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SENATE BILL 387

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

INTRODUCED BY

Stephen H. Fischmann

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 of the state of New Mexico  
are assets of the state held in trust by the state 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. "injurious substance" means:

15 (1) any substance that is an air contaminant  
16 under the Air Quality Control Act;

17 (2) any substance identified or listed as a  
18 hazardous waste under the Hazardous Waste Act;

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

22 (4) any hazardous constituent identified in 40  
23 C.F.R., Part 261, Appendix VIII;

24 (5) any solid waste exceeding the toxicity  
25 characteristics listed in Table 1 of 40 C.F.R. 261.24;

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1 (6) any constituent identified in 40 C.F.R.,  
2 Part 264, Appendix IX;

3 (7) any substance meeting the definition of  
4 hazardous chemical under the Hazardous Chemicals Information  
5 Act;

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

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

10 (10) oil of any kind or in any form, including  
11 petroleum, fuel oil, sludge, oil refuse and oil mixed with  
12 wastes;

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

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

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

23 (12) any other substance that the trustee may  
24 by rule designate as an injurious substance based upon its  
25 toxicity, persistence and degradability in nature; potential

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1 for accumulation in tissue; and other related factors such as  
2 flammability, corrosiveness and other hazardous  
3 characteristics;

4 B. "natural resources" includes land; minerals;  
5 soils; sediments; geologic resources; air; surface waters;  
6 ground waters; drinking water supplies; aquifers; perennial,  
7 seasonal and ephemeral drainages; arroyos; watersheds; biota;  
8 fish; wildlife; supporting habitats; and vegetation;

9 C. "restoration" means those actions necessary to  
10 return an injured natural resource to its baseline condition as  
11 measured in terms of the injured natural resource's physical,  
12 chemical or biological properties and the services it  
13 previously provided; and

14 D. "trustee" means the natural resources trustee."

15 Section 3. A new section of the Natural Resources Trustee  
16 Act is enacted to read:

17 "[NEW MATERIAL] LIABILITY FOR DAMAGES.--

18 A. Except as provided in Subsection E of this  
19 section, with respect to any facility from which there is an  
20 intentional or unintentional release of an injurious substance  
21 into the environment, including a release within the facility,  
22 the following persons shall be jointly and severally liable to  
23 the state for all damages resulting from the release:

24 (1) the owner or operator of the facility at  
25 the time of the release;

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1                   (2) any person who previously owned or  
2 operated the facility during a time in which the injurious  
3 substance was released, placed, disposed of or treated;

4                   (3) any person who by agreement or otherwise  
5 arranged for release, placement, disposal or treatment of the  
6 injurious substance at the facility or arranged with a  
7 transporter for transport of the injurious substance to or from  
8 the facility whether or not the injurious substance was owned  
9 or possessed by the person; and

10                   (4) any person who accepted the injurious  
11 substance for transport to a disposal or treatment facility or  
12 site selected by that person.

13                   B. Damages owed to the state under this section  
14 include:

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

17                   (2) interim losses incurred after the release  
18 and before the completion of restoration;

19                   (3) residual losses remaining after completion  
20 of restoration of the natural resources; and

21                   (4) the reasonable costs of assessing the  
22 injury resulting from the release.

23                   C. Damages owed to the state under this section may  
24 be recovered regardless of prospective or ongoing remediation  
25 efforts.

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1           D. The amount of damages may be established by any  
2 methodology that demonstrates:

3           (1) the cost of restoration or rehabilitation  
4 of the injured natural resources to a condition where they can  
5 provide the level of services and resource value available  
6 before the release of the injurious substance;

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

10           (3) the value of the services and resources  
11 lost to the public from the time of the release through the  
12 completion of the restoration, rehabilitation, replacement or  
13 acquisition of equivalent natural resources; and

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

16           E. There shall be no liability under this section  
17 for a release of an injurious substance if the release is in  
18 compliance with a license or permit duly issued by the state or  
19 the federal government and in effect at the time of the  
20 release."

21           Section 4. A new section of the Natural Resources Trustee  
22 Act is enacted to read:

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

24           A. The trustee, as plaintiff, may bring a suit on  
25 behalf of the state against any person who is liable, under the

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1 provisions of the Natural Resources Trustee Act, for damages  
2 caused by a release of an injurious substance, except that,  
3 before initiating suit, the trustee shall make reasonable  
4 efforts to conduct a cooperative assessment of the nature and  
5 extent of the damages and of methods to achieve resolution of  
6 the trustee's claim in cooperation with the responsible party  
7 and, upon initiating suit, the trustee shall certify that, in  
8 the trustee's judgment, the efforts have not succeeded in  
9 resolving the trustee's claims.

10 B. Venue shall be in the district court for Santa  
11 Fe county or in the district court for the county in which  
12 damages were sustained."

13 Section 5. A new section of the Natural Resources Trustee  
14 Act is enacted to read:

15 "[NEW MATERIAL] DUAL RECOVERY PROHIBITED.--There shall be  
16 no dual recovery under the Natural Resources Trustee Act for  
17 damages to the same natural resources, including the costs of  
18 damage assessment or restoration, rehabilitation or  
19 acquisition, caused by the same release of injurious  
20 substances."

21 Section 6. A new section of the Natural Resources Trustee  
22 Act is enacted to read:

23 "[NEW MATERIAL] LIMITATION ON ACTIONS.--No claim may be  
24 made under the Natural Resources Trustee Act for recovery of  
25 damages unless the claim is made before the later of the

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1 following:

2 A. five years after the date that the trustee  
3 became aware of the nature and extent of the release and the  
4 extent of injuries caused by the release; or

5 B. January 1, 2015."

6 Section 7. A new section of the Natural Resources Trustee  
7 Act is enacted to read:

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

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

12 (1) defining and describing injurious  
13 substances;

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

16 (3) prescribing procedures for assessing and  
17 establishing claims.

18 B. No rule shall be adopted until after a public  
19 hearing by the trustee or the trustee's designee. Notice of  
20 the hearing shall be given at least sixty days prior to the  
21 hearing date and shall state the subject, the time and the  
22 place of the hearing and the manner in which interested persons  
23 may present their views. The proposed language amending any  
24 existing rule or any proposed new rule shall be made available  
25 to the public as of the date that the notice of the hearing is

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1 given. The notice shall also state where interested persons  
2 may secure copies of any proposed amendment or new rule. The  
3 notice shall be published in a newspaper of general circulation  
4 in the area affected. Reasonable effort shall be made to give  
5 notice to all persons who have made a written request for  
6 advance notice of hearings.

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

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

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

24 (1) arbitrary, capricious or an abuse of  
25 discretion; or

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

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

4 "75-7-2. NATURAL RESOURCES TRUSTEE--OFFICE OF NATURAL  
5 RESOURCES TRUSTEE.--

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

20 B. The "office of natural resources trustee" is  
21 created. The office shall be administratively attached to the  
22 department of environment. The administrative head of the  
23 office of natural resources trustee is the natural resources  
24 trustee. For purposes of this subsection, the term  
25 "administratively attached" means the same as specified in

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1 Section 9-1-7 NMSA 1978."

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

4 "75-7-3. NATURAL RESOURCES TRUSTEE POWERS AND DUTIES.--

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

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

16 (2) investigate injury to, destruction of or  
17 loss of natural resources;

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

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

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

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

3 B. The natural resources trustee may:

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

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

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

13 C. The attorney general shall provide legal counsel  
14 and representation to the natural resources trustee and the  
15 office of the natural resources trustee."

16 Section 10. Section 75-7-5 NMSA 1978 (being Laws 1993,  
17 Chapter 292, Section 5, as amended) is amended to read:

18 "75-7-5. NATURAL RESOURCES TRUSTEE FUND.--

19 A. The "natural resources trustee fund" is created  
20 in the state treasury. Money appropriated to the fund or  
21 accruing to it through gifts, grants, fees, penalties, bequests  
22 or any other source shall be delivered to the state treasurer  
23 and deposited in the fund. Money recovered for the state by or  
24 on behalf of the [~~natural resources~~] trustee shall be deposited  
25 in the natural resources trustee fund. The fund shall be

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1 administered by the ~~[natural resources]~~ trustee as a separate  
2 account and may consist of subaccounts that the ~~[natural~~  
3 ~~resources]~~ trustee deems necessary to carry out the purposes of  
4 the fund. Disbursements from the fund shall be made upon  
5 warrants drawn by the secretary of finance and administration  
6 pursuant to vouchers signed by the ~~[natural resources]~~ trustee  
7 or the trustee's designated representative. Money in the fund  
8 shall not revert to the general fund at the end of a fiscal  
9 year.

10 B. Pursuant to the following criteria, money in the  
11 natural resources trustee fund shall be used to carry out the  
12 provisions of the Natural Resources Trustee Act by restoring,  
13 replacing or acquiring natural resources ~~[in an area where~~  
14 ~~natural resources have been injured, destroyed or lost,~~  
15 ~~provided that money deposited in the fund because of injury to,~~  
16 ~~destruction of or loss of natural resources in an area shall be~~  
17 ~~disbursed to restore, replace or acquire natural resources in~~  
18 ~~that same area]:~~

19 (1) if an expenditure from the fund is  
20 necessary to comply with a court order or court-approved  
21 settlement or to match federal funds, then, pursuant to  
22 Sections 6-3-23 through 6-3-25 NMSA 1978, the ~~[natural~~  
23 ~~resources]~~ trustee may request a budget increase and, if  
24 approved, the amount of the expenditure is appropriated;

25 (2) if money is received for reimbursement of

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1 assessment costs, then the ~~[natural resources]~~ trustee may  
2 expend money for injury assessment, and money is appropriated  
3 in that amount for that purpose; ~~[and]~~

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

6 (4) money deposited in the fund because of  
7 injury to, destruction of or loss of natural resources in an  
8 area shall be expended to restore, replace or acquire natural  
9 resources in that same area, provided that the trustee may  
10 undertake a restoration action outside the area where the  
11 natural resources were injured, destroyed or lost if, in the  
12 trustee's judgment, action within the area would be infeasible  
13 or ineffective.

14 C. In addition to expenditures made pursuant to  
15 Subsection B of this section, money shall be appropriated  
16 annually by the legislature from the general fund for the  
17 purpose of providing for necessary personnel and other costs of  
18 the ~~[natural resources]~~ trustee, the attorney general and the  
19 office of natural resources trustee in carrying out the  
20 provisions of the Natural Resources Trustee Act, including the  
21 cost of investigation, assessment, collection or enforcement.

22 D. For purposes of this section, "assessment  
23 'costs" means the costs of restoration and the costs of  
24 collecting, compiling and analyzing information, statistics or  
25 data to determine damages for injuries to natural resources

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pursuant to the Natural Resources Trustee Act.

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

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

Section 12. EFFECTIVE DATE.--The effective date of the provisions of this act is July 1, 2009.