



New Mexico State Legislature Proposes Expanded Powers for Natural Resources Trustee to Recover Damages

By: [Craig Berube](#), [Carol Leach](#) and [Kelly de la Torre](#)

House Bill 27 (“HB 27”) is seeking significant changes to the Natural Resources Trustee Act (“NRTA”). The New Mexico legislature enacted the Natural Resources Trustee Act in 1993 with provisions consistent with the Comprehensive Environmental Response Compensation and Liability Act (“CERCLA”). One of the express duties of the natural resources trustee is assessment and collection of “damages for injury to, destruction of, or loss of natural resources, including bringing legal actions.” N.M. Stat. Ann. § 75-7-3(A)(5). The NRTA, as currently written, provides for collection of damages consistent with federal law. In particular, the NRTA provides that an award under the NRTA “shall consist of those amounts calculated in accordance with federal law, including . . . the cost of restoration, replacement or acquisition of equivalent resources, plus compensation for the loss of use or enjoyment of the natural resources.” N.M. Stat. Ann. § 75-7-4(A). CERCLA provides a comprehensive mechanism for waste clean up, site restoration and remediation and imposes cleanup costs on the responsible parties. CERCLA further provides a mechanism to address damage assessment for natural resource injury, damage recovery for such injury and use of such recovery.

In significantly overhauling the NRTA, the State of New Mexico is in potential conflict with CERCLA and other federal statutes. HB 27 may be in response to a decision by the U.S. Court of Appeals for the 10th Circuit, *State of New Mexico v. General Electric Company, et al.*, 467 F.3d 1223 (10th Cir. 2006). In this case, the federal court of appeals explained that “CERCLA’s comprehensive [natural resources damages] scheme preempts any state remedy designed to achieve something other than the restoration, replacement, or acquisition of the equivalent of a contaminated natural resource.” *Id.* at 1247.

HB 27, however, provides for recovery of damages beyond that provided for under CERCLA. Specifically, HB 27 provides that “the state should recover damages for injury to natural resources, regardless of whether such natural resources have been or may be used or committed to use at any time and regardless of whether the natural resources are at present capable of being used.” See, new section Legislative Findings, section 1D. Further, the bill provides for recovery of: “(1) damages for injury to natural resources, including the destruction or loss of natural resources; (2) interim losses incurred after the release and before the completion of restoration; (3) residual losses remaining after completion of restoration of the natural resources; and (4) the reasonable costs of assessing the injury resulting from the release.” See, new section, Liability for Damages, paragraph (B).

Significantly, the amendments include repeal of N.M. Stat. Ann. § 75-7-4(A), that provides for recovery consistent with federal law and was cited by the court in *State of New Mexico v. General Electric Company*. “Notably, the NRDs allowable under New Mexico’s NRT appear identical to damages allowable under CERCLA.” 467 F.3d at 1245.

HB 27 further provides that “damages owed to the state under this section may be recovered regardless of prospective or ongoing remediation efforts.” See, new section, Liability for Damages, paragraph (C). Whereas, courts have previously held that CERCLA protects execution of CERCLA plans until completion of the plan in order to prevent interference with clean up efforts. “To the extent a state seeks to challenge a CERCLA response action, the plain language of § 9613(h) would limit a federal court’s jurisdiction to review such a challenge.” 467 F.3d at 1249. In effect, new section C may run afoul of CERCLA § 9613(h) by providing for an avenue of recovery prior to completion of remediation.

HB 27 appears to be an attempt to broaden the scope natural resource damages beyond that contemplated under federal law. This type of expansion may, in some instances, conflict with CERCLA and may create the potential for legal challenges to address the conflict between state and federal law addressing resource and environmental protection. To the extent, however, the bill authorizes through rulemaking the designation of injurious substances that are not included in federal laws then it creates a new cause of action for the trustee and exposes more operators and landowners to liability.

The bill has been endorsed by the Governor. House Bill 27 is nearly identical to Senate Bill 387 of the 49th Legislature (First Session), which died in committee during the 2009 legislative session. The bill is scheduled to have

its first hearing Friday, January 29, 2010, in the House Energy and Natural Resources Committee.

The foregoing does not purport to be a complete description of all provisions of House Bill 27. All interested parties are encouraged to examine the proposed legislation in its entirety, and/or contact this office with questions or concerns.

For additional information, please contact [Carol Leach](#).



2010, Beatty & Wozniak, P.C. All rights reserved.
This newsletter does not constitute legal advice. The views expressed in this newsletter are the views of the authors and not necessarily the views of the firm. Please consult with legal counsel for specific advice and or information.
Read our complete [legal disclaimer](#).