

Testimony
Senate Bill 2070
Senate Energy and Natural Resources Committee
January 7, 2021, 1:30 pm
North Dakota Department of Environmental Quality

Good afternoon Chairman Kreun and members of the Senate Energy and Natural Resources Committee. My name is David Glatt, Director of the North Dakota Department of Environmental Quality (DEQ). The DEQ is responsible for the implementation of many environmental protection programs in the state. I provide this testimony in support of SB 2070.

Historically the DEQ has been involved in assessing, monitoring, remediation and post-remediation activities associated with environmental emergencies and contaminated properties in the state. We strive to mitigate adverse environmental impacts using science and the authority provided to us in federal and state laws. When responsible parties are cooperative, this can be achieved with minimal cost to the state. However, when a responsible party is not cooperative or cannot be identified, the DEQ has found it challenging, if not impossible, to implement appropriate corrective action.

In these cases, contaminated properties remain a potential risk to communities – often for many years as the properties are abandoned or fall into disuse. The objective of SB 2070 is to reduce the number of abandoned contaminated properties in the state by incentivizing timely corrective action. It will also provide liability relief to investors, and developers, that voluntarily initiate corrective actions.

SB 2070 is inspired by a federal program known as the Comprehensive, Environmental Response, Compensation and Liability Act - commonly referred to as the Superfund. The Superfund identifies areas of extreme environmental concern and works to restore those areas to a useable state. The North Dakota Arsenic Trioxide Site and the Minot Landfill remediations were both completed with federal Superfund assistance.

In addition to funding corrective action, the Superfund program can compel responsible parties to perform cleanup activities or reimburse cleanup costs. Superfund is generally used for the most severe cases, with the average cleanup costing \$25 - 30 million dollars. The Superfund is of limited value for smaller sites. This is because smaller sites do not qualify for access to the Superfund, and therefore provide no authority to compel a responsible party to complete corrective action. With no other state or federal alternatives, many smaller contaminated sites remain unaddressed, abandoned and a continuing threat to public and environmental health.

Many states have enacted their own state-run programs modeled after the federal Superfund program to address this regulatory and funding gap. These state programs often are referred to as “mini Superfund” programs with unique provisions tailored to meet state needs. State statutes typically give state environmental agencies authority similar to that given to the federal government, namely the ability to compel cleanups, seek reimbursement from uncooperative responsible parties or to conduct corrective action in the absence of a responsible party.

North Dakota is one of the few states without a “mini superfund” program. The North Dakota DEQ has environmental laws requiring responsible parties to clean up contamination, but there are regulatory gaps which SB 2070 seeks to address. Funding deficiencies and state regulatory gaps have allowed unaddressed contaminated properties to exist, and investors avoid these properties due to potential liability concerns. Some examples of these types of sites are:

- City of Napoleon (historical hydrocarbon contamination)
- City of West Fargo- warehouse glass piles
- City of Williston- abandoned dry cleaning facility
- Abandoned agriculture storage facility - rotting peas
- Waste oil disposal along state highway contaminating a livestock water supply

The DEQ proposes to address some of the regulatory gaps through the implementation of SB 2070. The highlights of the bill are:

- The bill expands the scope of the long-standing Environmental Quality Restoration Fund. The original fund was limited in scope, to address emergency response actions only. SB 2070 seeks to expand its use to non-emergency environmental contamination, increase the fund amount to address larger projects and maintain the fund balance using money collected from environmental enforcement penalties among other funding sources identified in the bill. This will allow the DEQ to address serious environmental issues that do not necessarily qualify as “emergencies” under current law and increase the chances of returning contaminated property to beneficial use.

- In cases where there is a viable but uncooperative responsible party SB 2070 authorizes DEQ to take action to compel the responsible party, to initiate cleanup or to facilitate a state lead corrective action after appropriate notice. Like the federal Superfund, this bill also enables DEQ to seek cost reimbursement from responsible parties.

- The bill simplifies and expands the current voluntary clean up law, ensuring that a “good Samaritan” will not be liable for implementing a department-approved corrective action.

I will now briefly highlight the sections of SB 2070.

Section 1:

Amends this chapter to reflect the new chapters and reference accordingly.

Section 2: 23.1-10-04 Definitions:

This section defines terminology used within the law. Many are commonly used words that have been previously defined in existing federal and state statute. One definition that typically gets the most attention is the definition of Responsible Party. In general terms, it can be an individual, owner or operator of a facility where an unpermitted release of a regulated compound or material has occurred. The release may result in an adverse environmental impact.

Section 3: 23.1-10-05 Revenue to the Fund.

This section describes the potential revenue sources that can be deposited back into the fund once the fund has been established. In addition to cost recovery actions, funds generated through environmental enforcement penalty collections; funds donated for the purposes of this chapter, transfers from the oil and gas well plugging and site reclamation fund and federal funds for the purpose of this section have been identified. It is noted that penalties are only deposited into the fund when it is less than five million dollars (if the fund exceeds five million, penalties will go to the general fund as they do currently).

Section 4: 23.1-10-06 Release of regulated substance prohibited- Exception

All releases of regulated substances are prohibited. Exceptions are provided for releases of regulated substances that comply with existing federal or state statute.

Section 5: 23.1-10-07 Releases from Petroleum Tanks

Releases from petroleum tanks are typically covered under the North Dakota Petroleum Release Compensation Fund (NDPTRCF) (chapter 23.1-12). Funding from SB 2070 can only be expended for corrective action for tanks covered under chapter 23.1-12 if there are no available moneys in the NDPTRCF.

Section 6: 23.1-10-08. Responsible parties

This portion of the bill has received some comment related to the identification of responsible parties by the Department. Briefly this section notes that if no viable responsible party can be located after a reasonable investigation the current landowner shall be considered as the responsible party with some exceptions. The landowner would not be considered liable for contamination if:

- They acquired the property after the disposal or placement of the regulated waste on or in the property and at the time of the property being acquired did not know or had no reason to know a regulated substance was disposed on or in the property.
- The owner is a governmental entity receiving the property by tax sale, foreclosure etc.

- The owner acquired the property by inheritance or bequest and did not know or had no reasons to know a regulated substance was disposed on, in or at the property.

This section intends to ensure responsible parties are held accountable for contamination they created and do not, through various land acquisition or sale agreements, attempt to shirk their responsibility to clean up the contamination. It also makes available to new landowners the “innocent landowner defense” currently available in other state and federal laws, under which a new landowner can show proper due diligence was taken prior to purchase. It is also noted that the current lender protections remain available under this bill.

Section 7: 23.1-10-09 Duty to provide information- Inspections

This section provides site access authority to the DEQ with the intent of gathering information, conducting assessments and potentially taking removal or remedial actions. Upon request by the Department, the owner must provide information that is available or reasonably obtained and relevant to the contaminant release or threatened release.

Section 8: 23.1-10-10 Authority to establish and enforce remediation requirements

This section relates to the development of remediation end points to be achieved by corrective action taken under this chapter. The DEQ will consider at a minimum contaminant type, existing and future property use and exposure risk when considering corrective action limits. The evaluation process may allow the DEQ to develop site specific remediation end points.

Section 9: 23.1 Action to compel performance – Injunctive relief

This section identifies the Department’s ability to make a written request for corrective action to a responsible party in order to protect public and environmental health. The request must include the reasons for the action and appropriate timelines for completion. If the responsible party fails to initiate an appropriate remedy, the Department may bring action to compel a timely response. The section also notes that other landowners not considered to be a responsible

party to the contamination can be joined as an indispensable party in an action to compel performance.

Section 10. 23.1-10-12 Cost Recovery

This section will allow the Department to recover reasonable and necessary costs under this chapter after written notice is provided to the responsible party, if available. Costs incurred may include corrective action, administrative and legal expenses.

Section 11 23.1-10-13 Corrective Action Costs as lien – filing of notice of lien- Contents- Attachment priority.

This section provides the DEQ authority and outlines the process needed to file a lien on the responsible party's property. The lien will address documented costs associated with the implementation of corrective action and associated activities.

Section 12 – 23.1-2 Other remedies

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

Section 13 23.1-10-15 Voluntary response actions – Liability protection – Procedures

This section describes the steps needed for a person not otherwise considered a responsible party to obtain liability protection when implementing a DEQ approved voluntary corrective action plan. It identifies that corrective action is not complete until certified by the DEQ in writing. In addition, it identifies under what conditions (such as obtaining liability relief by fraud or conducting actions that aggravates or contributes to the release or potential release) where previously granted liability relief can be rescinded.

Section 14: 23.1-10-16 Zoning regulations establishing institutional controls

This section identifies the steps the department and a local zoning authority must complete before institutional controls on two or more properties are implemented. The steps include appropriate notice and a public hearing process. The hearing must be held jointly by the department and the local zoning authority. Institutional controls may also be terminated by written agreement between the Department and relevant political subdivision.

Section 15: 23.1 -10-17 Liability protection issued before August 1, 2021.

This chapter does not affect liability protections related to releases or threatened releases of regulated substances issued by the Department prior to August 1, 2021.

Section 16: 40-47-01 Cities may zone – Application of regulations.

Amends this chapter to reflect the new chapters and reference accordingly.

In closing it is important to emphasize the intent of SB 2070.

- Combine existing regulation relating to responsible parties, contaminant releases and the need to initiate corrective action into one law.
- Incentivize responsible parties to initiate and complete corrective action.
- Provide liability relief for parties that agree to initiate voluntary actions
- Most importantly it will incentivize the restoration or development of contaminated underutilized or abandoned properties resulting in an elevated asset to the community and property owner.

And lastly, I have attached the proposed amendments to SB 2070. These amendments clarify a continued appropriation and provide for retroactive application.

This ends my testimony I will now stand for any questions relating to SB 2021.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2070

Page 1, line 4, after “11-33-01,” insert “23.1-10-02,”

Page 1, line 7, after “properties” insert “; to provide a continuing appropriation; and to provide for retroactive application”

Page 2, after line 2 insert:

“**SECTION 2. AMENDMENT.** Section 23.1-10-02 of the North Dakota Century Code is amended and reenacted as follows:

23.1-10-02. Environmental quality restoration fund - Continuing appropriation.

There is established an environmental quality restoration fund into which the funds recovered in this chapter may be deposited. The fund is to be administered by the department of environmental quality and may be used by the department for costs of environmental assessment, removal, corrective action, or monitoring as determined on a case-by-case basis. All money placed in the fund under this section and section 23.1-10-05 is hereby appropriated to the department on a continuing basis.”

Page 13, after line 26 insert:

“**SECTION 20. RECTROACTIVE APPLICATION.** This Act is retroactive in application.”

Re-number accordingly.