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FISCAL IMPACT REPORT

SPONSOR McQueen LAST UPDATED _____
ORIGINAL DATE 2/3/23
BILL
SHORT TITLE Private Right of Action for Certain Statutes NUMBER House Bill 242
ANALYST J. Torres

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
NMED	No fiscal impact	\$596.9	\$596.9	\$1,193.8		

Sources of Information

LFC Files

Responses Received From

New Mexico Environment Department (NMED)

Office of Natural Resources Trustee (ONRT)

New Mexico Attorney General (NMAG)

Energy, Minerals and Natural Resources Department (EMNRD)

SUMMARY

Synopsis of House Bill 242

House Bill 242 (HB242) amends the Air Quality Control Act, Hazardous Waste Act, Solid Waste Act, and Water Quality Act to create a private right of action to seek enforcement against a person regulated by and alleged to be in violation of the act, rule, permit, or order issued under the act. The person bringing the civil action must have standing by being injured or imminently threatened with an injury. The plaintiff would be required to provide 60 day notice to NMED, the alleged violator, and the Attorney General before bringing the action, except in the case of an immediate threat to health, safety, or of irreparable legal injury, in which case the action may be brought immediately after providing notice. Successful plaintiffs may be awarded reasonable litigation costs including expert and attorney fees. The injury may be economic or otherwise. Penalties for successful actions are deposited into specified accounts.

The private right of action would not be available if NMED is diligently prosecuting a civil action to require compliance with the relevant act, but a party with standing would be authorized to intervene as a matter of right, upon complying with the notice requirements. NMAG may intervene as a matter of right. NMED must be given at least 45 days to review and comment on any proposed consent decree, unless that agency is a party to the consent decree.

Private actions would be subject to the three-year statute of limitations for injury to persons provided in Section 37-1-8 NMSA 1978.

The effective date of this bill is July 1, 2023.

FISCAL IMPLICATIONS

NMED states:

The fiscal impact of HB242 would depend on the civil actions that are filed and the penalties that are assessed. Penalties collected will be deposited in the treasury and credited to the NMED fund in which the civil action is filed. Initially, citizen suits pursuant to HB242 will result in an unknown amount of revenue to the state.

The overall scope of the potential fiscal implications from HB242 is unclear for NMED. NMED would likely still have to intervene as a party in any suit filed against a regulated entity under the laws establishing NMED's authority. NMED would also likely have to argue "diligent prosecution" in these citizen cases, in order to protect the agency's ongoing enforcement action from potentially conflicting investigation and remediation pursuant to court decision in the citizen suit. The citizen suit cannot result in a settlement or consent decree, unless NMED is a party in the case, or has been given 45 days to submit comments on the proposed settlement or decree.

HB242 may require significant legal resources from NMED, whose Office of General Counsel currently is short four attorneys due to lack of funding. While the exact dollar amount associated with the overall fiscal impact on NMED is difficult to calculate; at least four additional departmental attorneys and a paralegal (one Attorney II, two Attorney III, one Attorney IV and one Paralegal A) at an approximate expense of \$596,851 per year in salaries and benefits (mid-point) are likely required. This includes administrative support costs for these employees.

NMED currently lacks the resources to fully execute its statutory responsibilities. Unless NMED receives additional resources, the provisions of HB242 could exacerbate this situation: fewer inspections and discoveries of alleged violations and less enforcement. Citizen suits may encourage corporate entities to change compliance behavior for the better, which may, in turn, alleviate some compliance actions for NMED. However, it may also cause more private actions in court and increase litigation costs for NMED. Based on past enforcement history in New Mexico, NMED cannot conclusively say what this impact will be. Alternatively, a fully funded NMED could adequately pursue administrative enforcement, where necessary, and likely limit litigation costs.

EMNRD states:

The Energy, Minerals and Natural Resources Department, Oil Conservation Division ("OCD") is a constituent agency of the Water Quality Control Commission ("WQCC") under the Water Quality Act ("WQA"). Under the WQA, OCD administers groundwater permit and underground injection control ("UIC") permit programs for certain oil and gas related facilities. The fiscal impact of HB242 would depend on the civil actions that are filed and the penalties that are assessed. The provisions of the bill as drafted which direct that penalties collected will be deposited in the treasury and credited to the NMED fund in which the civil action is filed, ignores OCD's role and would deprive it of revenues. Initially, citizen suits pursuant to HB242 will result in an unknown amount of revenue to the state.

In terms of impacts to the OCD, it would likely still have to intervene as a party in any suit filed against a regulated entity under the laws establishing OCD authority. OCD would also likely have to argue “diligent prosecution” in these citizen cases, in order to protect the agency’s ongoing enforcement action from potentially conflicting investigation and remediation pursuant to court decision in the citizen suit. OCD also has concerns about the consent decree process under the bill. While it does not require us to participate, unless OCD is a party, and gives us the option of providing comments, the possibility settlements being finalized to which OCD is not a party could complicate future administrative enforcement efforts.

SIGNIFICANT ISSUES

NMAG states:

Although citizen suit provisions have been challenged under separation of powers and other constitutional theories, they are contained in all major federal environmental statutes and have been uniformly upheld. *See, e.g., Atl. States Legal Found., Inc. v. Buffalo Envelope, Div. of Am. Envelope Co.*, 823 F. Supp. 1065, 1076 (W.D.N.Y. 1993) (citizen suit provisions of the EPCRA, 42 U.S.C. § 11046, do not violate the principle of the separation of powers)

PERFORMANCE IMPLICATIONS

ENMRD states:

HB242 may cause additional and unexpected litigation for OCD, reducing bandwidth available for other efforts.

NMED states:

HB242 may cause additional and unexpected litigation for NMED, reducing NMED’s ability to focus its limited resources on regulating its programs. Since this would be outside of NMED’s control, NMED would be unable to effectively plan for the legal and programmatic resources required for these activities. This may also have unknown consequences on NMED’s primacy in various programs granted by the U.S. Environmental Protection Agency.

ADMINISTRATIVE IMPLICATIONS

NMAG states:

The bill would create private rights of action under state environmental law and require that plaintiffs provide advance notice and service of such actions on the Attorney General, and provide the Attorney General with intervention as of right. As such, it could necessitate the expenditure of resources to review prospective and filed cases, and increase caseload to the extent the Office decides to intervene.

NMED states:

NMED may be forced to expend its limited resources to address interruptions of ongoing administrative actions to account for or defend against civil actions brought pursuant to HB242.

OTHER SUBSTANTIVE ISSUES

NMAG states:

The bill does not specify the court having jurisdiction and venue over the proposed private right of action. Presumably it would be the district court where the plaintiff resides or where the alleged violator is located, but clarification could be helpful.

NMRT states:

The private citizens rights of actions provided under and contemplated by HB242 could complement and enhance the work of ONRT, and lead to the restoration of natural resources damaged as the result of violations of our state's environmental protection laws.

JT/ne