

HOUSE BILL 259

51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013

INTRODUCED BY

Emily Kane

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 owned or held in trust by
the state are meant to be used or maintained for the benefit of
the public;

B. the protection and the preservation of these
natural resources promote the well-being of the people of this

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1 state in the present and the future;

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

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

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

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

14 A. "facility" means:

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

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

23 B. "natural resources" includes land; minerals;
24 soils; sediments; geologic resources; air; surface waters;
25 ground waters; drinking water supplies; aquifers; perennial,

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1 seasonal and ephemeral drainages; arroyos; watersheds; biota;
2 fish; wildlife; supporting habitats; and vegetation; provided
3 that those natural resources are not owned by a private person;
4 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;

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; and

5 (4) any person who accepted the injurious
6 substance for transport to a disposal or treatment facility or
7 site selected by that person.

8 B. Damages owed to the state under this section
9 include:

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

12 (2) interim losses incurred after the release
13 and before the completion of restoration;

14 (3) residual losses remaining after completion
15 of restoration of the natural resources; and

16 (4) the reasonable costs of assessing the
17 injury resulting from the release.

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

21 D. The amount of damages may be established by any
22 methodology that demonstrates:

23 (1) the cost of restoration or rehabilitation
24 of the injured natural resources to a condition where they can
25 provide the level of services and resource value available

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1 before the release of the injurious substance;

2 (2) the cost of replacement or acquisition of
3 equivalent natural resources capable of providing such services
4 and resource value;

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

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

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

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

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

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

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1 methods to achieve resolution of the natural resources
2 trustee's claim in cooperation with the responsible party and,
3 upon initiating suit, shall certify that, in the natural
4 resources trustee's judgment, the efforts have not succeeded in
5 resolving the 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 acquisition, caused by the same release of injurious
16 substances."

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

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

23 A. three years after the date that the natural
24 resources trustee became aware of the nature and extent of the
25 release and the extent of injuries caused by the release; or

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1 B. January 1, 2016."

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

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

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

8 (1) defining and describing injurious
9 substances;

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

12 (3) prescribing procedures for assessing and
13 establishing claims.

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

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1 Reasonable effort shall be made to give notice to all persons
2 who have made a written request for advance notice of the
3 hearing.

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

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

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

21 (1) arbitrary, capricious or an abuse of
22 discretion; or

23 (2) otherwise not in accordance with law."

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

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1 "75-7-2. NATURAL RESOURCES TRUSTEE--OFFICE OF NATURAL
2 RESOURCES TRUSTEE.--

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

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

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

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1 "75-7-3. NATURAL RESOURCES TRUSTEE POWERS AND DUTIES.--

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

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

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

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

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

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

24 (6) expend money for the purposes set forth in
25 the Natural Resources Trustee Act.

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B. The natural resources trustee may:

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

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

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

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

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

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

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

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

(5) a solid waste exceeding the toxicity characteristics listed by the federal environmental protection agency in Table 1 of 40 C.F.R. 261.24;

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

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

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

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

10 (10) hydrocarbons; or

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

14 (a) cause, or significantly contribute
15 to, an increase in mortality or an increase in serious
16 irreversible, or incapacitating reversible, illness; or

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

21 ~~[G.]~~ D. The attorney general shall provide legal
22 counsel and representation to the natural resources trustee and
23 the office of the natural resources trustee."

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

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1 "75-7-5. NATURAL RESOURCES TRUSTEE FUND.--

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

18 B. Pursuant to the following criteria, money in the
19 natural resources trustee fund shall be used to carry out the
20 provisions of the Natural Resources Trustee Act by restoring,
21 replacing or acquiring natural resources [~~in an area where~~
22 ~~natural resources have been injured, destroyed or lost,~~
23 ~~provided that money deposited in the fund because of injury to,~~
24 ~~destruction of or loss of natural resources in an area shall be~~
25 ~~disbursed to restore, replace or acquire natural resources in~~

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1 ~~that same area~~]:

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

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

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

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

22 C. In addition to expenditures made pursuant to
23 Subsection B of this section, money shall be appropriated
24 annually by the legislature from the general fund for the
25 purpose of providing for necessary personnel and other costs of

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1 the natural resources trustee, the attorney general and the
2 office of natural resources trustee in carrying out the
3 provisions of the Natural Resources Trustee Act, including the
4 cost of investigation, assessment, collection or enforcement.

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

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

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

17 SECTION 12. EFFECTIVE DATE.--The effective date of the
18 provisions of this act is July 1, 2013.