

**CHAPTER 23.1-01**  
**DEPARTMENT OF ENVIRONMENTAL QUALITY**

**23.1-01-01. Department of environmental quality established - Director appointment.**

The department of environmental quality is established and is the primary state environmental agency. The governor shall appoint a director of the department who shall serve at the pleasure of the governor. The director must have a bachelor of science degree or higher from an accredited college in a natural or physical science area of study or be a registered professional engineer. The governor shall seek to appoint a director with at least seven years of environmental health or relevant engineering work experience. Three years of the work experience must include administrative and management responsibilities. Direct work experience in North Dakota is preferred. The director may not engage in any other occupation or business that may conflict with the statutory duties of the director. The position of director of the department is not a classified position, and the governor shall set the salary of the director within the limits of legislative appropriations.

**23.1-01-02. Environmental review advisory council - Members, powers, and duties.**

1. The environmental review advisory council is established to advise the department of environmental quality in carrying out its duties. The council consists of the director of the department of water resources, state geologist, and director of the game and fish department, who serve as ex officio members, and ten members appointed by the governor. The director of the department of environmental quality or the director's designee shall serve as the executive secretary for the council. The appointed members must be:
  - a. A representative of county or municipal government;
  - b. A representative of manufacturing or agricultural processing;
  - c. A representative of the solid fuels industry;
  - d. A representative of the liquid and gas fuels industry;
  - e. A representative of crop agriculture;
  - f. A representative of the waste management industry;
  - g. A representative with an agronomy or soil sciences degree;
  - h. A representative of the thermal electric generators industry;
  - i. A representative of the environmental sciences; and
  - j. A representative of the livestock industry.
2. Each appointive member of the council shall serve a four-year term. The governor may fill any vacancy in the membership of the council, and may remove an appointed member of the council for cause. The council members shall select a chairman from among the council members.
3. Council members must be reimbursed by the department of environmental quality for necessary travel and other expenses incurred in the performance of official duties.
4. The council shall hold at least two meetings per year and any other meetings deemed necessary by the chairman or a majority of the council.
5. The council shall:
  - a. Review and make recommendations to the department of environmental quality regarding rules and standards relating to environmental quality and the duties of the department. The department may not take final action on any rule or standard without first consulting the council.
  - b. Consider any other matter related to the purposes of this title and chapters 61-28, 61-28.1, and 61-28.2 the council deems appropriate and make any recommendation on its own initiative to the department of environmental quality concerning the administration of this title and chapters 61-28, 61-28.1, and 61-28.2.

**23.1-01-03. Director - Powers and duties.**

The director of the department of environmental quality shall:

1. Enforce all rules adopted by the department;
2. Hire employees as necessary to carry out the duties of the department and director;
3. Organize the department in the most efficient and effective manner;
4. Maintain, in conjunction with the department of health and human services, a laboratory to carry out the necessary tests and examinations for purposes of this title, and establish a fee schedule for the tests and examinations;
5. Issue bulletins, news releases, or reports as necessary to inform the public of environmental hazards;
6. Establish rules necessary for maintaining sanitation, including rules for approving plans for water works and sewage systems;
7. Maintain a central environmental laboratory and, if necessary, branch laboratories for the standard function of diagnostic, sanitary, and chemical examinations; and
8. Any other action, including the collection and distribution of environmental quality data, necessary and appropriate for the administration of this title and chapters 61-28, 61-28.1, and 61-28.2.

#### **23.1-01-04. Rulemaking authority - Limitations.**

1. Except as provided in subsection 2, the department of environmental quality may not adopt any rule for the purpose of the state administering a program under the federal Clean Air Act [42 U.S.C. 7401 et seq.]; federal Clean Water Act [33 U.S.C. 1251 et seq.]; federal Safe Drinking Water Act [42 U.S.C. 300 et seq.]; federal Resource Conservation and Recovery Act [42 U.S.C. 6901 et seq.]; federal Comprehensive Environmental Response, Compensation, and Liability Act [42 U.S.C. 9601 et seq.]; federal Emergency Planning and Community Right to Know Act of 1986 [42 U.S.C. 11001 et seq.]; federal Toxic Substances Control Act [42 U.S.C. 2601 et seq.]; or federal Atomic Energy Act of 1954 [42 U.S.C. 2011 et seq.]; which is more stringent than corresponding federal regulations that address the same circumstances. In adopting the rules, the department may incorporate by reference corresponding federal regulations.
2. The department may adopt rules more stringent than corresponding federal regulations or adopt rules where there are no corresponding federal regulations, for the purposes described in subsection 1, only if the department makes a written finding after public comment and hearing and based upon evidence in the record, that corresponding federal regulations are not adequate to protect the public health and the environment of the state. Those findings must be supported by an opinion of the department referring to and evaluating the public health and environmental information and studies contained in the record which form the basis for the department's conclusions.
3. If the department, upon petition by any person affected by a rule of the department, identifies rules more stringent than federal regulations or rules where there are no corresponding federal regulations, the department shall review and revise those rules to comply with this section within nine months of the filing of the petition.
4. Any person issued a notice of violation, or a denial of a permit or other approval, based upon a rule of the department which is more stringent than a corresponding federal regulation or where there is no corresponding federal regulation, may assert a partial defense to that notice, or a partial challenge to that denial, on the basis and to the extent the department's rule violates this section by imposing requirements more stringent than corresponding federal regulations, unless the more stringent rule of the department has been adopted in compliance with this section.

#### **23.1-01-05. Department of environmental quality authorized to transfer future accumulated fees.**

The department of environmental quality may from time to time transfer unclaimed fees on deposit with the Bank of North Dakota or other authorized depository to the state general fund when the unclaimed status has existed for a period of at least three years.

**23.1-01-06. Department to employ waste management facility inspectors.**

The department of environmental quality shall employ and establish the qualifications, duties, and compensation of at least one full-time inspector for each commercial, nonpublicly owned waste management disposal or incineration facility that accepts more than twenty-five thousand tons [22679.5 kilograms] per year of hazardous waste, industrial waste, nuclear waste, or ash resulting from the incineration of municipal solid waste. This section does not apply to any energy conversion facility or coal mining operation that disposes of its solid waste onsite. The department may require inspectors for those facilities that accept less than twenty-five thousand tons [22679.5 kilograms] per year. The facility inspector shall conduct regular inspections of the operating procedure and conditions of the facility and report the findings to the department on a regular basis. If an inspector discovers a condition at a facility that is likely to cause imminent harm to the health and safety of the public or environment, the inspector shall notify the department. The department shall proceed as provided by sections 23.1-08-19 and 23.1-08-20.

The department shall assess the owner or operator of a waste management facility that accepts hazardous waste, industrial waste, nuclear waste, or ash resulting from the incineration of municipal solid waste an annual fee to pay the salaries, wages, and operating expenses associated with employing an inspector for the facility. The owner or operator of the facility shall submit the fee to the department by July first of each year. Any fees collected must be deposited in the department's operating fund in the state treasury and any expenditures from the fund are subject to appropriation by the legislative assembly. If a facility begins operation after July first of any year, the owner or operator of the facility shall pay to the department a prorated fee for the fiscal year before the facility may begin accepting waste. Moneys in the waste management facility account may be spent by the department within the limits of legislative appropriation.

**23.1-01-07. Permit or investigatory hearings - Exemption from chapters 28-32 and 54-57.**

A permit hearing conducted for purposes of receiving public comment or an investigatory hearing conducted under chapters 23.1-03, 23.1-04, 23.1-06, 23.1-08, 61-28, and 61-28.1 is not an adjudicative proceeding under chapter 28-32 and is not subject to the requirements of chapter 54-57.

**23.1-01-08. Commercial feed, insecticide, fungicide, rodenticide, fertilizer, and soil conditioner laws - Laboratory function.**

Notwithstanding any other provision of law, any laboratory test or analysis required under chapter 4.1-34, 4.1-40, or 4.1-41 must be performed by the department of environmental quality for the agriculture commissioner at no charge.

**23.1-01-09. Department of environmental quality - Indirect cost recoveries.**

Notwithstanding section 54-44.1-15, the department of environmental quality may deposit indirect cost recoveries in its operating account.

**23.1-01-10. Zoning regulation of concentrated animal feeding operations - Central repository.**

The department of environmental quality shall establish, operate, and maintain an electronically accessible central repository for all county and township zoning regulations that pertain to concentrated animal feeding operations. The county auditor of a county and a township clerk of a township having a zoning regulation that pertains to concentrated animal feeding operations shall file the regulation with the department of environmental quality for inclusion in the central repository.

**23.1-01-11. Appeal from permit proceedings.**

1. An appeal from the issuance, denial, modification, or revocation of a permit issued under chapter 23.1-03, 23.1-04, 23.1-06, 23.1-08, or 61-28 may be made by the person who filed the permit application, or by any person who is aggrieved by the

permit application decision, provided that person participated in or provided comments during the hearing process for the permit application, modification, or revocation. An appeal must be taken within thirty days after the final permit application determination is mailed by first-class mail to the permit applicant and to any interested person who has requested a copy of the final permit determination during the permit hearing process. Except as provided in this section, an appeal of the final permit determination is governed by sections 28-32-40, 28-32-42, 28-32-43, 28-32-44, 28-32-46, and 28-32-49. The department may substitute final permit conditions and written responses to public comments for findings of fact and conclusions of law. Except for a violation of chapter 23.1-03, 23.1-04, 23.1-06, 23.1-08, or 61-28 which occurs after the permit is issued, or any permit condition, rule, order, limitation, or other applicable requirement implementing those chapters which occurs after the permit is issued, any challenge to the department's issuance, modification, or revocation of the permit or permit conditions must be made in the permit hearing process and may not be raised on any collateral or subsequent legal proceeding, and the applicant and any aggrieved person may raise on appeal only issues that were raised to the department in the permit hearing process.

2. Notwithstanding subsection 1, the department may adopt any procedures governing appeals it determines are necessary and appropriate to develop, implement, or enforce a federally delegated, authorized, or approved program.

**23.1-01-11.1. Environmental compliance background review - Criminal history background checks.**

1. As part of an environmental compliance background review, the department may require an applicant for a radioactive materials license under chapter 23.1-03 or a solid waste permit under chapter 23.1-08 to complete a statewide and nationwide criminal history record check as provided in section 12-60-24. The applicant shall submit personal information and fingerprints with the application necessary to complete the statewide and nationwide criminal history record check in the manner provided in subsection 1 of section 12-60-24. All costs associated with the statewide and nationwide criminal history record check are the responsibility of the applicant.
2. For purposes of this section, an "applicant" means the person applying for the license or permit, and includes:
  - a. Each entity as defined in subsection 7 of section 10-01.1-02 that is, or is proposed to be:
    - (1) A partner in a partnership as defined in subsection 19 of section 45-13-01;
    - (2) An entity holding ten percent or more of the applicant's debt;
    - (3) An entity holding ten percent or more of the applicant's equity; or
    - (4) The parent of a corporation as defined in subsection 46 of section 10-19.1-01.
  - b. Each individual who has, or is proposed to have, any of the following relationships with the applicant:
    - (1) A board member as defined in subsection 8 of section 10-19.1-01;
    - (2) A partner in a partnership as defined in subsection 19 of section 45-13-01;
    - (3) An officer as defined in section 10-15-29 or 10-19.1-52;
    - (4) A radiation safety officer as defined in North Dakota Administrative Code subsection 34 of section 33.1-10-01-04;
    - (5) A holder of ten percent or more of the applicant's debt; or
    - (6) A holder of ten percent or more of the applicant's equity.
3. The department may deny an application for the issuance, renewal, transfer, or major modification of a license or permit based on its environmental compliance background review.
  - a. Reasons for denial include:
    - (1) The applicant has intentionally misrepresented or concealed any material fact in a statement required under this section;

- (2) The applicant has been convicted of a felony or pleaded guilty or nolo contendere to a felony involving the laws of any state or the federal government within five years preceding the application;
  - (3) The applicant has been adjudicated in contempt of an order of any court enforcing the laws of this state or any other state or the federal government within five years preceding the application; or
  - (4) The applicant has repeatedly violated any state or federal environmental protection laws.
- b. The department also shall consider the relevance of the offense to the business to which the license or permit is issued, the nature and seriousness of the offense, the circumstances under which the offense occurred, the date of the offense, and the ownership and management structure in place at the time of the offense.

**23.1-01-12. Rules.**

The department may adopt rules consistent with national or regional standards which relate to the promotion of plastic bottle recycling and the maintenance of safe plastic bottle recycling practices in the state.

**23.1-01-13. Contracts for inspections.**

The department may contract with public health units and other appropriate entities to conduct inspections on behalf of the department or provide other services.

**23.1-01-14. Environmental laboratories - Certification required - Fees.**

1. The department shall establish and administer a certification program for environmental laboratories. The department may:
  - a. Establish standards and procedures for certifying environmental laboratories;
  - b. Issue certifications to all applicants who satisfy the requirements for certification under this section and any rules under this section, to renew certifications, and to deny, suspend, or revoke certifications for cause after notice and opportunity for hearing;
  - c. Specify in a certification the parameters and analytical procedures the environmental laboratory is certified to conduct;
  - d. Conduct onsite evaluations of certified environmental laboratories and applicants for certification;
  - e. Establish reasonable fees for certifying environmental laboratories, which must be deposited in the department operating fund and spent subject to appropriation by the legislative assembly;
  - f. Reject any testing or data submitted by an environmental laboratory not certified by the department;
  - g. Refuse to accept testing or data from a certified environmental laboratory when the department reasonably determines that the results do not meet reasonable criteria for validation; and
  - h. Adopt and enforce rules as necessary for implementation of this section.
2. Unless exempted by the department, all environmental laboratories that conduct tests or prepare data for submittal to the department must be certified by the department and comply with any conditions imposed by the certification.
3. The department may grant interim approval to operate an environmental laboratory required to obtain certification under this section if the laboratory was certified under any department program as of July 31, 2019. An environmental laboratory with interim approval shall apply immediately for certification once the department adopts rules for the issuance of certifications under this section. The interim approval is valid until the department acts on the application.

**23.1-01-15. International climate control regulations.**

A climate control-related regulation of an international organization, either directly through the organization or indirectly through law or regulation, is not enforceable on this state.