR Cook

SHORT TITLE Uniform Environmental Covenants Act **SB** _____

ANALYST Glenn

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY19	FY20	FY21		
	Indeterminate/See Fiscal Implications	Indeterminate/See Fiscal Implications	Recurring	Water Quality Management Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	75.0	75.0	75.0	225.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)

New Mexico Environment Department (NMED)

Administrative Office of the Courts (AOC)

Energy, Minerals & Natural Resources Department (EMNRD)

SUMMARY

Synopsis of Bill

House Bill 471 enacts the Uniform Environmental Covenants Act (UCEA), which provides rules for perpetual real property interests in the form of environmental covenants to regulate the use of real property in connection with environmental response projects. Any person, including an

owner of an interest in the real property, as well as an agency or a municipality or other local government, may hold an environmental covenant in land that is the subject of an environmental response project. Those projects include plans or work performed to remediate real property that is conducted: 1) under a federal or state environmental remediation program; 2) incident to approved closure of a solid or hazardous waste management unit; or 3) under a state voluntary cleanup program authorized in the Voluntary Remediation Act. The bill includes rules applying to interests in real property that exist at the time an environmental covenant is created, including a provision for voluntary agreements to subordinate prior interests.

The UCEA contains a list of mandatory information that must be included in an environmental covenant, including a description of the real property subject to the covenant, a description of the activity and use limitations on the real property, and the identity of each holder (grantee) of the environmental covenant. In addition to the mandatory information, an environmental covenant may contain any other information, restrictions and requirements agreed to by the persons who sign the covenant.

Under the UECA, environmental covenants would run with the land and remain valid and enforceable even if

- it is not appurtenant to an interest in real property;
- it can be assigned to someone other than the original holder;
- it is of a character not traditionally recognized in common law;
- it imposes a negative burden;
- it imposes an affirmative obligation on a person with interest in the real property or on the covenant holder;
- the benefit or burden does not touch or concern real property;
- there is no privity of estate or contract;
- the holder dies, ceases to exist, resigns or is replaced; or
- the owner of an interest subject to the environmental covenant and the holder are the same person.

The UECA does not authorize a use of real property that is otherwise prohibited by zoning, another law regulating the use of real property or a recorded instrument with priority over the environmental covenant, and does not affect obligations under other laws governing an environmental response project. The UECA provides that an environmental covenant may prohibit or restrict a use of real property authorized by zoning or by a law other than the UECA.

The UECA requires that an environmental covenant and any amendment, assignment or termination of the covenant or any subordination agreement be recorded in the counties where the subject property is located. An environmental covenant is perpetual, unless it is terminated as specified in the UECA, and may not be extinguished or impaired by tax lien foreclosure or adverse possession and similar doctrines. An environmental covenant may be terminated or amended by consent of the agency responsible for the environmental response project, owner of the real property affected by the covenant, the signatories to the original covenant and the holder.

A civil action for injunctive relief for violation of an environmental covenant may be maintained by the responsible agency, a party to the covenant, and other specified persons and local governments. The UECA does not limit the regulatory authority of government agencies under

laws other than the UECA with respect to an environmental response project.

The UECA requires NMED to establish and maintain a registry containing all environmental covenants. A notice of a covenant filed in the registry may be recorded in county land records in lieu of recording the entire covenant. The registry is a public record subject to inspection and copying under the Inspection of Public Records Act.

NMED is required to promulgate regulations to implement the UECA, including a schedule of fees reflecting the reasonable cost of administering the registry. The fees are required to be deposited to the water quality management fund.

The effective date of HB 471 is July 1, 2019.

FISCAL IMPLICATIONS

NMED states that HB 471 requires NMED to promulgate regulations with a fee schedule in order to implement an Intuition Controls Program to document and track all activity and use limitations for environmentally damaged properties throughout the state. NMED's Ground Water Quality Bureau (Bureau) will need one fulltime FTE to accomplish this rule making. NMED states implementation of the program will require NMED to hire a half time Geographic Information Systems (GIS) staff person to maintain the database and communicate with counties and municipalities regarding updates to the GIS layer (the database).

The bill provides that fees imposed by NMED for environmental covenants shall be deposited to the water quality management fund. *See* Section 74-6-5.2 NMSA 1978.

AOC states there will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judicial branch would be proportional to the enforcement of this law and commenced civil actions for injunctive or other equitable relief for violation of an environmental covenant, actions to terminate or reduce the burden of a covenant based on changed circumstances, actions seeking to fill a vacancy in the position of holder, and any appeals from such actions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

NMAG provides the following background from the Uniform Laws Commission (ULC), which promulgated the UECA in 2003. According to the ULC, the UECA's provisions confirming the validity of environmental covenants serve two principal policies:

One is to ensure that land use restrictions, mandated environmental monitoring requirements, and a wide range of common engineering controls designed to control the potential environmental risk of residual contamination will be recorded in the land records and effectively enforced over time as valid real property servitude. This Act reverses the variety of common law doctrines that cast doubt on such enforceability.

A second important policy served by the UECA is the return of previously

contaminated property, often located in urban areas, to the stream of commerce. The environmental and real property legal communities have often been unable to identify a common set of principles applicable to such properties. The frequent result has been that these properties do not attract interested purchasers and therefore remain vacant, blighted and unproductive. This is an undesirable outcome for communities seeking to return once important commercial sites to productive use. Large numbers of contaminated sites, often known as brown fields, are unlikely to be successfully recycled until regulators, owners, responsible parties, affected communities, and prospective purchasers and their lenders become confident that environmental covenants will be properly drafted, implemented, monitored and enforced for so long as needed. This Act should encourage transfer of ownership and property re-use by offering a clear and objective process for creating, modifying or terminating environmental covenants and for recording these instruments which will appear in any title abstract for the property in question.

The ULC also notes that

The UECA also does not affect the liability of principally responsible parties for the cleanup or any harm caused to third parties by the contamination – instead, it provides a method for minimizing the exposure of third parties to such risks and for owners and responsible parties to engage in long-term cleanup mechanisms.

According to ULC, 24 states have enacted the UECA. States, like New Mexico, that have not adopted the UECA must rely on statutory enforcement or traditional restrictive covenants.

EMNRD states an environmental covenant can be a useful tool for agencies and landowners who are dealing with contaminated property that is extremely difficult or costly to completely remediate. Covenants are especially useful when a landowner must deal with old contamination that renders property difficult to re-develop (i.e., “brownfields” properties). EMNRD may use covenants for mines that have been reclaimed but where certain future uses (e.g., residential) would be inappropriate. An enforceable covenant can be part of the agreement to release the property from further reclamation obligations.

According to EMNRD, the UECA proposed by HB 471 is necessary because covenants generally are only enforceable by persons who have an interest in the property or an adjacent property. In contrast, the UECA allows the regulatory agency, local government, and any other person designated in the agreement to enforce the restrictions in the covenant.

NMED notes that there is a misconception that allowing use of environmental covenants will enable polluters to walk away from contaminated properties without cleaning them up, or preemptively restrict uncontaminated property such that they can pollute without consequence. NMED states that HB 471 would not have such an effect. The UECA provides for property use and activity restrictions that can be effectively tracked and enforced over time, thereby facilitating redevelopment of brownfields sites in a responsible manner that is protective of human health.

ADMINISTRATIVE IMPLICATIONS

NMED notes that Bureau staff will be required to draft regulations, and the Bureau Chief or other high-level manager within the Bureau will be required to present testimony in a rulemaking hearing. This will take time away from other duties. The implementation and administration of the registry would be a new duty and program for the Bureau, but it is well within the Bureau's purview and expertise. With the additional resources noted under Fiscal Implications, the Bureau will be able to assume these responsibilities.

TECHNICAL ISSUES

EMNRD suggests that, because the proposed UCEA applies only to New Mexico, the definition of "state" in Section 2(I) of the bill be changed to refer simply to "the state of New Mexico" rather than to any state in the U.S.

There are a couple typos in Section 11(B) of the bill. In line 17, the word "law" should be "laws" and the word "that" should be "than".

BG/gb