

Testimony
House Bill 1079
House Judiciary Committee
January 19, 2021; 9:30 am
North Dakota Department of Environmental Quality

Chairman Klemin and members of the House Judiciary Committee. My name is David Glatt, Director for the North Dakota Department of Environmental Quality (DEQ). The DEQ is responsible for implementing many of the environmental protection programs in the state. I am here today to provide testimony in support of HB 1079.

Historically, the DEQ has provided technical and regulatory oversight relating to the cleanup and ongoing use of contaminated properties. The success of cleanup actions depends on the type of contaminant, site location and local geology. When cleanup of a property to background conditions is not achievable or would far exceed the property's value, residual contamination may be left in place. Leaving contamination can result in the land being designated as a Brownfield where the land is typically left vacant, abandoned or underused. However, we note that some Brownfield properties can be safely used for certain activities with appropriate environmental controls. The environmental or institutional controls are also referred to as environmental covenants. These environmental covenants identify controls that ensure that the contamination does not spread or adversely impact human health.

North Dakota law has provided for environmental covenants since 2005. They are necessary to ensure that environmental or institutional controls remain in place even if the property is transferred to new ownership. Although environmental covenants have been a useful tool in North Dakota for many years, there are concerns with the current law (NDCC 23.1-04-04). It provides little detail on how environmental covenants interact with other areas of law, including real estate and environmental law. The need for the law clarification recently became evident when working on a large cleanup project involving several environmental covenants.

The Uniform Environmental Covenant Act, which HB 1079 was modeled after, was drafted with input from various stakeholders, including regulators, landowners, and bankers. It has been adopted by 26 states and provides certainty

for investors across state lines. Adopting the Uniform Environmental Covenant Act would ensure there are no conflicts or gaps in existing state law.

Some key areas the Uniform Environmental Covenants Act would address that are currently not addressed in ND law are:

- **47-37-02:** adopts the basic rule that interests prior to the environmental covenant remain valid (e.g., a mortgage) and clarifies that relevant parties can agree to re-order the priorities in a “subordination agreement”
- **47-37-04:** clarifies that certain traditional common law doctrines do not apply, ensuring an environmental covenant remains enforceable and in effect
- **47-37-05:** clarifies that the Act does not authorize a use that is prohibited by zoning law or a prior recorded instrument
- **47-37-06:** expands who must receive notice of the environmental covenant
- **47-37-08 & 47-37-09:** clarifies and simplifies the termination or amendment of an environmental covenant
- **47-37-11:** requires the DEQ to establish a registry of environmental covenants and allows notice of the covenant to be recorded instead of the entire document, which should simplify the recording process and make it easier for interested parties to locate documents

It is important to note that the DEQ has a companion bill, SB 2070, also referred to as the “mini Superfund” bill, that addresses other aspects of cleaning up contaminated properties. SB 2070 repeals NDCC 23.1-04-04 and includes reference to the Uniform Environmental Covenants Act.

We believe HB 1079 would provide clarity in the process and certainty to property owners and investors involved with the Environmental Covenants.

This concludes my testimony on HB 1079. I will stand for any questions from the committee.