

1 HOUSE BILL 429

2 **51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013**

3 INTRODUCED BY

4 Georgene Louis

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10 AN ACT

11 RELATING TO THE ENVIRONMENT; PROVIDING FOR A PRIVATE RIGHT OF
12 ACTION TO ENFORCE THE PROVISIONS OF CERTAIN ACTS; PROVIDING FOR
13 PROCEDURES; ENACTING NEW SECTIONS OF THE ENVIRONMENTAL
14 IMPROVEMENT ACT AND THE WATER QUALITY ACT; AMENDING AND
15 ENACTING SECTIONS OF THE NMSA 1978.

16
17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

18 SECTION 1. Section 70-2-29 NMSA 1978 (being Laws 1935,
19 Chapter 72, Section 20, as amended) is amended to read:

20 "70-2-29. ACTIONS FOR DAMAGES--INSTITUTION OF ACTIONS FOR
21 INJUNCTIONS BY PRIVATE PARTIES.--

22 A. Nothing [~~in this act~~] contained or authorized in
23 the Oil and Gas Act and no suit by or against the commission or
24 the oil conservation division of the energy, minerals and
25 natural resources department and no penalties imposed or

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1 claimed against any person for violating any statute of this
2 state with respect to conservation of oil and gas, or any
3 provision of [~~this~~] the Oil and Gas Act or any rule, regulation
4 or order issued [~~thereunder~~] pursuant to that act, shall impair
5 or abridge or delay any cause of action for damages [~~which~~]
6 that any person may have or assert against any person violating
7 any statute of this state with respect to conservation of oil
8 and gas or any provision of [~~this~~] the Oil and Gas Act or any
9 rule, regulation or order issued [~~thereunder~~] pursuant to that
10 act. Any person so damaged by the violation may sue for and
11 recover such damages as [~~he~~] the person may be entitled to
12 receive. [~~In the event the division should fail to bring suit~~
13 ~~to enjoin any actual or threatened violation of any statute of~~
14 ~~this state with respect to the conservation of oil and gas, or~~
15 ~~of any provisions of this act, or of any rule, regulation or~~
16 ~~order made thereunder, then any person or party in interest~~
17 ~~adversely affected by such violation, and who has notified the~~
18 ~~division in writing of such violation or threat thereof and has~~
19 ~~requested the division to sue, may, to prevent any or further~~
20 ~~violation, bring suit for that purpose in the district court of~~
21 ~~any county in which the division could have brought suit. If,~~
22 ~~in such suit, the court holds that injunctive relief should be~~
23 ~~granted, then the division shall be made a party and shall be~~
24 ~~substituted for the person who brought the suit, and the~~
25 ~~injunction shall be issued as if the division had at all times~~

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1 ~~been the complaining party.]~~

2 B. Except as provided in Subsection C of this
3 section, a person who is injured in fact, economically or
4 otherwise, or who is imminently threatened with injury,
5 economically or otherwise, may commence a civil action on the
6 person's own behalf against:

7 (1) any other person, including the state of New
8 Mexico, a political subdivision thereof or any officer or
9 agency of either, charging a violation of the Oil and Gas Act
10 or a rule, permit or order issued pursuant to that act; or

11 (2) the commission or the oil conservation
12 division of the energy, minerals and natural resources
13 department alleging a failure to perform any substantive and
14 nondiscretionary act or duty required by a provision of the Oil
15 and Gas Act or a rule promulgated pursuant to that act.

16 C. No action may be commenced under Subsection B of
17 this section:

18 (1) unless the alleged violation or alleged
19 failure to perform a substantive and nondiscretionary act or
20 duty relates to a statute, rule, permit or order primarily
21 concerned with environmental protection, including but not
22 limited to statutes, rules, permits or orders concerned with:

23 (a) pits, closed-loop systems, below-grade
24 tanks and sumps;

25 (b) plugging and abandonment of wells;

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- 1 (c) remediation;
- 2 (d) produced water;
- 3 (e) waste disposal; or
- 4 (f) surface waste management facilities;

5 (2) unless the plaintiff has given sixty days'
6 written notice of the violation to the commission, the oil
7 conservation division of the energy, minerals and natural
8 resources department, the attorney general and any alleged
9 violator of the Oil and Gas Act or a rule, permit or order.
10 However, where the violation of the statute, rule, permit or
11 order complained of constitutes an immediate threat to the
12 health or safety of the plaintiff or would immediately and
13 irreversibly impair a legal interest of the plaintiff, an
14 action under this section may be brought immediately after
15 notification of the proper parties; or

16 (3) if the commission or division has commenced
17 and is diligently prosecuting a civil action in a court of this
18 state or an administrative enforcement proceeding to require
19 compliance with the Oil and Gas Act or a rule, permit or order.
20 In an administrative or court action commenced by the
21 commission or division, a person who has standing pursuant to
22 Subsection B of this section and who has provided notice
23 pursuant to Paragraph (2) of this subsection prior to the
24 initiation of the action may intervene as a matter of right.

25 D. Whenever any action is brought under this section,

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1 the plaintiff shall serve a copy of the complaint on the
2 commission and the oil conservation division of the energy,
3 minerals and natural resources department. No stipulated
4 judgment shall be entered in an action brought under this
5 section if the commission or division is not a party, unless
6 the judgment is entered at least forty-five days after the
7 receipt of a copy of the proposed stipulated judgment by the
8 commission or division, during which time the commission or
9 division may submit comments on the proposed stipulated
10 judgment to the court or may intervene as a matter of right.
11 The plaintiff in the action shall be responsible for providing
12 the proposed stipulated judgment to the commission and the
13 division.

14 E. In any action brought pursuant to this section,
15 the court may award reasonable costs of litigation, including
16 expert costs and attorney fees, except that, in an action
17 against the commission or the oil conservation division of the
18 energy, minerals and natural resources department, no costs of
19 litigation, expert costs or attorney fees shall be awarded
20 against the commission or division.

21 F. Except as otherwise provided in Subsection G of
22 this section, any civil penalties assessed shall be deposited
23 in the same fund in which they would have been deposited if the
24 action had been brought by the commission or the oil
25 conservation division of the energy, minerals and natural

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1 resources department.

2 G. Notwithstanding the provisions of Subsection E of
3 this section, the court shall have discretion to order that any
4 civil penalties assessed, not to exceed twenty-five thousand
5 dollars (\$25,000), be used in beneficial mitigation projects
6 that are consistent with the Oil and Gas Act or the rule,
7 permit or order alleged to have been violated and that enhance
8 the public health or the environment. Before exercising this
9 discretion, the court shall obtain written comments on
10 beneficial mitigation projects from the commission or the oil
11 conservation division of the energy, minerals and natural
12 resources department."

13 SECTION 2. A new section of the Environmental Improvement
14 Act is enacted to read:

15 "[NEW MATERIAL] PRIVATE RIGHT OF ACTION.--

16 A. Except as provided in Subsection B of this
17 section, a person who is injured in fact, economically or
18 otherwise, or who is imminently threatened with injury,
19 economically or otherwise, may commence a civil action on the
20 person's own behalf against:

21 (1) any other person, including the state of New
22 Mexico, a political subdivision thereof or any officer or
23 agency of either, charging a violation of any statute, rule or
24 permit, the enforcement of which is delegated to the department
25 or any order of the board or the secretary issued pursuant to a

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1 statute or rule; or

2 (2) the department or the board alleging a
3 failure to perform any substantive and nondiscretionary act or
4 duty required by an act or rule the enforcement of which is
5 delegated to the department or board.

6 B. No action may be commenced under Subsection A of
7 this section:

8 (1) unless the plaintiff has given sixty days'
9 written notice of the violation to the secretary, the attorney
10 general and any alleged violator of the statute, rule, permit
11 or order. However, where the violation of the statute, rule,
12 permit or order complained of constitutes an immediate threat
13 to the health or safety of the plaintiff or would immediately
14 and irreversibly impair a legal interest of the plaintiff, an
15 action under this section may be brought immediately after
16 notification of the proper parties; or

17 (2) if the department has commenced and is
18 diligently prosecuting a civil action in a court of this state
19 or an administrative enforcement proceeding to require
20 compliance with the Environmental Improvement Act or a rule,
21 permit or order. In an administrative or court action
22 commenced by the department, a person who has standing pursuant
23 to Paragraph (1) of this subsection prior to the initiation of
24 the action may intervene as a matter of right.

25 C. Whenever any action is brought under this section,

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1 the plaintiff shall serve a copy of the complaint on the
2 secretary. No stipulated judgment shall be entered in an
3 action brought under this section if the department is not a
4 party, unless the judgment is entered at least forty-five days
5 after the receipt of a copy of the proposed stipulated judgment
6 by the secretary, during which time the department may submit
7 comments on the proposed stipulated judgment to the court or
8 may intervene in the action as a matter of right. The
9 plaintiff in the action shall be responsible for providing the
10 proposed stipulated judgment to the secretary.

11 D. In any action brought pursuant to this section,
12 the court may award reasonable costs of litigation, including
13 expert costs and attorney fees, except that, in an action
14 against the department or the board, no costs of litigation,
15 expert costs or attorney fees shall be awarded against the
16 department or the board.

17 E. Except as otherwise provided in Subsection F of
18 this section, any civil penalties assessed shall be deposited
19 in the same fund in which they would have been deposited if the
20 action had been brought by the department or board.

21 F. Notwithstanding the provisions of Subsection E of
22 this section, the court shall have discretion to order that any
23 civil penalties assessed, not to exceed twenty-five thousand
24 dollars (\$25,000), be used in beneficial mitigation projects
25 that are consistent with the act, rule, permit or order alleged

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1 to have been violated and that enhance the public health or the
2 environment. Before exercising this discretion, the court
3 shall obtain written comments on beneficial mitigation projects
4 from the secretary.

5 G. In an action brought pursuant to this section to
6 enforce a provision of the Air Quality Control Act or a rule,
7 permit or order issued under that act, if jurisdiction to
8 enforce the act has been assumed by a local authority and if
9 the complaint arose within the jurisdiction of the local
10 authority, then, notwithstanding the definitions in Section
11 74-1-3 NMSA 1978, as used in this section:

12 (1) "board" means the local board created by the
13 local authority;

14 (2) "department" means the administrative agency
15 established by the local authority pursuant to Paragraph (2) of
16 Subsection A of Section 74-2-4 NMSA 1978; and

17 (3) "secretary" means the director or
18 administrative head of the local agency."

19 SECTION 3. A new section of the Water Quality Act is
20 enacted to read:

21 "[NEW MATERIAL] PRIVATE RIGHT OF ACTION.--

22 A. Except as provided in Subsection B of this
23 section, a person who is injured in fact, economically or
24 otherwise, or who is imminently threatened with injury,
25 economically or otherwise, may commence a civil action on the

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1 person's own behalf against:

2 (1) any other person, including the state of New
3 Mexico, a political subdivision thereof or any officer or
4 agency of either, charging a violation of the Water Quality Act
5 or a rule, permit or order issued pursuant to that act; or

6 (2) the commission or a constituent agency
7 alleging a failure to perform any substantive and
8 nondiscretionary act or duty required by the Water Quality Act
9 or a rule, permit or order promulgated pursuant to that act.

10 B. No action may be commenced under Subsection A of
11 this section:

12 (1) unless the plaintiff has given sixty days'
13 written notice of the violation to the commission, the
14 appropriate constituent agency, the attorney general and any
15 alleged violator of the statute, rule, permit or order.

16 However, where the violation of the statute, rule, permit or
17 order complained of constitutes an immediate threat to the
18 health or safety of the plaintiff or would immediately and
19 irreversibly impair a legal interest of the plaintiff, an
20 action under this section may be brought immediately after
21 notification of the proper parties; or

22 (2) if a constituent agency has commenced and is
23 diligently prosecuting a civil action in a court of this state
24 or an administrative enforcement proceeding to require
25 compliance with the act, rule, permit or order. In an

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1 administrative or court action commenced by a constituent
2 agency, a person who has standing pursuant to Subsection A of
3 this section and who has provided notice pursuant to Paragraph
4 (1) of this subsection prior to the initiation of the action
5 may intervene as a matter of right.

6 C. Whenever any action is brought under this section,
7 the plaintiff shall serve a copy of the complaint on the
8 commission and the appropriate constituent agency. No
9 stipulated judgment shall be entered in an action brought under
10 this section if the appropriate constituent agency is not a
11 party, unless the judgment is entered at least forty-five days
12 after the receipt of a copy of the proposed stipulated judgment
13 by the agency, during which time the agency may submit comments
14 on the proposed stipulated judgment to the court or may
15 intervene in the action as a matter of right. The plaintiff in
16 the action shall be responsible for providing the proposed
17 stipulated judgment to the agency.

18 D. In any action brought pursuant to this section,
19 the court may award reasonable costs of litigation, including
20 expert costs and attorney fees, except that, in an action
21 against the commission or a constituent agency, no costs of
22 litigation, expert costs or attorney fees shall be awarded
23 against the commission or constituent agency.

24 E. Except as otherwise provided in Subsection F of
25 this section, any civil penalties assessed shall be deposited

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1 in the same fund in which they would have been deposited if the
2 action had been brought by the appropriate constituent agency.

3 F. Notwithstanding the provisions of Subsection E of
4 this section, the court shall have discretion to order that any
5 civil penalties assessed, not to exceed twenty-five thousand
6 dollars (\$25,000), be used in beneficial mitigation projects
7 that are consistent with the Water Quality Act or the rule,
8 permit or order alleged to have been violated and that enhance
9 the public health or the environment. Before exercising this
10 discretion, the court shall obtain written comments on
11 beneficial mitigation projects from the appropriate constituent
12 agency."

13 SECTION 4. EFFECTIVE DATE.--The effective date of the
14 provisions of this act is July 1, 2013.