

Sixty-seventh
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2070

Introduced by

Energy and Natural Resources Committee

(At the request of the Department of Environmental Quality)

1 A BILL for an Act to create and enact sections 23.1-10-04, 23.1-10-05, 23.1-10-06, 23.1-10-07,
 2 23.1-10-08, 23.1-10-09, 23.1-10-10, 23.1-10-11, 23.1-10-12, 23.1-10-13, 23.1-10-14,
 3 23.1-10-15, 23.1-10-16, and 23.1-10-17 of the North Dakota Century Code, relating to the
 4 regulated substance response; to amend and reenact sections 11-33-01, 23.1-10-02, 40-47-01,
 5 and 58-03-11 of the North Dakota Century Code, relating to the regulated substance response;
 6 to repeal sections 23.1-04-04 and 23.1-10-01 of the North Dakota Century Code, relating to
 7 contaminated properties; to provide a continuing appropriation; and to provide for retroactive
 8 application.

9 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

10 **SECTION 1. AMENDMENT.** Section 11-33-01 of the North Dakota Century Code is
 11 amended and reenacted as follows:

12 **11-33-01. County power to regulate property.**

13 For the purpose of promoting health, safety, morals, public convenience, general prosperity,
 14 and public welfare, the board of county commissioners of any county may regulate and restrict
 15 within the county, subject to chapter 54-21.3, the location and the use of buildings and
 16 structures and the use, condition of use, or occupancy of lands for residence, recreation, and
 17 other purposes. The board of county commissioners and a county zoning commission shall
 18 state the grounds upon which any request for a zoning amendment or variance is approved or
 19 disapproved, and written findings upon which the decision is based must be included within the
 20 records of the board or commission. The board of county commissioners shall establish zoning
 21 requirements for solid waste disposal and incineration facilities before July 1, 1994. The board
 22 of county commissioners may impose tipping or other fees on solid waste management and
 23 incineration facilities. The board of county commissioners may not impose any fee under this
 24 section on an energy conversion facility or coal mining operation that disposes of its waste

1 onsite. The board of county commissioners may establish institutional controls that address
2 environmental concerns with the department of environmental quality as provided in section
3 ~~23.1-04-04~~23.1-10-16.

4 **SECTION 2. AMENDMENT.** Section 23.1-10-02 of the North Dakota Century Code is
5 amended and reenacted as follows:

6 **23.1-10-02. Environmental quality restoration fund - Continuing appropriation.**

7 There is established an environmental quality restoration fund into which the funds
8 recovered in this chapter may be deposited. The fund is to be administered by the department
9 of environmental quality and may be used by the department for costs of environmental
10 assessment, removal, corrective action, or monitoring as determined on a case-by-case basis.
11 All moneys placed in the fund under this section and section 23.1-10-05 are appropriated to the
12 department on a continuing basis.

13 **SECTION 3.** Section 23.1-10-04 of the North Dakota Century Code is created and enacted
14 as follows:

15 **23.1-10-04. Definitions.**

16 As used in this chapter, unless the context otherwise requires:

- 17 1. "Containment unit" means any one or a combination of containers, vessels, and
18 enclosures, including structures and appurtenances connected to them, which or has
19 been used to contain or dispense a regulated substance and is either stationary or
20 attached to a motor vehicle. The definition includes pipeline facilities that transport and
21 store regulated substances.
- 22 2. "Corrective action" means an action taken to investigate, minimize, contain, eliminate,
23 remediate, mitigate, monitor, or clean up a release including any necessary
24 emergency remedial effort.
- 25 3. "Corrective action cost" means any cost incurred by the department in conducting or
26 overseeing corrective actions performed on a release; or the performance of
27 reasonable measures undertaken to prevent or mitigate damage to the public health,
28 public safety, public welfare, or environment of the state.
- 29 4. "Department" means the department of environmental quality.
- 30 5. "Emergency remedial effort" means an action taken to protect the public health, public
31 safety, or environment from imminent danger resulting from a release, and an action

- 1 taken to contain a release that, if not contained, will pose in time a greater threat to the
2 public health, public safety, or environment than if the action is not taken immediately.
- 3 6. "Environment" means land, including public and private property, surface and
4 underground waters, fish, wildlife, biota, air, and other similar resources within the
5 state.
- 6 7. "Fund" means the environmental quality restoration fund.
- 7 8. "Institutional controls" and "activity and use limitations" are restrictions on the use and
8 management of real property, including buildings or fixtures, containing or preventing
9 migration of regulated substances or other pollution or contamination, or protecting
10 receptors from exposure or the threat of exposure to regulated substances or other
11 pollution or contamination. Institutional controls may apply:
- 12 a. During environmental remediation activities; or
- 13 b. To residual regulated substances, pollutants, or other pollution or contamination
14 or the byproducts of residual regulated substances, pollutants, or other pollution
15 or contamination which may remain on property after active environmental
16 remediation activities are concluded or while natural attenuation of regulated
17 substances or other pollution or contamination is occurring.
- 18 9. "Potentially responsible party" means a person identified as a possible cause of, or
19 contributor to, contamination or pollution on a site or property.
- 20 10. "Regulated substance" means a compound designated by the department, including
21 pesticides and fertilizers regulated by the department of agriculture; the hazardous
22 substances designated by the Federal Water Pollution Control Act [Pub. L. 80-845; 62
23 Stat. 1155; 33 U.S.C. 1251 et seq.]; the toxic pollutants designated by the Federal
24 Water Pollution Control Act and the Toxic Substances Control Act [Pub. L. 94-469; 90
25 Stat. 2003; 15 U.S.C. 2601 et seq.]; the hazardous substances designated by the
26 federal Comprehensive Environmental Response, Compensation, and Liability Act
27 [Pub. L. 96-510; 94 Stat. 2767; 42 U.S.C. 9601 et seq.]; petroleum, petroleum
28 substances, oil, gasoline, kerosene, fuel oil, oil sludge, oil refuse, production water, oil
29 mixed with other wastes, crude oils, substances, or additives to be utilized in refining
30 or blending crude petroleum or petroleum stock; any other oil or petroleum substance;
31 solid waste regulated under chapter 23.1-08; and technologically enhanced naturally

1 occurring radioactive material regulated under chapter 23.1-03. Radioactive material
2 other than technologically enhanced naturally occurring radioactive material is not a
3 regulated substance under this chapter.

4 11. "Release" means an intentional or unintentional act or omission that results in the
5 discharge, spill, leak, emission, escape, or disposal of a regulated substance into the
6 environment and harms or threatens harm to public health or public safety or the
7 environment.

8 12. "Responsible party" means a person that causes or contributes to an onsite or offsite
9 release or threatened release, or that is responsible for an illegal or unpermitted
10 storage, of a regulated substance that results in the contamination or pollution of a
11 property or site.

12 **SECTION 4.** Section 23.1-10-05 of the North Dakota Century Code is created and enacted
13 as follows:

14 **23.1-10-05. Revenue to the fund.**

15 Revenue from the following sources must be deposited in the state treasury and credited to
16 the fund:

17 1. If the balance of the fund is less than five million dollars, moneys recovered by the
18 department in an action or administrative proceeding based on violation of the state's
19 environmental statutes, including actions for administrative expense recoveries, civil
20 penalties, compensatory damages; and money paid pursuant to any agreement,
21 stipulation, or settlement. This section does not limit the department's ability to agree
22 to a supplemental environmental project as part of a settlement.

23 2. Moneys donated to the department for the purposes of this chapter.

24 3. Transfers from the abandoned oil and gas well plugging and site reclamation fund
25 under subdivision f of subsection 2 of section 38-08-04.5.

26 4. Moneys received from a federal agency for the purpose of this section.

27 5. Any other moneys as may be deposited in the fund for use in carrying out the
28 purposes of this chapter.

29 **SECTION 5.** Section 23.1-10-06 of the North Dakota Century Code is created and enacted
30 as follows:

1 **23.1-10-06. Release of regulated substance prohibited - Exception.**

2 The release of a regulated substance is prohibited. This section does not apply to releases
3 of regulated substances pursuant to and in compliance with the conditions of a federal or state
4 environmental permit.

5 **SECTION 6.** Section 23.1-10-07 of the North Dakota Century Code is created and enacted
6 as follows:

7 **23.1-10-07. Releases from petroleum tanks.**

8 Releases from petroleum tanks are subject to this chapter, but the department may expend
9 moneys in the fund to address releases from petroleum tanks only if there are no available
10 moneys in the petroleum tank release compensation fund under chapter 23.1-12.

11 **SECTION 7.** Section 23.1-10-08 of the North Dakota Century Code is created and enacted
12 as follows:

13 **23.1-10-08. Responsible parties.**

14 1. If the department determines a release has occurred, the department shall identify the
15 responsible party.

16 2. If no other viable responsible party can be located after the department's reasonable
17 investigation, the department shall consider a person that became an owner of the
18 property after the release to be a responsible party, subject to the limitations in this
19 section.

20 a. Notwithstanding any other provision of law and except as expressly provided by
21 federal law, a person that acquires property is not liable for an existing regulated
22 substance on the property if the person:

23 (1) Acquired the property after the disposal or placement of the regulated
24 substance on, in, or at the property; and at the time the property was
25 acquired did not know and had no reason to know a regulated substance
26 was disposed of on, in, or at the property;

27 (2) Is a governmental entity that acquired the property by escheat, by tax sale,
28 by foreclosure, through any other involuntary transfer or acquisition, or
29 through the exercise of eminent domain authority by purchase or
30 condemnation; or

1 (3) Acquired the property by inheritance or bequest, and did not know a
2 regulated substance was disposed of on, in, or at the property; or is the
3 owner of the surface estate and the regulated substance was released as a
4 result of oil or gas drilling and production operations, or other operation
5 authorized by chapter 38-08, and the owner of the surface estate is not and
6 has never been an operator of oil and gas wells permitted under chapter
7 38-08.

8 b. To establish the person had no reason to know a regulated substance was
9 disposed of on, in, or at the property, the person must have undertaken, at the
10 time of acquisition, all appropriate inquiries into the previous ownership and uses
11 of the property consistent with good commercial or customary practice in an effort
12 to minimize liability. For purposes of this requirement, the department shall take
13 into account any specialized knowledge or experience on the part of the person,
14 the relationship of the purchase price to the value of the property as
15 uncontaminated, commonly known or reasonably ascertainable information about
16 the property, the obviousness of the presence or likely presence of regulated
17 substances at the property, and the ability to detect the regulated substances by
18 appropriate inspection.

19 c. A person that has acquired real property may establish a rebuttable presumption
20 the person has made all appropriate inquiries if the person establishes the
21 person performed an investigation of the property, conducted by an
22 environmental professional immediately before or at the time of acquisition, to
23 determine or discover the obviousness of the presence or likely presence of a
24 release or threatened release of regulated substances on the property.

25 d. The presumption does not arise unless the person has maintained a compilation
26 of the information reviewed during the investigation.

27 e. This section does not diminish the liability of a previous owner or operator of the
28 property which otherwise would be liable under this chapter, and nothing in this
29 section affects the liability under this chapter of a person that, by any act or
30 omission, caused or contributed to the release or threatened release of a
31 regulated substance that is the subject of the action relating to the property.

1 f. As used in this section, "environmental professional" means an individual, or
2 entity managed or controlled by an individual, such as an engineer,
3 environmental consultant, and attorney, who, through academic training,
4 occupational experience, and reputation, can objectively conduct one or more
5 aspects of an environmental investigation.

6 3. A lender-owner is liable for a release or threatened release of a regulated substance
7 only as provided in chapter 32-40.1.

8 **SECTION 8.** Section 23.1-10-09 of the North Dakota Century Code is created and enacted
9 as follows:

10 **23.1-10-09. Duty to provide information - Inspections.**

11 1. When requested by the department, a responsible or potentially responsible party, or
12 owner of real property where a release or threatened release is located or where
13 response actions are proposed to be taken, shall furnish to the department any
14 information the person may have or reasonably may obtain which is relevant to the
15 release or threatened release.

16 2. The department, upon presentation of credentials, may:

17 a. Examine and copy any books, papers, records, memoranda, or data of any
18 person that has a duty to provide information to the department under
19 subsection 1; and

20 b. Enter upon any property, public or private, to take action authorized by this
21 chapter, including obtaining information from a person that has a duty to provide
22 the information under subsection 1, conducting surveys or investigations, and
23 taking removal or remedial action.

24 **SECTION 9.** Section 23.1-10-10 of the North Dakota Century Code is created and enacted
25 as follows:

26 **23.1-10-10. Authority to establish and enforce remediation requirements.**

27 In determining the appropriate standards to be achieved by corrective actions taken or
28 requested under this chapter to protect public health and welfare and the environment from a
29 release or threatened release, the department shall consider the planned use of the property
30 where the release or threatened release is located. This chapter does not limit the authority of
31 the department to establish environmental standards for remediation of air, soil, or water

1 pollution pursuant to this title or chapters 61-28 and 61-28.1, or to enforce site-specific
2 environmental remediation requirements in particular cases.

3 **SECTION 10.** Section 23.1-10-11 of the North Dakota Century Code is created and enacted
4 as follows:

5 **23.1-10-11. Action to compel performance - Injunctive relief.**

- 6 1. The department may make a request for corrective action to a responsible party. A
7 request must be in writing, state the action requested, the reasons for the action, and
8 reasonable times for the action to begin and be completed taking into account the
9 urgency of the action for protection of the public health or welfare or the environment.
- 10 2. If a person responsible for a release or threatened release of a regulated substance
11 fails to take corrective actions or make reasonable progress in completing corrective
12 actions requested under subsection 1, the department may bring an action to compel
13 performance of the requested corrective actions. If any person having any right, title,
14 or interest in and to the real property where the containment unit is located or where
15 corrective actions are proposed to be taken is not a person responsible for the release
16 or threatened release, the person may be joined as an indispensable party in an action
17 to compel performance to assure the requested corrective actions can be taken on
18 that property by the responsible parties.
- 19 3. The release or threatened release of a regulated substance may constitute a public
20 nuisance and may be enjoined in an action brought by the department.

21 **SECTION 11.** Section 23.1-10-12 of the North Dakota Century Code is created and enacted
22 as follows:

23 **23.1-10-12. Cost recovery.**

24 The department may recover its reasonable and necessary expenses incurred under this
25 chapter, including all corrective action costs and administrative and legal expenses, in a civil
26 action brought against a responsible party. The department's certification of expenses is prima
27 facie evidence the expenses are reasonable and necessary. The department shall provide
28 written notice to a responsible party before incurring costs, except when prior notice is not
29 possible because identity of the responsible party is unknown or situations require emergency
30 remedial efforts.

1 **SECTION 12.** Section 23.1-10-13 of the North Dakota Century Code is created and enacted
2 as follows:

3 **23.1-10-13. Corrective action costs as lien - Filing of notice of lien - Contents -**
4 **Attachment priority.**

5 All corrective action costs expended from the fund pursuant to this chapter constitute a lien
6 on all property owned by the responsible party when a notice of lien is filed with the recorder in
7 the county where the property is located. The notice of lien must contain a description of the
8 property of the responsible party upon which the lien is made, a description of the property upon
9 which corrective action or emergency remedial efforts were made, and a statement of the
10 corrective action costs expended from the fund. Upon entry, the lien must attach to all real
11 property of the responsible party. The lien has priority over all other claims or liens on the
12 property, except those perfected before the department's filing of the notice of lien.

13 **SECTION 13.** Section 23.1-10-14 of the North Dakota Century Code is created and enacted
14 as follows:

15 **23.1-10-14. Other remedies.**

16 This chapter does not limit the powers of the department or preclude the pursuit of any
17 other administrative, civil, injunctive, or criminal remedies by the department or any other
18 person. Administrative remedies do not need to be exhausted to proceed under this chapter.
19 The remedies provided by this chapter are in addition to those provided under other statutory or
20 common law.

21 **SECTION 14.** Section 23.1-10-15 of the North Dakota Century Code is created and enacted
22 as follows:

23 **23.1-10-15. Voluntary response actions - Liability protection - Procedures.**

- 24 1. Subject to the provisions of this section, a person that is not otherwise responsible
25 under this chapter or another environmental law for a release or threatened release is
26 not responsible solely because the person undertakes and completes response
27 actions to remove or remedy releases or threatened releases at an identified area of
28 real property in accordance with a voluntary cleanup agreement.
- 29 2. A person requesting liability protection under this section shall submit an application in
30 the form required by the department. The requestor also shall submit a voluntary
31 response action plan that includes an investigation report prepared by an appropriate

1 professional describing the methods and results of an investigation of the releases and
2 threatened releases at the identified area of real property, methods of investigation,
3 and the analytical results and professional's evaluation of the reported information.

4 The department may approve the application only if the department determines the
5 nature and extent of the releases and threatened releases at the identified area of real
6 property have been identified and evaluated adequately in the investigation report.

7 The department's approval also must be based on consideration of the following:

8 a. If reuse or development of the property is proposed, the voluntary response
9 action plan provides for all response actions required to carry out the proposed
10 reuse or development;

11 b. The response actions and the activities associated with any reuse or
12 development proposed for the property will not aggravate or contribute to
13 releases or threatened releases that are not required to be removed or remedied
14 under the voluntary response action plan, and will not interfere with or
15 substantially increase the cost of response actions to address the remaining
16 releases or threatened releases; and

17 c. The owner of the property or other relevant person agrees to cooperate with the
18 department or other persons acting at the department's direction in taking
19 response actions necessary to address remaining releases or threatened
20 releases, and to avoid any action that interferes with the response actions.

21 3. If the department approves the application, the department and requestor shall enter a
22 voluntary cleanup agreement in which the department agrees to take no action under
23 title 23.1 and chapters 61-28 and 61-28.1 against the requestor and those persons
24 identified in subsection 5 so long as the plan is implemented pursuant to the
25 agreement's terms and with the exercise of due care. As part of the agreement, the
26 department may require the owner, requestor, or other relevant person agrees to any
27 of the following conditions:

28 a. To provide access to the property;

29 b. To allow reasonable and necessary activities at the property, including placement
30 of borings, wells, equipment, and structures on the property; and

- 1 c. To enter an environmental covenant for the property containing institutional
2 controls under chapter 47-37. Alternatively, institutional controls may be imposed
3 on the property using zoning regulations under section 23.1-10-16.
- 4 4. Response actions taken under a voluntary cleanup agreement are not complete until
5 the department certifies completion in writing. The department shall issue a certificate
6 of completion if the parties demonstrate to the department's satisfaction the response
7 action is complete. If a voluntary response action plan does not require removal or
8 remedy of all regulated substances, the department may condition the certificate of
9 completion on the owner's, requestor's, or other relevant person's continued
10 compliance with conditions in the voluntary cleanup agreement or other conditions
11 deemed necessary by the department.
- 12 5. In addition to the person that undertakes and completes a voluntary response action
13 pursuant to a voluntary cleanup agreement, the liability protection provided by this
14 section applies to the following persons so long as the persons comply with any
15 conditions imposed by the department under subsection 4:
- 16 a. The owner of the identified property, if the owner is not responsible for any
17 release or threatened release identified in the approved voluntary response
18 action plan;
- 19 b. A person providing financing to the person that undertakes and completes the
20 response actions or that acquires or develops the identified property;
- 21 c. A fiduciary that arranges for the undertaking and completion of response actions;
22 and
- 23 d. A successor or assignee of a person to which the liability protection applies.
- 24 6. Notwithstanding subsection 1, when a person that is responsible for a release or
25 threatened release undertakes and completes response actions, the protection from
26 liability provided by this section applies to persons described in subsection 5 if the
27 response actions are undertaken and completed in accordance with the following:
- 28 a. The response actions must be undertaken and completed in accordance with a
29 voluntary cleanup agreement.
- 30 b. When the department issues a certificate of completion for response actions
31 completed by a responsible party, the department and the responsible party may

1 enter an agreement that resolves the responsible party's future liability to the
2 department for the release or threatened release addressed by the response
3 actions.

4 7. The protection from liability provided by this section does not apply to a person that:

5 a. Aggravates or contributes to a release or threatened release that was not
6 remedied under an approved voluntary response action plan; or

7 b. Obtains the department's approval of a voluntary cleanup agreement for
8 purposes of this section by fraud or misrepresentation or by knowingly failing to
9 disclose material information, or that knows the approval was so obtained before
10 taking an action that would have made the person subject to the protection of this
11 section.

12 8. This section does not affect the authority of the department to exercise any powers or
13 duties with respect to a new or additional release or threatened release of a regulated
14 substance on a property or site regulated under this section, or the right of the
15 department or any other person to seek legal or equitable relief against a person not
16 subject to a liability protection provided under this section.

17 **SECTION 15.** Section 23.1-10-16 of the North Dakota Century Code is created and enacted
18 as follows:

19 **23.1-10-16. Zoning regulations establishing institutional controls.**

20 1. If an area made subject to institutional controls involves two or more property owners
21 and an area larger than either one city block or ten acres [4.05 hectares], the
22 department and the political subdivision having zoning authority over the property may
23 agree to institutional controls relating to the identified area impacted by the release or
24 threatened release. Before the institutional controls become effective, the controls
25 must be the subject of a public hearing and be established in the same manner as
26 zoning regulations are established by that political subdivision. The political
27 subdivision shall provide all notices under this subdivision, but any public hearing must
28 be held jointly by the political subdivision and the department.

29 2. The department shall consider the factors in subsection 2 of section 23.1-10-15 before
30 agreeing to institutional controls under this section.

1 3. Institutional controls may be terminated or amended at any time by written agreement
2 between the department and the relevant political subdivision.

3 **SECTION 16.** Section 23.1-10-17 of the North Dakota Century Code is created and enacted
4 as follows:

5 **23.1-10-17. Liability protections issued before August 1, 2021.**

6 This chapter does not affect liability protections related to releases or threatened releases
7 of regulated substances issued by the department before August 1, 2021. These liability
8 protections remain in effect, subject to any conditions that were imposed by the department and
9 the statutes in effect on the date issued.

10 **SECTION 17. AMENDMENT.** Section 40-47-01 of the North Dakota Century Code is
11 amended and reenacted as follows:

12 **40-47-01. Cities may zone - Application of regulations.**

13 For the purpose of promoting health, safety, morals, or the general welfare of the
14 community, the governing body of any city may, subject to the provisions of chapter 54-21.3,
15 regulate and restrict the height, number of stories, and the size of buildings and other
16 structures, the percentage of lot that may be occupied, the size of yards, courts, and other open
17 spaces, the density of population, and the location and use of buildings, structures, and land for
18 trade, industry, residence, or other purposes. ~~Such~~The regulations may provide that a board of
19 adjustment may determine and vary the application of the regulations in harmony with ~~their~~the
20 regulations' general purpose and intent and in accordance with general or specific rules ~~therein~~
21 contained in the regulations. The governing body of a city may establish institutional controls
22 that address environmental concerns with the department of environmental quality as provided
23 in section ~~23.1-04-04~~23.1-10-16.

24 **SECTION 18. AMENDMENT.** Section 58-03-11 of the North Dakota Century Code is
25 amended and reenacted as follows:

26 **58-03-11. Establishment of zoning districts - Uniformity.**

27 For the purpose of promoting the health, safety, morals, or the general welfare, or to secure
28 the orderly development of approaches to municipalities, the board of township supervisors may
29 establish one or more zoning districts and within ~~such~~the districts ~~may~~, subject to the provisions
30 of chapter 54-21.3 and section 58-03-11.1, may regulate and restrict the erection, construction,
31 reconstruction, alteration, repair, or use of buildings and structures; ~~the~~ the height, number of

1 stories, and size of buildings and structures; the percentage of lot that may be occupied; the
2 size of courts, yards, and other open spaces; the density of population; and the location and
3 use of buildings, structures, and land for trade, industry, residence, or other purposes. All such
4 regulations and restrictions under this section must be uniform throughout each district, but the
5 regulations and restrictions in one district may differ from those in other districts. The board of
6 township supervisors may establish institutional controls that address environmental concerns
7 with the department of environmental quality as provided in section ~~23.1-04-04~~23.1-10-16.

8 **SECTION 19. REPEAL.** Sections 23.1-04-04 and 23.1-10-01 of the North Dakota Century
9 Code are repealed.

10 **SECTION 20. RETROACTIVE APPLICATION.** This Act is retroactive in application.