## Fifty-ninth Legislative Assembly of North Dakota

## SECOND ENGROSSMENT

REENGROSSED 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:

SECTION 1. AMENDMENT. Section 11-33-01 of the North Dakota Century Code is
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 15 and 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 that address environmental concerns with 20 the department of health as provided in 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 <u>Institutional controls, responsibility exemptions, and regulatory assurances for</u> 24 <u>contaminated properties - Continuing appropriation.</u>

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1	<u>1.</u>		e department may establish institutional controls or give site-specific
2		res	ponsibility exemptions or regulatory assurances to owners, operators, or
3		len	ders, as provided by this section for real property contaminated by regulated
4		<u>sub</u>	stances or other pollution or contamination regulated by the department under
5		<u>this</u>	chapter or chapter 61-28. To qualify for a site-specific responsibility
6		exe	emption, the owner of the property, or the political subdivision establishing
7		inst	itutional controls under this Act this section through its zoning authority, must:
8		<u>a.</u>	Delineate the vertical and horizontal extent and concentration of the pollution
9			or contamination in soil and ground water;
10		<u>b.</u>	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		<u>C.</u>	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		<u>d.</u>	Identify any surface water or ground water uses, or ground water wells, that
19			may be impacted by the pollution or contamination;
20		<u>e.</u>	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		<u>f.</u>	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;
28		<u>g.</u>	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

1		h. Agree to comply with all institutional controls, letters of no further remediation.
2		letters of no further action, or letters of regulatory assurance established or
3		instituted under this section as a condition of receiving a property-specific or
4		site-specific responsibility exemption or regulatory assurance.
5	<u>2.</u>	"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. The political subdivision is
23		responsible for providing all notices under this subdivision, but any public
24		hearing must be held jointly by the political subdivision and the department.
25		b. In addition or in the alternative, the department also may establish institutional
26		controls by agreement to an environmental covenant with the owner of the
27		real property. Before agreeing to any environmental covenants under this
28		subdivision, all contiguous landowners to the property to which the covenants
29		will attach must be notified by certified mail or by service by publication as
30		provided in the North Dakota Rules of Civil Procedure. An environmental
31		covenant must state that it is an environmental covenant that runs with the

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

1		release or culpability for exposure of onsite or offsite receptors to pollution or
2		contamination, must be considered by the department in determining whether to
3		void any institutional controls, and any final determination by the department to
4		void an institutional control is subject to review under chapter 28-32. If the
5		institutional control is an environmental covenant established under subdivision b
6		of subsection 2, the written notice voiding the environmental covenant as well as a
7		copy of the covenant being voided by the department must be filed with the county
8		recorder of the appropriate county.
9	<u>6.</u>	Institutional controls may also be terminated or amended at any time by written
10		agreement between the department, the relevant political subdivision, the owner of
11		the property, or other body or person subject to the institutional controls, as well as
12		any identified lender, after giving notice as described in subsection 2. Letters of no
13		further remediation, of no further action, or regulatory assurance may be amended
14		by written agreement of the participating parties.
15	<u>7.</u>	Before agreeing to any institutional controls or responsibility exemptions, the
16		department may require insurance coverage or other financial assurance for any
17		additional environmental monitoring or remediation that may become necessary on
18		the property after the site-specific responsibility exemptions and institutional
19		controls are established, and must require such insurance coverage or other
20		financial assurance when the projected cost of an active monitoring or remediation
21		program exceeds five hundred thousand dollars. The department may enter a joint
22		agreement with affected political subdivisions, state or federal agencies, property
23		owners, lenders, the administrator of the petroleum tank release compensation
24		fund, or any responsible or potentially responsible party concerning payment for or
25		funding of any insurance coverage or other financial assurance for any additional
26		environmental monitoring or remediation that may become necessary on
27		contaminated or affected properties. Such agreements do not waive the liability
28		limitations that apply by law to the state, to state agencies, or to political
29		subdivisions, except up to the amounts, and subject to the terms, conditions, and
30		limitations, of any insurance policy or any financial assurance fund created by the
31		joint agreement of the parties under this subsection. Any financial assurance fund

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1		must comply with chapters 59-01, 59-02, 59-03, and 59-04, and be managed for
2		the benefit of the affected persons or community, but liability of the fund may not
3		exceed the amount deposited with the fund.
4	<u>8.</u>	Participation by a lender in an agreement under this section may not be construed
5		as management of the property under chapter 32-40.1. Lenders who participate in
6		an agreement under this section may not be held responsible for any
7		environmental remediation on the site or property except as provided in
8		subsection 3 of section 32-40.1-02. As part of an agreement under subsection 7,
9		the department may issue a letter of regulatory assurance to a lender which states
10		that the lender is not responsible for environmental remediation on the property or
11		site, and which addresses other issues relating to responsibility, notice, violation of
12		agreement under subsection 7 by the owner or operator, default, or other matters
13		affecting potential environmental liability, investment, or redevelopment. A
14		responsibility exemption of regulatory assurance given or granted to a lender
15		under this section also applies to a lender's tranferees or assigns, provided the
16		party has had no prior involvement with or responsibility for the site of the
17		environmental release, and uses and manages the property after the transfer or
18		assignment in compliance with institutional controls or other conditions established
19		under this section and the requirements of this chapter and chapter 61-28.
20	<u>9.</u>	The department may adopt rules to implement this section. The department may
21		assess administrative fees in an amount and manner established by rule against
22		responsible parties. In addition, by agreement of the participants, under
23		subsection 7 the department may collect an administrative fee for a specific site or
24		project to address the department's costs and expenses at that site or project, in
25		an amount agreed to under subsection 7, or may collect an administrative fee in an
26		amount set by rule from a person making a request for a responsibility exemption
27		or regulatory assurance under this section. Any administrative fees collected
28		under this section must be deposited by the department in a separate account in
29		the department's operating fund and used only for administration of remediation
30		activities under this chapter or chapter 61-28 and moneys deposited in this
31		account are appropriated to the department on a continuing basis. Administrative

1		fees may not be collected out of federal moneys or against the petroleum tank
2		release compensation fund.
3	<u>10.</u>	The administrator of the petroleum tank release compensation fund under chapter
4		23-37 may request recovery of expenditures the administrator has made at a
5		remediation site from the separate account in the department's operating fund from
6		fees collected under this section if recovery may not be made from a responsible
7		party or as provided in chapter 23-37. If the department determines that sufficient
8		funds are available without compromising the remediation project at the site,
9		moneys in the separate account may be used to reimburse the petroleum tank
10		release compensation fund for expenditures the administrator has made at the
11		remediation site.
12	<u>11.</u>	All letters of partial or complete exemption from responsibility for remediation or
13		further action issued by the department under this section may be revoked by the
14		department if any condition of the letters is violated; if institutional controls on the
15		property are not complied with; or if the person, governmental body, or entity
16		violates any provision of this chapter or chapter 61-28.
17	<u>12.</u>	"Environmental covenant" means a covenant running with the land as established
18		under this section.
19	<u>13.</u>	"Natural attenuation" means the reduction in the mass or concentration in soils or
20		groundwater of a regulated substance, pollutant, contaminant, and the products
21		into which a substance breaks down, due to naturally occurring physical, chemical,
22		and biological processes, without human intervention. "Enhanced natural
23		attenuation" means the enhancement of natural attenuation at a site by the
24		addition of chemicals, biota, or other substances or processes. "Monitored natural
25		attenuation" means the monitoring of natural attenuation as it occurs. The
26		department in its discretion may consider natural attenuation or enhanced or
27		monitored natural attenuation as remediation alternatives for a site when pollution
28		or contamination on a site or property does not pose a threat to human health or
29		the environment, and reasonable safeguards are established under this section or
30		other provisions of state or federal law.

1	<u>14.</u>	"Regulatory assurance" means an assurance issued by the department concerning	
2		enforcement relating to existing contamination or pollution on a property or site	
3		based on compliance with conditions stated in a letter of regulatory assurance. A	
4		regulatory assurance is not voidable under subsection 5.	
5	<u>15.</u>	"Responsibility exemption" means a partial or complete exemption from	
6		responsibility for remediation or further action on a contaminated property or at a	
7		contaminated site based on compliance with the conditions identified in a letter of	
8		no further remediation or a letter of no further action. A responsibility exemption is	
9		voidable only against a person that violates an institutional control or a condition of	
10		a letter of no further action or no further remediation, or that is responsible for a	
11		new or additional release or migration of a regulated substance or pollutant on the	
12		property or site, or whose actions or negligence cause the violation, release, or	
13		migration.	
14	<u>16.</u>	"Responsible party" means a person who causes or contributes to an onsite or	
15		offsite release or discharge, or who is responsible for an illegal or unpermitted	
16		storage, of a pollutant or regulated substance in violation of this chapter or chapter	
17		61-28, that results in the contamination or pollution of a property or site.	
18		"Potentially responsible party" means a person who is identified as a possible	
19		cause of, or contributor to, contamination or pollution on a site or property.	
20	<u>17.</u>	This section does not affect the authority of the department, the state, or its	
21		political subdivisions to exercise any powers or duties under this chapter or other	
22		provisions of state law with respect to any new or additional discharge or release	
23		or threatened discharge or release of a pollutant or regulated substance on a	
24		property or site regulated under this section, or the right of the department or any	
25		other person to seek legal or equitable relief against any person that is not subject	
26		to a liability protection provided under this section.	
27	SEC	CTION 3. AMENDMENT. Section 40-47-01 of the North Dakota Century Code is	
28	28 amended and reenacted as follows:		
29	9 <b>40-47-01. Cities may zone - Application of regulations.</b> For the purpose of		
30	promoting health, safety, morals, or the general welfare of the community, the governing body		
31	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 1 2 be occupied, the size of yards, courts, and other open spaces, the density of population, and 3 the location and use of buildings, structures, and land for trade, industry, residence, or other 4 purposes. Such regulations may provide that a board of adjustment may determine and vary 5 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 6 7 establish institutional controls that address environmental concerns with the department of 8 health as provided in section 2 of this Act.

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

11 For the purpose of promoting the health, safety, morals, or the general welfare, or 1. 12 to secure the orderly development of approaches to municipalities, the board of 13 township supervisors may establish one or more zoning districts and within such 14 districts may, subject to the provisions of chapter 54-21.3, regulate and restrict the 15 erection, construction, reconstruction, alteration, repair, or use of buildings and 16 structures, the height, number of stories, and size of buildings and structures, the 17 percentage of lot that may be occupied, the size of courts, yards, and other open 18 spaces, the density of population, and the location and use of buildings, structures, 19 and land for trade, industry, residence, or other purposes. All such regulations and 20 restrictions must be uniform throughout each district, but the regulations and 21 restrictions in one district may differ from those in other districts. The board of 22 township supervisors may establish institutional controls that address 23 environmental concerns with the department of health as provided in section 2 of 24 this Act.

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