

**Fifty-ninth Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 4, 2005**

HOUSE BILL NO. 1279
(Representatives Porter, R. Kelsch)
(Senator Cook)

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

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

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

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

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

Institutional controls, responsibility exemptions, and regulatory assurances for contaminated properties - Continuing appropriation.

1. The department may establish institutional controls or give site-specific responsibility exemptions or regulatory assurances to owners, operators, or lenders, as provided by this section for real property contaminated by regulated substances or other pollution or contamination regulated by the department under this chapter or chapter 61-28. To qualify for a site-specific responsibility exemption, the owner of the property, or the political subdivision establishing institutional controls under this Act this section through its zoning authority, must:
 - a. Delineate the vertical and horizontal extent and concentration of the pollution or contamination in soil and ground water;
 - b. Identify potential persons or receptors that may be impacted by the pollution or contamination, evaluate the potential for movement or migration of the pollution or contamination and potential pathways of exposure, and identify potential health or environmental impacts to persons or receptors based on the proposed property use;
 - c. Identify the past and current uses of the property, the current uses of contiguous properties, and zoning restrictions or regulations that apply to the property and contiguous properties;

- d. Identify any surface water or ground water uses, or ground water wells, that may be impacted by the pollution or contamination;
 - e. Agree to comply with and complete any remediation or monitoring plan agreed to or ordered by the department as a condition of receiving a site-specific responsibility exemption, including monitoring of natural attenuation of pollution or contamination;
 - f. If remediation or monitoring of pollution or contamination is being conducted by a responsible party or governmental body other than the landowner or operator, agree to allow access for all monitoring or remedial activities reasonably related to the identified pollution or contamination;
 - g. Agree to any other reasonable institutional controls that are necessary to protect public health and welfare from pollution or contamination on the property or to satisfy environmental standards enforced by the department; and
 - h. Agree to comply with all institutional controls, letters of no further remediation, letters of no further action, or letters of regulatory assurance established or instituted under this section as a condition of receiving a property-specific or site-specific responsibility exemption or regulatory assurance.
2. "Institutional controls" are restrictions on the use and management of real property, including use and management of buildings or fixtures, that contain or prevent migration of regulated substances or other pollution or contamination, or protect receptors from exposure or the threat of exposure to regulated substances or other pollution or contamination. Institutional controls may apply during environmental remediation activities, or may apply to residual regulated substances, pollutants, or other pollution or contamination or their byproducts that may remain on property after active environmental remediation activities are concluded or while natural attenuation of regulated substances or other pollution or contamination is occurring. Institutional controls may be established by the department as follows:
- a. When an area made subject to institutional controls involves two or more property owners and an area larger than either one city block or ten acres [4.05 hectares], the department and the political subdivision having zoning authority over the property may agree to institutional controls relating to the identified area impacted by the pollution or the contamination. Before the institutional controls become effective, they must be the subject of a public hearing and be established in the same manner as zoning regulations are established by that political subdivision. The political subdivision is responsible for providing all notices under this subdivision, but any public hearing must be held jointly by the political subdivision and the department.
 - b. In addition or in the alternative, the department also may establish institutional controls by agreement to an environmental covenant with the owner of the real property. Before agreeing to any environmental covenants under this subdivision, all contiguous landowners to the property to which the covenants will attach must be notified by certified mail or by service by publication as provided in the North Dakota Rules of Civil Procedure. An environmental covenant must state that it is an environmental covenant that runs with the land; have a legally sufficient description of the real property subject to the covenant; describe activity or use limitations and terms of access for any monitoring or remediation; identify every holder who is a grantee of the covenant; be signed by every holder and the owner of the property before a notary public; and describe the name and location of any administrative record for the environmental response or remediation identified for the property under subsection 1. All environmental covenants must be filed with the county recorder of the county in which the property is located.

3. In addition or in the alternative to institutional controls, after completion of the assessments and requirements of subsection 1, the department may issue a letter of no further remediation or a letter of no further action to a property owner when an environmental remediation is completed on the site or property, or when no institutional controls are necessary to protect public health or welfare or to come into compliance with an environmental standard that has been violated and later corrected on the site or property.
4. Notwithstanding any institutional controls established for any real property, the department has access for inspection and enforcement for environmental violations as provided by law.
5. If there is any additional discharge or release of a regulated substance, pollutant, or contaminant on the property subject to institutional controls or regulatory exemptions that intermingles with the delineated pollution or contamination identified under subsection 1, or if the owner or operator of the property manages the property in a manner that causes the contamination to migrate to a neighboring contiguous property or results in the exposure of contaminants to receptors on the property, then institutional controls or regulatory exemptions established under this section are voidable by the department after a public investigatory hearing by giving written notice to the political subdivision and the current owner of the property subject to the institutional controls, as well as any lender holding a lien on the property identified under subsections 7 and 8. Culpability of the owner or operator of the property for any new or additional discharge, release, or movement of pollution or contamination, as well as responsibility for any offsite discharge or release or culpability for exposure of onsite or offsite receptors to pollution or contamination, must be considered by the department in determining whether to void any institutional controls, and any final determination by the department to void an institutional control is subject to review under chapter 28-32. If the institutional control is an environmental covenant established under subdivision b of subsection 2, the written notice voiding the environmental covenant as well as a copy of the covenant being voided by the department must be filed with the county recorder of the appropriate county.
6. Institutional controls may also be terminated or amended at any time by written agreement between the department, the relevant political subdivision, the owner of the property, or other body or person subject to the institutional controls, as well as any identified lender, after giving notice as described in subsection 2. Letters of no further remediation, of no further action, or regulatory assurance may be amended by written agreement of the participating parties.
7. Before agreeing to any institutional controls or responsibility exemptions, the department may require insurance coverage or other financial assurance for any additional environmental monitoring or remediation that may become necessary on the property after the site-specific responsibility exemptions and institutional controls are established, and must require such insurance coverage or other financial assurance when the projected cost of an active monitoring or remediation program exceeds five hundred thousand dollars. The department may enter a joint agreement with affected political subdivisions, state or federal agencies, property owners, lenders, the administrator of the petroleum tank release compensation fund, or any responsible or potentially responsible party concerning payment for or funding of any insurance coverage or other financial assurance for any additional environmental monitoring or remediation that may become necessary on contaminated or affected properties. Such agreements do not waive the liability limitations that apply by law to the state, to state agencies, or to political subdivisions, except up to the amounts, and subject to the terms, conditions, and limitations, of any insurance policy or any financial assurance fund created by the joint agreement of the parties under this subsection. Any financial assurance fund must comply with chapters 59-01, 59-02, 59-03, and 59-04, and be managed for the benefit of the affected persons or community, but liability of the fund may not exceed the amount deposited with the fund.

8. Participation by a lender in an agreement under this section may not be construed as management of the property under chapter 32-40.1. Lenders who participate in an agreement under this section may not be held responsible for any environmental remediation on the site or property except as provided in subsection 3 of section 32-40.1-02. As part of an agreement under subsection 7, the department may issue a letter of regulatory assurance to a lender which states that the lender is not responsible for environmental remediation on the property or site, and which addresses other issues relating to responsibility, notice, violation of agreement under subsection 7 by the owner or operator, default, or other matters affecting potential environmental liability, investment, or redevelopment. A responsibility exemption of regulatory assurance given or granted to a lender under this section also applies to a lender's transferees or assigns, provided the party has had no prior involvement with or responsibility for the site of the environmental release, and uses and manages the property after the transfer or assignment in compliance with institutional controls or other conditions established under this section and the requirements of this chapter and chapter 61-28.
9. The department may adopt rules to implement this section. The department may assess administrative fees in an amount and manner established by rule against responsible parties. In addition, by agreement of the participants, under subsection 7 the department may collect an administrative fee for a specific site or project to address the department's costs and expenses at that site or project, in an amount agreed to under subsection 7, or may collect an administrative fee in an amount set by rule from a person making a request for a responsibility exemption or regulatory assurance under this section. Any administrative fees collected under this section must be deposited by the department in a separate account in the department's operating fund and used only for administration of remediation activities under this chapter or chapter 61-28 and moneys deposited in this account are appropriated to the department on a continuing basis. Administrative fees may not be collected out of federal moneys or against the petroleum tank release compensation fund.
10. The administrator of the petroleum tank release compensation fund under chapter 23-37 may request recovery of expenditures the administrator has made at a remediation site from the separate account in the department's operating fund from fees collected under this section if recovery may not be made from a responsible party or as provided in chapter 23-37. If the department determines that sufficient funds are available without compromising the remediation project at the site, moneys in the separate account may be used to reimburse the petroleum tank release compensation fund for expenditures the administrator has made at the remediation site.
11. All letters of partial or complete exemption from responsibility for remediation or further action issued by the department under this section may be revoked by the department if any condition of the letters is violated; if institutional controls on the property are not complied with; or if the person, governmental body, or entity violates any provision of this chapter or chapter 61-28.
12. "Environmental covenant" means a covenant running with the land as established under this section.
13. "Natural attenuation" means the reduction in the mass or concentration in soils or groundwater of a regulated substance, pollutant, contaminant, and the products into which a substance breaks down, due to naturally occurring physical, chemical, and biological processes, without human intervention. "Enhanced natural attenuation" means the enhancement of natural attenuation at a site by the addition of chemicals, biota, or other substances or processes. "Monitored natural attenuation" means the monitoring of natural attenuation as it occurs. The department in its discretion may consider natural attenuation or enhanced or monitored natural attenuation as remediation alternatives for a site when pollution or contamination on a site or property does not pose a threat to human health or

the environment, and reasonable safeguards are established under this section or other provisions of state or federal law.

14. "Regulatory assurance" means an assurance issued by the department concerning enforcement relating to existing contamination or pollution on a property or site based on compliance with conditions stated in a letter of regulatory assurance. A regulatory assurance is not voidable under subsection 5.
15. "Responsibility exemption" means a partial or complete exemption from responsibility for remediation or further action on a contaminated property or at a contaminated site based on compliance with the conditions identified in a letter of no further remediation or a letter of no further action. A responsibility exemption is voidable only against a person that violates an institutional control or a condition of a letter of no further action or no further remediation, or that is responsible for a new or additional release or migration of a regulated substance or pollutant on the property or site, or whose actions or negligence cause the violation, release, or migration.
16. "Responsible party" means a person who causes or contributes to an onsite or offsite release or discharge, or who is responsible for an illegal or unpermitted storage, of a pollutant or regulated substance in violation of this chapter or chapter 61-28, that results in the contamination or pollution of a property or site. "Potentially responsible party" means a person who is identified as a possible cause of, or contributor to, contamination or pollution on a site or property.
17. This section does not affect the authority of the department, the state, or its political subdivisions to exercise any powers or duties under this chapter or other provisions of state law with respect to any new or additional discharge or release or threatened discharge or release of a pollutant or regulated substance on a property or site regulated under this section, or the right of the department or any other person to seek legal or equitable relief against any person that is not subject to a liability protection provided under this section.

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

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

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

1. For the purpose of promoting the health, safety, morals, or the general welfare, or to secure the orderly development of approaches to municipalities, the board of township supervisors may establish one or more zoning districts and within such districts may, subject to the provisions of chapter 54-21.3, regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures, the height, number of stories, and size of buildings and structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. All such regulations and restrictions must be uniform throughout each district,

but the regulations and restrictions in one district may differ from those in other districts. The board of township supervisors may establish institutional controls that address environmental concerns with the department of health as provided in section 2 of this Act.

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

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Fifty-ninth Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1279 and that two-thirds of the members-elect of the House of Representatives voted in favor of said law.

Vote: Yeas 91 Nays 0 Absent 3

Speaker of the House

Chief Clerk of the House

This certifies that two-thirds of the members-elect of the Senate voted in favor of said law.

Vote: Yeas 46 Nays 0 Absent 1

President of the Senate

Secretary of the Senate

Received by the Governor at _____ M. on _____, 2005.

Approved at _____ M. on _____, 2005.

Governor

Filed in this office this _____ day of _____, 2005,

at _____ o'clock _____ M.

Secretary of State