

LFC Requester:	Austin Davidson
-----------------------	------------------------

**AGENCY BILL ANALYSIS
2024 REGULAR SESSION**

WITHIN 24 HOURS OF BILL POSTING, UPLOAD ANALYSIS TO:

Analysis.nmlegis.gov

{Analysis must be uploaded as a PDF}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply:

Original **Amendment**
Correction **Substitute**

Date 1/17/2024
Bill No: HJR 4

**Agency Name
and Code
Number:** EMNRD 521

Sponsor: Rep. Joanne Ferrary

**Person Writing
Analysis:** Ben Shelton, General Counsel

**Short
Title:** CA – Environmental Rights

Phone: 505-487-6648 **Email:** benjamin.shelton@emnrd.nm.gov

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: N/A

Duplicates/Relates to Appropriation in the General Appropriation Act: N/A

SECTION III: NARRATIVE

BILL SUMMARY

House Joint Resolution 4 (HJR 4) proposes an amendment to Article 2 of the constitution of New Mexico to add a new section recognizing the rights of the people of New Mexico to “clean and healthy air, water soil and environments; a stable climate; and self-sustaining ecosystems, for the benefit of public health, safety and general welfare.” The amendment also directs the state to protect these rights equitably. It makes the state, counties and municipalities trustees of New Mexico’s natural resources and directs them to conserve, protect and maintain them for present and future generations. HJR 4 also makes the provisions self-executing, precludes monetary damages, but does expressly make the provision enforceable against the state and its municipalities.

If HJR 4 passes, it will be voted on by the New Mexican public during the next general election or at any special election prior to that date.

FISCAL IMPLICATIONS

HJR4, if passed and adopted by the voters, would create an ability for citizens to sue the state for not upholding the environmental protection responsibilities identified in the measure, given that the rights identified in the proposed amendment are self-effectuating as drafted and require no additional legislative action unlike Article 20, Section 21, which is a directive for the state legislature.

While the amendment precludes monetary damages, it increases the likelihood that the state will be the subject of citizen suits. As written, plaintiffs pursuing actions under this provision would be more likely to seek relief by declaring specific actions taken by the state to be unconstitutional and to obtain a judicial reversal of the challenged actions or other equitable remedies, rather than seeking monetary relief.

For example, a party might try to challenge a permit issued by EMNRD’s Forestry Division that authorizes a private party to engage in forest thinning activities for wildfire control, even if that permit was otherwise issued in compliance with the Forest Conservation Act. Such a cause of

action would not otherwise be available under existing laws. Similarly, constitutional provisions, like the one proposed in HJR 4, have been used to challenge legislative acts. For example, in Pennsylvania oil and gas legislation was invalidated because it did not meet the legislature's obligation under that state's constitutional environmental rights amendment.¹

EMNRD is also concerned that this amendment, if passed, would negatively impact renewable energy and transmission development in the state. While renewable energy and transmission have net positive effects on climate, air quality, etc., those projects can and do have localized impacts in the areas where they are constructed. Impacts within the scope of the amendment could be used by project opponents to stop or delay those projects, or at a minimum create enough litigation related uncertainty to make projects financially impracticable.

Under the Forestry scenario outlined above, any reviewing court would need to compare the agency action under existing law (as authorized by the legislature) against the broad constitutional provision, putting the court in the position of substituting its own policy judgement for that of the legislature in order to determine the constitutional sufficiency of the course of action. EMNRD would have to participate in those lawsuits to defend its decisions in any number of ongoing enforcement, permit, or other regulatory actions. This engagement would require resources on both the legal and programmatic sides of the agencies, even if monetary damages are not available. Because those cases would be in court, they would automatically become first priority, draining agency resources from other compliance, enforcement, and programmatic efforts. An analogue for this drain is the ongoing *Atencio v. NM* lawsuit, which has yet to proceed to summary judgment or discovery phases and has already cost New Mexico taxpayers amounts that will grow into the hundreds of thousands in the next year.

SIGNIFICANT ISSUES

See above.

PERFORMANCE IMPLICATIONS

See above.

ADMINISTRATIVE IMPLICATIONS

See above.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Unlike previous year's versions of this proposal, HJR 4 does not include a provision repealing Article 20, Section 21. Leaving Section 21 in place would create two different sections of the state constitution providing misaligned authority and standards governing the state's constitutional obligations with regards to environmental protection.

Article 20, Section 21 directs the legislature to "provide for the control of pollution and control of despoilment of the air, water other natural resources of the state, consistent with the use and development of these resources for the maximum benefit of the people."

The proposed language would create an alternate constitutional requirement where people are individually entitled to "clean and healthy air, water, soil and environments; a stable climate; and self-sustaining ecosystems."

Depending on individual determinations of the adequacy of legislative actions, these two provisions may act in direct conflict to each other, with Article 20, Section 21 allowing an action as being an allowable balance between controlling pollution and developing resources, but the proposed language creating a right of action to assert the individual entitlement. The task would fall to the courts to create a test to determine which constitutional section should prevail under different fact patterns.

TECHNICAL ISSUES

N/A

OTHER SUBSTANTIVE ISSUES

N/A

ALTERNATIVES

N/A

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

If HJR 4 is not enacted, the constitution would not be changed, and state agencies would continue to protect the environment as directed by the legislature through the statutory programs they currently administer.

AMENDMENTS