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FISCAL IMPACT REPORT

ORIGINAL DATE 02/08/09
 SPONSOR Fishmann LAST UPDATED 02/12/09 HB _____
 SHORT TITLE Natural Resource Damage Recovery SB 387
 ANALYST Moser

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	\$1.0	\$1.0	Natural Resource Trustee Fund

(Parenthesis () Indicate Expenditure Decreases)

Duplicates Appropriation in the General Appropriation Act
 Relates to Appropriation in the General Appropriation Act

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY09	FY10	FY11		
	\$1.0	\$1.0	Recurring	Natural Resource Trustee Fund
	(\$1.0)	(\$1.0)	Recurring	Land Grant Permanent Fund, State Road Fund

(Parenthesis () Indicate Revenue Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Office of the Attorney General (AGO)
- NM Department of Environment (NMED)
- State Land Office (SLO)
- Office of the State Engineer (OSE)
- Office of the Natural Resource Trustee (ONRT)

SUMMARY

Synopsis of Bill

Senate Bill 387 would amend the Natural Resources Trustee Act, NMSA 1978, § 75-7-1 *et seq.*, to give the natural resources trustee authority to bring an action on behalf of the state of New Mexico to recover damages in the event of an intentional or unintentional release of an “injurious substance” (as defined in the bill) “into the environment,” which includes a release “within the facility” from which the release occurred.

The definition of “injurious substance” includes hazardous substances regulated under various federal environmental protection laws and (i) “oil of any kind or in any form,” (ii) certain forms or amounts of solid waste,” and (iii) “any other substance that the trustee may by rule designate as an injurious substance based upon its toxicity, persistence and degradability in nature; potential for accumulation in tissue; and other related factors such as flammability, corrosiveness and other hazardous characteristics.”

The trustee is authorized to promulgate rules following notice and a public hearing. A person “who is or may be” affected by a rule may bring suit in the district court for Santa Fe County for relief. The district court “shall” set aside the rule if the court finds the rule to be arbitrary, capricious, or an abuse of discretion, or otherwise not in accordance with law.

The bill amends the current statute to increase the authority of the trustee to take any action necessary to carry out the responsibilities under the state law as well existing responsibilities under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980. It amends the current statute to require that monies deposited in the natural resources trustee fund shall be expended to restore, replace, or acquire natural resources in the same area where the damage occurred, unless such restoration would be infeasible or ineffective.

FISCAL IMPLICATIONS

Senate Bill 387 will increase the revenues and expenditures of the ONRT fund as penalties are imposed and collected and work is contracted for remediation activities.

Because these activities occur on a substantial portion of the roughly 13 million acres of state trust land, and because those activities generate a substantial amount of the revenue generated for the Land Grant Permanent Fund, the potential effect on the State Land Office and the trust is significant.

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SIGNIFICANT ISSUES

NMED indicates that SB 387 amends the Natural Resource Trustee Act (Act) to give the state explicit authority to seek claims for damages to the State’s natural resources from polluters. Under the Act, the ONRT seeks compensation for damages under federal law (i.e., the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the

Oil Protection Act (OPA) that authorizes resource trustees to recover damages to natural resources. Recovery is generally made in the form of monetary damages used to conduct restoration projects so there is no net loss of resources.

NMED indicates that at its core, SB 387 is a groundwater restoration bill and seeks to close an existing “loophole” in federal law. NMED points out that “Federal law is not clear concerning trustees’ authority to recover damages and seek restoration of groundwater resources. In New Mexico, more than 90 percent of our citizens rely on groundwater for drinking water supplies; such a loophole puts the long-term sustainability of our groundwater resource in jeopardy.” NMED argues that “CERCLA and OPA do not fully address recovery for natural resource damages in New Mexico in other ways. For example, federal law does not allow for recovery or restoration of resources damaged by oil pollution if the pollution does not affect a navigable waterway. New Mexico has hundreds of sites with oil-polluted groundwater, and the State currently has no way to seek recovery for damages. Federal law also does not allow compensation to the State for damage to aquifers from nitrate contamination – the most widespread groundwater contaminant in the State.” NMED feels that SB 387 addresses those loopholes in federal law. This would enhance the State’s ability to recover groundwater resource damages

The bill establishes a statute of limitations for releases of the later of five years from discovery or January 1, 2015. This would appear to permit actions for existing or past releases. It is not clear how far back the trustee may go in bringing such an action.

The State Land Office expresses its concern that certain activities conducted on state trust lands (including mining and oil and gas exploration and production) are ones that might lead to a release covered by this bill. It is SLO’s opinion that enactment of the legislation would increase the risk of liability associated with these activities in New Mexico and would increase the risk of liability on state trust land. Because these activities occur on a substantial portion of the roughly 13 million acres of state trust land, and generate a substantial amount of the revenue for the Land Grant Permanent Fund, the potential effect on the trust and the SLO is significant.

The SLO indicates that the Enabling Act trust managed by the commissioner of public lands includes some natural resources subject to this bill and that the bill potentially conflicts with the jurisdiction of the commissioner of public lands and the terms of the Enabling Act relating to recovery from or related to state trust lands and their natural products and the placement of proceeds of such recovery in the permanent fund or maintenance fund pertaining to that trust land. Additionally, the SLO argues that “...the bill does not address the question of whether liability may extend to a state agency or instrumentality or a municipality where such entity is the owner of the property where the release occurred or is otherwise connected to the facility where the release occurred. Also, while the joint and several liability contemplated by the bill would allow the trustee to pursue some but not all potentially responsible parties, the persons pursued by the trustee may seek indemnification or contribution by governmental entities. Thus, the bill may have the effect of increasing governmental liability.”

PERFORMANCE IMPLICATIONS

It is the opinion of the SLO that this legislation may affect the level of mining and oil and gas exploration and production that occurs on state trust land and the price that potential lessees are willing to pay for the right to conduct these activities on state trust land.

ADMINISTRATIVE IMPLICATIONS

The SLO expresses concern with the following:

- It is unclear to what extent the SLO would be consulted and involved in actions brought by the trustee pursuant to this legislation when the facility where the release occurred is located on state trust land or where the affected natural resources are located on state trust land. Such involvement would increase the administrative burdens of the State Land Office.
- The increased liability risk for potential state trust land lessees may add complexity to the leasing process. To extent that the State Land Office may be brought into litigation by the trustee or a potentially responsible party seeking indemnification or contribution, the potential increase in the administrative burden to the State Land Office is quite high.

The OSE indicates that an additional administrative burden exist as a result of notification of the release of an injurious substance to notify well owners and applicants for domestic well permits of a release or requests for data from the trustee. The scope of any such burden cannot be predicted at this time.

DUPLICATION, RELATIONSHIP

The SLO indicates concern that amendments to the Natural Resources Trustee Act overlap substantially with the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

SLO argues that absent a waiver, the state and its instrumentalities have Eleventh Amendment immunity from monetary liability under CERCLA. *See Celanese Corp. v. Coastal Water Authority*, 475 F.Supp.2d 623, 632 n. 5 (S.D.Tex. 2007). Section 5 of the bill states that there shall be “no dual recovery” for damages to the same natural resources caused by the same release. It is unclear what this means with respect to a release which is the subject of federal enforcement action under CERCLA. Paragraph E of Section 3 exempts from liability a release which is “in compliance with a license or permit duly issued by the state or the federal government.” Nonetheless, by including oil and related substances within the definition of “injurious substance,” the bill may create conflicts or complications with the jurisdiction and actions of the Oil Conservation Division. There may be other conflicts or complications with respect to activities regulated by the Environment Department. This was not an issue raised by NMEd in its analysis of this bill.

The SLO reiterates its position that since the Enabling Act trust managed by the commissioner of public lands includes some of the natural resources which are the subject of the bill, the bill potentially conflicts with the jurisdiction of the commissioner of public lands and with the terms of the Enabling Act relating to recovery from or related to state trust lands and their natural products and the placement of proceeds of such recovery in the permanent fund or maintenance fund pertaining to that trust land.

The SLO notes that most SLO leases, by their own terms or in conjunction with SLO regulations, allocate to the lessee responsibility for remediation of contamination and reclamation of sites when a facility closes.

TECHNICAL ISSUES

The bill does not define the term “facility” or “environment.” In the absence of statutory definitions, the terms are vague. Both terms are defined in the federal CERCLA statute, 42 U.S.C. § 9601, which might be looked at as a model.

NMED indicates that the exemption for a release which is “in compliance with a license or permit duly issued by the state or the federal government” (Section 3, Paragraph E of the bill) is vague. CERCLA defines “federally permitted release.” 42 U.S.C. § 9601(10). That definition should be consulted.

The OSE expresses concern that “...while it is clear under existing statutes that water, surface or ground, belongs to the people of the state of New Mexico, the same is not true for land and minerals”... and asks if ...”can the trustee bring an action independent of a land owner for remediation and would this constitute “dual recovery” if the trustee was to obtain a judgment for remediation and the owner was to sue for some other form of damage not recoverable by the trustee?”

The SLO is concerned as to whether the legislation would apply retroactively to releases that occurred prior to the effective date, or how damages are assessed when a release is ongoing (continuous or intermittent) from a time prior to the effective date.

OTHER SUBSTANTIVE ISSUES

The OSE indicates that ““Natural resources” is defined as land, minerals, soils, sediments, geological resources, etc. While it is clear under existing statutes that water, surface or ground, belongs to the people of the state of New Mexico, the same is not true for land and minerals. Can the trustee bring an action independent of a land owner for remediation and would this constitute “dual recovery” if the trustee was to obtain a judgment for remediation and the owner was to sue for some other form of damage not recoverable by the trustee?”

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