

HOUSE BILL NO. 1279

Introduced by

Representatives Porter, R. Kelsch

Senator Cook

1 A BILL for an Act to create and enact a new section to chapter 23-20.3 of the North Dakota
2 Century Code, relating to contaminated properties; to amend and reenact sections 11-33-01
3 and 40-47-01 and subsection 1 of section 58-03-11 of the North Dakota Century Code, relating
4 to institutional controls by counties, cities, and townships; to provide a continuing appropriation;
5 and to declare an emergency.

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

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

9 **11-33-01. County power to regulate property.** For the purpose of promoting health,
10 safety, morals, public convenience, general prosperity, and public welfare, the board of county
11 commissioners of any county may regulate and restrict within the county, subject to section
12 11-33-20 and chapter 54-21.3, the location and the use of buildings and structures and the use,
13 condition of use, or occupancy of lands for residence, recreation, and other purposes. The
14 board of county commissioners shall establish zoning requirements for solid waste disposal and
15 incineration facilities before July 1, 1994. The board of county commissioners may impose
16 tipping or other fees on solid waste management and incineration facilities. The board of
17 county commissioners may not impose any fee under this section on an energy conversion
18 facility or coal mining operation that disposes of its waste onsite. The board of county
19 commissioners may establish institutional controls with the department of health as provided in
20 section 2 of this Act.

21 **SECTION 2.** A new section to chapter 23-20.3 of the North Dakota Century Code is
22 created and enacted as follows:

23 **23-20.3-12. Institutional controls, responsibility exemptions, and regulatory**
24 **assurances for contaminated properties - Continuing appropriation.**

- 1 1. The department may establish institutional controls and give site-specific
2 responsibility exemptions or regulatory assurances to owners, operators, or
3 lenders, as provided by this section for real property contaminated by regulated
4 substances or other pollution or contamination regulated by the department under
5 this chapter or chapter 61-28. To qualify for a site-specific responsibility
6 exemption, the owner of the property, or the political subdivision establishing
7 institutional controls under this Act this section through its zoning authority, must:
- 8 a. Delineate the vertical and horizontal extent and concentration of the pollution
9 or contamination in soil and ground water;
- 10 b. Identify potential persons or receptors that may be impacted by the pollution
11 or contamination, evaluate the potential for movement or migration of the
12 pollution or contamination and potential pathways of exposure, and identify
13 potential health or environmental impacts to persons or receptors based on
14 the proposed property use;
- 15 c. Identify the past and current uses of the property, the current uses of
16 contiguous properties, and zoning restrictions or regulations that apply to the
17 property and contiguous properties;
- 18 d. Identify any surface water or ground water uses, or ground water wells, that
19 may be impacted by the pollution or contamination;
- 20 e. Agree to comply with and complete any remediation or monitoring plan
21 agreed to or ordered by the department as a condition of receiving a
22 site-specific responsibility exemption, including monitoring of natural
23 attenuation of pollution or contamination;
- 24 f. If remediation or monitoring of pollution or contamination is being conducted
25 by a responsible party or governmental body other than the landowner or
26 operator, agree to allow access for all monitoring or remedial activities
27 reasonably related to the identified pollution or contamination; and
- 28 g. Agree to any other reasonable institutional controls that are necessary to
29 protect public health and welfare from pollution or contamination on the
30 property or to satisfy environmental standards enforced by the department,
31 and agree to comply with all institutional controls, letters of no further

1 remediation, letters of no further action, or letters of regulatory assurance
2 established or instituted under this section as a condition of receiving a
3 property-specific or site-specific responsibility exemption or regulatory
4 assurance.

5 2. "Institutional controls" are restrictions on the use and management of real property,
6 including use and management of buildings or fixtures, that contain or prevent
7 migration of regulated substances or other pollution or contamination, or protect
8 receptors from exposure or the threat of exposure to regulated substances or other
9 pollution or contamination. Institutional controls may apply during environmental
10 remediation activities, or may apply to residual regulated substances, pollutants, or
11 other pollution or contamination or their byproducts that may remain on property
12 after active environmental remediation activities are concluded or while natural
13 attenuation of regulated substances or other pollution or contamination is
14 occurring. Institutional controls may be established by the department as follows:

15 a. When an area made subject to institutional controls involves two or more
16 property owners and an area larger than either one city block or ten acres
17 [4.05 hectares], the department and the political subdivision having zoning
18 authority over the property may agree to institutional controls relating to the
19 identified area impacted by the pollution or the contamination. Before the
20 institutional controls become effective, they must be the subject of a public
21 hearing and be established in the same manner as zoning regulations are
22 established by that political subdivision.

23 b. In addition or in the alternative, the department also may establish institutional
24 controls by agreement to an environmental covenant with the owner of the
25 real property. Before agreeing to any environmental covenants under this
26 subdivision, all contiguous landowners to the property to which the covenants
27 will attach must be notified by certified mail or by service by publication as
28 provided in the North Dakota Rules of Civil Procedure. An environmental
29 covenant must state that it is an environmental covenant that runs with the
30 land; have a legally sufficient description of the real property subject to the
31 covenant; describe activity or use limitations and terms of access for any

- 1 monitoring or remediation; identify every holder who is a grantee of the
2 covenant; be signed by the department, every holder, and the owner of the
3 property before a notary public; and describe the name and location of any
4 administrative record for the environmental response or remediation identified
5 for the property under subsection 1. All environmental covenants must be
6 filed with the county recorder of the county in which the property is located.
- 7 c. In addition or in the alternative, the department may issue a letter of no further
8 remediation or a letter of no further action to a property owner when an
9 environmental remediation is completed on the site or property, or when no
10 institutional controls are necessary to protect public health or welfare or to
11 come into compliance with an environmental standard that has been violated
12 and later corrected on the site or property.
- 13 3. Notwithstanding any institutional controls established for any real property, the
14 department has access for inspection and enforcement authority for environmental
15 violations as provided by law.
- 16 4. If there is any additional discharge or release of a regulated substance, pollutant,
17 or contaminant on the property subject to institutional controls or regulatory
18 exemptions that intermingles with the delineated pollution or contamination
19 identified under subsection 1, or if the owner or operator of the property manages
20 the property in a manner that causes the contamination to migrate to a neighboring
21 contiguous property, then institutional controls or regulatory exemptions
22 established under this section are voidable by the department after a public
23 investigatory hearing by giving written notice to the political subdivision and the
24 current owner of the property subject to the institutional controls, as well as any
25 lender holding a lien on the property identified under subsections 6 and 7.
26 Culpability of the owner or operator of the property, as well as responsibility for any
27 offsite discharge or release, must be considered by the department in determining
28 whether to void any institutional controls, and any final determination by the
29 department to void an institutional control is subject to review under chapter 28-32.
30 If the institutional control is an environmental covenant established under
31 subdivision b of subsection 2, the written notice voiding the environmental

- 1 covenant as well as a copy of the covenant being voided by the department must
2 be filed with the county recorder of the appropriate county.
- 3 5. Institutional controls may also be terminated or amended at any time by written
4 agreement between the department, the relevant political subdivision, the owner of
5 the property, or other body or person subject to the institutional controls, as well as
6 any identified lender, after giving notice as described in subsection 2. Letters of no
7 further remediation, of no further action, or regulatory assurance may be amended
8 by written agreement of the participating parties.
- 9 6. Before agreeing to any institutional controls or responsibility exemptions, the
10 department may require insurance coverage or other financial assurance for any
11 additional environmental monitoring or remediation that may become necessary on
12 the property after the site-specific responsibility exemptions and institutional
13 controls are established, and must require such insurance coverage or other
14 financial assurance when the projected cost of an active monitoring or remediation
15 program exceeds five hundred thousand dollars. The department may enter a joint
16 agreement with affected political subdivisions, state or federal agencies, property
17 owners, lenders, the administrator of the petroleum tank release compensation
18 fund, or any responsible or potentially responsible party concerning payment for or
19 funding of any insurance coverage or other financial assurance for any additional
20 environmental monitoring or remediation that may become necessary on
21 contaminated or affected properties. Such agreements do not waive the liability
22 limitations that apply by law to the state, to state agencies, or to political
23 subdivisions, except up to the amounts, and subject to the terms, conditions, and
24 limitations, of any insurance policy or any financial assurance fund created by the
25 joint agreement of the parties under this subsection. Any financial assurance fund
26 must comply with chapters 59-01, 59-02, 59-03, and 59-04, and be managed for
27 the benefit of the affected persons or community, but liability of the fund may not
28 exceed the amount deposited with the fund.
- 29 7. Subject to chapter 32-40.1 and except as preempted by federal law, the liability of
30 lenders who participate in an agreement under this section may not exceed the
31 value of the mortgage or lien held by the lender on the property, and may not,

- 1 under chapter 32-40.1, be construed as management of the property. Subject to
2 chapter 32-40.1 and except as preempted by federal law, as part of an agreement
3 under subsection 6 the department may issue a letter of regulatory assurance that
4 states the limits of the lender's liability to a lender who lends money and secures a
5 mortgage or other lien on real property contaminated by regulated substances or
6 other pollution or contamination.
- 7 8. The department may adopt rules to implement this section. The department may
8 assess administrative fees in an amount and manner established by rule against
9 responsible parties, or, by agreement of the participants, under subsection 6, in an
10 amount agreed to under subsection 6. All administrative fees collected under this
11 section must be deposited by the department in the environmental remediation
12 operating fund and used only for administration of remediation activities under this
13 chapter or chapter 61-28 and are appropriated to the department on a continuing
14 basis. Administrative fees may not be collected out of federal moneys or against
15 the petroleum tank release compensation fund.
- 16 9. The administrator of the petroleum tank release compensation fund under chapter
17 23-37 may request recovery of expenditures the administrator has made at a
18 remediation site from the environmental remediation operating fund if recovery may
19 not be made from a responsible party or as provided in chapter 23-37. If the
20 department determines that sufficient funds are available without compromising the
21 remediation project at the site, the environmental remediation operating fund may
22 be used to reimburse the petroleum tank release compensation fund for
23 expenditures the administrator has made at the remediation site.
- 24 10. All letters of partial or complete exemption from responsibility for remediation or
25 further action issued by the department under this section may be revoked by the
26 department if any condition of the letters is violated; if institutional controls on the
27 property are not complied with; or if the person, governmental body, or entity
28 violates any provision of this chapter or chapter 61-28.
- 29 11. "Environmental covenant" means a covenant running with the land as established
30 under this section.

- 1 12. "Natural attenuation" means the reduction in the mass or concentration in soils or
2 groundwater of a substance, and the products into which a substance breaks
3 down, due to naturally occurring physical, chemical, and biological processes,
4 without human intervention. "Enhanced natural attenuation" means the
5 enhancement of natural attenuation at a site by the addition of chemicals, biota, or
6 other substances or processes. "Monitored natural attenuation" means the
7 monitoring of natural attenuation as it occurs. The department in its discretion may
8 consider natural attenuation or enhanced or monitored natural attenuation as
9 remediation alternatives for a site when pollution or contamination on a site or
10 property does not pose a threat to human health or the environment, and
11 reasonable safeguards are established under this section or other provisions of
12 state or federal law.
- 13 13. "Regulatory assurance" means an assurance issued by the department concerning
14 enforcement relating to existing contamination or pollution on a property or site
15 based on compliance with conditions stated in a letter of regulatory assurance.
- 16 14. "Responsibility exemption" means a partial or complete exemption from
17 responsibility for remediation or further action on a contaminated property or at a
18 contaminated site based on compliance with the conditions identified in a letter of
19 no further remediation or a letter of no further action.
- 20 15. "Responsible party" means a person who causes or contributes to an onsite or
21 offsite release or discharge, or who is responsible for an illegal or unpermitted
22 storage, of a pollutant or regulated substance in violation of this chapter or chapter
23 61-28, that results in the contamination or pollution of a property or site.
24 "Potentially responsible party" means a person who is identified as a possible
25 cause of, or contributor to, contamination or pollution on a site or property.
- 26 16. This section does not affect the authority of the department, the state, or its political
27 subdivisions to exercise any powers or duties under this chapter or other
28 provisions of state law with respect to any new or additional discharge or release or
29 threatened discharge or release of a pollutant or regulated substance on a property
30 or site regulated under this section, or the right of the department or any other

1 person to seek legal or equitable relief against any person that is not subject to a
2 liability protection provided under this section.

3 **SECTION 3. AMENDMENT.** Section 40-47-01 of the North Dakota Century Code is
4 amended and reenacted as follows:

5 **40-47-01. Cities may zone - Application of regulations.** For the purpose of
6 promoting health, safety, morals, or the general welfare of the community, the governing body
7 of any city may, subject to the provisions of chapter 54-21.3, regulate and restrict the height,
8 number of stories, and the size of buildings and other structures, the percentage of lot that may
9 be occupied, the size of yards, courts, and other open spaces, the density of population, and
10 the location and use of buildings, structures, and land for trade, industry, residence, or other
11 purposes. Such regulations may provide that a board of adjustment may determine and vary
12 the application of the regulations in harmony with their general purpose and intent and in
13 accordance with general or specific rules therein contained. The governing body of a city may
14 establish institutional controls with the department of health as provided in section 2 of this Act.

15 **SECTION 4. AMENDMENT.** Subsection 1 of section 58-03-11 of the North Dakota
16 Century Code is amended and reenacted as follows:

17 1. For the purpose of promoting the health, safety, morals, or the general welfare, or
18 to secure the orderly development of approaches to municipalities, the board of
19 township supervisors may establish one or more zoning districts and within such
20 districts may, subject to the provisions of chapter 54-21.3, regulate and restrict the
21 erection, construction, reconstruction, alteration, repair, or use of buildings and
22 structures, the height, number of stories, and size of buildings and structures, the
23 percentage of lot that may be occupied, the size of courts, yards, and other open
24 spaces, the density of population, and the location and use of buildings, structures,
25 and land for trade, industry, residence, or other purposes. All such regulations and
26 restrictions must be uniform throughout each district, but the regulations and
27 restrictions in one district may differ from those in other districts. The board of
28 township supervisors may establish institutional controls with the department of
29 health as provided in section 2 of this Act.

30 **SECTION 5. EMERGENCY.** This Act is declared to be an emergency measure.