

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, 40-47-01, and  
5 58-03-11 of the North Dakota Century Code, relating to the regulated substance response; and  
6 to repeal sections 23.1-04-04 and 23.1-10-01 of the North Dakota Century Code, relating to  
7 contaminated properties.

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

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

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

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

1 environmental concerns with the department of environmental quality as provided in section  
2 ~~23.1-04-04~~23.1-10-16.

3 **SECTION 2.** Section 23.1-10-04 of the North Dakota Century Code is created and enacted  
4 as follows:

5 **23.1-10-04. Definitions.**

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

- 7 1. "Containment unit" means any one or a combination of containers, vessels, and  
8 enclosures, including structures and appurtenances connected to them, which or has  
9 been used to contain or dispense a regulated substance and is either stationary or  
10 attached to a motor vehicle. The definition includes pipeline facilities that transport and  
11 store regulated substances.
- 12 2. "Corrective action" means an action taken to investigate, minimize, contain, eliminate,  
13 remediate, mitigate, monitor, or clean up a release including any necessary  
14 emergency remedial effort.
- 15 3. "Corrective action cost" means any cost incurred by the department in conducting or  
16 overseeing corrective actions performed on a release; or the performance of  
17 reasonable measures undertaken to prevent or mitigate damage to the public health,  
18 public safety, public welfare, or environment of the state.
- 19 4. "Department" means the department of environmental quality.
- 20 5. "Emergency remedial effort" means an action taken to protect the public health, public  
21 safety, or environment from imminent danger resulting from a release, and an action  
22 taken to contain a release that, if not contained, will pose in time a greater threat to the  
23 public health, public safety, or environment than if the action is not taken immediately.
- 24 6. "Environment" means land, including public and private property, surface and  
25 underground waters, fish, wildlife, biota, air, and other similar resources within the  
26 state.
- 27 7. "Fund" means the environmental quality restoration fund.
- 28 8. "Institutional controls" and "activity and use limitations" are restrictions on the use and  
29 management of real property, including buildings or fixtures, containing or preventing  
30 migration of regulated substances or other pollution or contamination, or protecting

1 receptors from exposure or the threat of exposure to regulated substances or other  
2 pollution or contamination. Institutional controls may apply:

3 a. During environmental remediation activities; or

4 b. To residual regulated substances, pollutants, or other pollution or contamination  
5 or the byproducts of residual regulated substances, pollutants, or other pollution  
6 or contamination which may remain on property after active environmental  
7 remediation activities are concluded or while natural attenuation of regulated  
8 substances or other pollution or contamination is occurring.

9 9. "Potentially responsible party" means a person identified as a possible cause of, or  
10 contributor to, contamination or pollution on a site or property.

11 10. "Regulated substance" means a compound designated by the department, including  
12 pesticides and fertilizers regulated by the department of agriculture; the hazardous  
13 substances designated by the Federal Water Pollution Control Act [Pub. L. 80-845; 62  
14 Stat. 1155; 33 U.S.C. 1251 et seq.]; the toxic pollutants designated by the Federal  
15 Water Pollution Control Act and the Toxic Substances Control Act [Pub. L. 94-469; 90  
16 Stat. 2003; 15 U.S.C. 2601 et seq.]; the hazardous substances designated by the  
17 federal Comprehensive Environmental Response, Compensation, and Liability Act  
18 [Pub. L. 96-510; 94 Stat. 2767; 42 U.S.C. 9601 et seq.]; petroleum, petroleum  
19 substances, oil, gasoline, kerosene, fuel oil, oil sludge, oil refuse, production water, oil  
20 mixed with other wastes, crude oils, substances, or additives to be utilized in refining  
21 or blending crude petroleum or petroleum stock; any other oil or petroleum substance;  
22 solid waste regulated under chapter 23.1-08; and technologically enhanced naturally  
23 occurring radioactive material regulated under chapter 23.1-03. Radioactive material  
24 other than technologically enhanced naturally occurring radioactive material is not a  
25 regulated substance under this chapter.

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

30 12. "Responsible party" means a person that causes or contributes to an onsite or offsite  
31 release or threatened release, or that is responsible for an illegal or unpermitted

1           storage, of a regulated substance that results in the contamination or pollution of a  
2           property or site.

3           **SECTION 3.** Section 23.1-10-05 of the North Dakota Century Code is created and enacted  
4 as follows:

5           **23.1-10-05. Revenue to the fund.**

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

- 8           1. If the balance of the fund is less than five million dollars, moneys recovered by the  
9           department in an action or administrative proceeding based on violation of the state's  
10           environmental statutes, including actions for administrative expense recoveries, civil  
11           penalties, compensatory damages; and money paid pursuant to any agreement,  
12           stipulation, or settlement. This section does not limit the department's ability to agree  
13           to a supplemental environmental project as part of a settlement.
- 14           2. Moneys donated to the department for the purposes of this chapter.
- 15           3. Transfers from the abandoned oil and gas well plugging and site reclamation fund  
16           under subdivision f of subsection 2 of section 38-08-04.5.
- 17           4. Moneys received from a federal agency for the purpose of this section.
- 18           5. Any other moneys as may be deposited in the fund for use in carrying out the  
19           purposes of this chapter.

20           **SECTION 4.** Section 23.1-10-06 of the North Dakota Century Code is created and enacted  
21 as follows:

22           **23.1-10-06. Release of regulated substance prohibited - Exception.**

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

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

28           **23.1-10-07. Releases from petroleum tanks.**

29           Releases from petroleum tanks are subject to this chapter, but the department may expend  
30 moneys in the regulated substance response fund to address releases from petroleum tanks

1 only if there are no available moneys in the petroleum tank release compensation fund under  
2 chapter 23.1-12.

3 **SECTION 6.** Section 23.1-10-08 of the North Dakota Century Code is created and enacted  
4 as follows:

5 **23.1-10-08. Responsible parties.**

6 1. If the department determines a release has occurred, the department shall identify the  
7 responsible party.

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

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

15 (1) Acquired the property after the disposal or placement of the regulated  
16 substance on, in, or at the property; and at the time the property was  
17 acquired did not know and had no reason to know a regulated substance  
18 was disposed of on, in, or at the property;

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

23 (3) Acquired the property by inheritance or bequest, and did not know and had  
24 no reason to know a regulated substance was disposed of on, in, or at the  
25 property.

26 b. To establish the person had no reason to know a regulated substance was  
27 disposed of on, in, or at the property, the person must have undertaken, at the  
28 time of acquisition, all appropriate inquiries into the previous ownership and uses  
29 of the property consistent with good commercial or customary practice in an effort  
30 to minimize liability. For purposes of this requirement, the department shall take  
31 into account any specialized knowledge or experience on the part of the person.

1           the relationship of the purchase price to the value of the property as  
2           uncontaminated, commonly known or reasonably ascertainable information about  
3           the property, the obviousness of the presence or likely presence of contamination  
4           at the property, and the ability to detect the contamination by appropriate  
5           inspection.

6           c. A person that has acquired real property may establish a rebuttable presumption  
7           the person has made all appropriate inquiries if the person establishes the  
8           person performed an investigation of the property, conducted by an  
9           environmental professional immediately before or at the time of acquisition, to  
10           determine or discover the obviousness of the presence or likely presence of a  
11           release or threatened release of regulated substances on the property.

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

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

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

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

26           **SECTION 7.** Section 23.1-10-09 of the North Dakota Century Code is created and enacted  
27 as follows:

28           **23.1-10-09. Duty to provide information - Inspections.**

29           1. When requested by the department, a responsible or potentially responsible party, or  
30           owner of real property where a release or threatened release is located or where  
31           response actions are proposed to be taken, shall furnish to the department any

1 information the person may have or reasonably may obtain which is relevant to the  
2 release or threatened release.

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

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

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

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

13 **23.1-10-10. Authority to establish and enforce remediation requirements.**

14 In determining the appropriate standards to be achieved by corrective actions taken or  
15 requested under this chapter to protect public health and welfare and the environment from a  
16 release or threatened release, the department shall consider the planned use of the property  
17 where the release or threatened release is located. This chapter does not limit the authority of  
18 the department to establish environmental standards for remediation of air, soil, or water  
19 pollution pursuant to this title or chapters 61-28 and 61-28.1, or to enforce site-specific  
20 environmental remediation requirements in particular cases.

21 **SECTION 9.** Section 23.1-10-11 of the North Dakota Century Code is created and enacted  
22 as follows:

23 **23.1-10-11. Action to compel performance - Injunctive relief.**

24 1. The department may make a request for corrective action to a responsible party. A  
25 request must be in writing, state the action requested, the reasons for the action, and  
26 reasonable times for the action to begin and be completed taking into account the  
27 urgency of the action for protection of the public health or welfare or the environment.

28 2. If a person responsible for a release or threatened release of a regulated substance  
29 fails to take corrective actions or make reasonable progress in completing corrective  
30 actions requested under subsection 1, the department may bring an action to compel  
31 performance of the requested corrective actions. If any person having any right, title,

1           or interest in and to the real property where the containment unit is located or where  
2           corrective actions are proposed to be taken is not a person responsible for the release  
3           or threatened release, the person may be joined as an indispensable party in an action  
4           to compel performance to assure the requested corrective actions can be taken on  
5           that property by the responsible parties.

6           3.   The release or threatened release of a regulated substance constitutes a public  
7           nuisance and may be enjoined in an action brought by the department.

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

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

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

18           **SECTION 11.** Section 23.1-10-13 of the North Dakota Century Code is created and enacted  
19 as follows:

20           **23.1-10-13. Corrective action costs as lien - Filing of notice of lien - Contents -**  
21 **Attachment priority.**

22           All corrective action costs expended from the regulated substance response fund pursuant  
23 to this chapter constitute a lien on all property owned by the responsible party when a notice of  
24 lien is filed with the recorder in the county where the property is located. The notice of lien must  
25 contain a description of the property of the responsible party upon which the lien is made, a  
26 description of the property upon which corrective action or emergency remedial efforts were  
27 made, and a statement of the corrective action costs expended from the response fund. Upon  
28 entry, the lien must attach to all real property of the responsible party. The lien has priority over  
29 all other claims or liens on the property, except those perfected before the department's filing of  
30 the notice of lien.



1       **SECTION 12.** Section 23.1-10-14 of the North Dakota Century Code is created and enacted  
2 as follows:

3       **23.1-10-14. Other remedies.**

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

9       **SECTION 13.** Section 23.1-10-15 of the North Dakota Century Code is created and enacted  
10 as follows:

11       **23.1-10-15. Voluntary response actions - Liability protection - Procedures.**

- 12       1. Subject to the provisions of this section, a person that is not otherwise responsible  
13 under this chapter or another environmental law for a release or threatened release is  
14 not responsible solely because the person undertakes and completes response  
15 actions to remove or remedy releases or threatened releases at an identified area of  
16 real property in accordance with a voluntary cleanup agreement.
- 17       2. A person requesting liability protection under this section shall submit an application in  
18 the form required by the department. The requestor also shall submit a voluntary  
19 response action plan that includes an investigation report prepared by an appropriate  
20 professional describing the methods and results of an investigation of the releases and  
21 threatened releases at the identified area of real property, methods of investigation,  
22 and the analytical results and professional's evaluation of the reported information.  
23 The department may approve the application only if the department determines the  
24 nature and extent of the releases and threatened releases at the identified area of real  
25 property have been identified and evaluated adequately in the investigation report.  
26 The department's approval also must be based on consideration of the following:
- 27       a. If reuse or development of the property is proposed, the voluntary response  
28 action plan provides for all response actions required to carry out the proposed  
29 reuse or development;
- 30       b. The response actions and the activities associated with any reuse or  
31 development proposed for the property will not aggravate or contribute to

- 1                   releases or threatened releases that are not required to be removed or remedied  
2                   under the voluntary response action plan, and will not interfere with or  
3                   substantially increase the cost of response actions to address the remaining  
4                   releases or threatened releases; and
- 5           c.   The owner of the property or other relevant person agrees to cooperate with the  
6                   department or other persons acting at the department's direction in taking  
7                   response actions necessary to address remaining releases or threatened  
8                   releases, and to avoid any action that interferes with the response actions.
- 9           3.   If the department approves the application, the department and requestor shall enter a  
10                   voluntary cleanup agreement in which the department agrees to take no action under  
11                   title 23.1 and chapters 61-28 and 61-28.1 against the requestor and those persons  
12                   identified in subsection 5 so long as the plan is implemented pursuant to the  
13                   agreement's terms and with the exercise of due care. As part of the agreement, the  
14                   department may require the owner, requestor, or other relevant person agrees to any  
15                   of the following conditions:
- 16                   a.   To provide access to the property;  
17                   b.   To allow reasonable and necessary activities at the property, including placement  
18                   of borings, wells, equipment, and structures on the property; and  
19                   c.   To enter an environmental covenant for the property containing institutional  
20                   controls under chapter 47-37. Alternatively, institutional controls may be imposed  
21                   on the property using zoning regulations under section 23.1-10-16.
- 22           4.   Response actions taken under a voluntary cleanup agreement are not complete until  
23                   the department certifies completion in writing. The department shall issue a certificate  
24                   of completion if the parties demonstrate to the department's satisfaction the response  
25                   action is complete. If a voluntary response action plan does not require removal or  
26                   remedy of all regulated substances, the department may condition the certificate of  
27                   completion on the owner's, requestor's, or other relevant person's continued  
28                   compliance with conditions in the voluntary cleanup agreement or other conditions  
29                   deemed necessary by the department.
- 30           5.   In addition to the person that undertakes and completes a voluntary response action  
31                   pursuant to a voluntary cleanup agreement, the liability protection provided by this

- 1 section applies to the following persons so long as the persons comply with any  
2 conditions imposed by the department under subsection 4:
- 3 a. The owner of the identified property, if the owner is not responsible for any  
4 release or threatened release identified in the approved voluntary response  
5 action plan;
- 6 b. A person providing financing to the person that undertakes and completes the  
7 response actions or that acquires or develops the identified property;
- 8 c. A fiduciary that arranges for the undertaking and completion of response actions;  
9 and
- 10 d. A successor or assignee of a person to which the liability protection applies.
- 11 6. Notwithstanding subsection 1, when a person that is responsible for a release or  
12 threatened release undertakes and completes response actions, the protection from  
13 liability provided by this section applies to persons described in subsection 5 if the  
14 response actions are undertaken and completed in accordance with the following:
- 15 a. The response actions must be undertaken and completed in accordance with a  
16 voluntary cleanup agreement.
- 17 b. When the department issues a certificate of completion for response actions  
18 completed by a responsible party, the department and the responsible party may  
19 enter an agreement that resolves the responsible party's future liability to the  
20 department for the release or threatened release addressed by the response  
21 actions.
- 22 7. The protection from liability provided by this section does not apply to a person that:
- 23 a. Aggravates or contributes to a release or threatened release that was not  
24 remedied under an approved voluntary response action plan; or
- 25 b. Obtains the department's approval of a voluntary cleanup agreement for  
26 purposes of this section by fraud or misrepresentation or by knowingly failing to  
27 disclose material information, or that knows the approval was so obtained before  
28 taking an action that would have made the person subject to the protection of this  
29 section.
- 30 8. This section does not affect the authority of the department to exercise any powers or  
31 duties with respect to a new or additional release or threatened release of a regulated

1 substance on a property or site regulated under this section, or the right of the  
2 department or any other person to seek legal or equitable relief against a person not  
3 subject to a liability protection provided under this section.

4 **SECTION 14.** Section 23.1-10-16 of the North Dakota Century Code is created and enacted  
5 as follows:

6 **23.1-10-16. Zoning regulations establishing institutional controls.**

- 7 1. If an area made subject to institutional controls involves two or more property owners  
8 and an area larger than either one city block or ten acres [4.05 hectares], the  
9 department and the political subdivision having zoning authority over the property may  
10 agree to institutional controls relating to the identified area impacted by the release or  
11 threatened release. Before the institutional controls become effective, the controls  
12 must be the subject of a public hearing and be established in the same manner as  
13 zoning regulations are established by that political subdivision. The political  
14 subdivision shall provide all notices under this subdivision, but any public hearing must  
15 be held jointly by the political subdivision and the department.
- 16 2. The department shall consider the factors in subsection 2 of section 23.1-10-15 before  
17 agreeing to institutional controls under this section.
- 18 3. Institutional controls may be terminated or amended at any time by written agreement  
19 between the department and the relevant political subdivision.

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

22 **23.1-10-17. Liability protections issued before August 1, 2021.**

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

27 **SECTION 16. AMENDMENT.** Section 40-47-01 of the North Dakota Century Code is  
28 amended and reenacted as follows:

29 **40-47-01. Cities may zone - Application of regulations.**

30 For the purpose of promoting health, safety, morals, or the general welfare of the  
31 community, the governing body of any city may, subject to the provisions of chapter 54-21.3,

1 regulate and restrict the height, number of stories, and the size of buildings and other  
2 structures, the percentage of lot that may be occupied, the size of yards, courts, and other open  
3 spaces, the density of population, and the location and use of buildings, structures, and land for  
4 trade, industry, residence, or other purposes. ~~Such~~The regulations may provide that a board of  
5 adjustment may determine and vary the application of the regulations in harmony with ~~their~~the  
6 regulations' general purpose and intent and in accordance with general or specific rules ~~therein~~  
7 contained in the regulations. The governing body of a city may establish institutional controls  
8 that address environmental concerns with the department of environmental quality as provided  
9 in section ~~23.1-04-04~~23.1-10-16.

10 **SECTION 17. AMENDMENT.** Section 58-03-11 of the North Dakota Century Code is  
11 amended and reenacted as follows:

12 **58-03-11. Establishment of zoning districts - Uniformity.**

13 For the purpose of promoting the health, safety, morals, or the general welfare, or to secure  
14 the orderly development of approaches to municipalities, the board of township supervisors may  
15 establish one or more zoning districts and within ~~such~~the districts ~~may~~, subject to the provisions  
16 of chapter 54-21.3 and section 58-03-11.1, may regulate and restrict the erection, construction,  
17 reconstruction, alteration, repair, or use of buildings and structures; the height, number of  
18 stories, and size of buildings and structures; the percentage of lot that may be occupied; the  
19 size of courts, yards, and other open spaces; the density of population; and the location and  
20 use of buildings, structures, and land for trade, industry, residence, or other purposes. All ~~such~~  
21 regulations and restrictions under this section must be uniform throughout each district, but the  
22 regulations and restrictions in one district may differ from those in other districts. The board of  
23 township supervisors may establish institutional controls that address environmental concerns  
24 with the department of environmental quality as provided in section ~~23.1-04-04~~23.1-10-16.

25 **SECTION 18. REPEAL.** Sections 23.1-04-04 and 23.1-10-01 of the North Dakota Century  
26 Code are repealed.