

TESTIMONY OF

David Glatt, Director of North Dakota Department of Environmental Quality

Good morning Chairman Porter and members of the House 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 of the environmental protection programs in the state. I provide this testimony in support of SB 2070.

Historically the DEQ has been involved in the assessment, monitoring, remediation, and post-remediation activities associated with environmental emergencies and contaminated properties in the state. Through our involvement in corrective action activities, we strive to mitigate adverse environmental impacts utilizing the best science with authority provided in existing federal and state laws. When responsible parties are cooperative, actions to mitigate environmental contamination can be achieved with minimal cost to the state. However, where a responsible party is not cooperative, recalcitrant or cannot be identified, the DEQ has found it challenging, if not impossible, to implement appropriate and timely corrective action. This can result in contaminated properties posing a potential risk in a community and in many cases being abandoned. One of the objectives of SB 2070 is to reduce the incidences of abandoned contaminated properties in the state by incentivizing responsible parties to initiate timely corrective action. In cases where a responsible party is recalcitrant or not identified SB 2070 will also provide the resources needed to initiate necessary timely corrective action minimizing adverse public or environmental health impacts. Finally, it will also provide liability relief to investors that voluntarily initiate corrective actions.

To understand the origins of SB 2070, it is important to first look at one federal regulatory program that addresses environmental contamination. Known as the Comprehensive, Environmental Response, Compensation and Liability Act (CERCLA) or commonly referred to as Superfund, it allows the U.S. Environmental Protection Agency (EPA), after completion of a formal assessment and national ranking process, to expend funds to address environmental contamination. The North Dakota Arsenic Trioxide Site remedial action was funded through participation in the federal Superfund program. In addition to funding corrective action at sites where a responsible party could not be identified, the Superfund program can also force identified responsible parties to perform cleanup and reimburse EPA for cleanup costs. Superfund is generally used for the most serious cases, with the average cleanup costing \$25-30 million. For smaller sites, Superfund is generally of limited value from a state perspective due to the lack of direct access to Superfund and no authority to issue administrative orders or file actions seeking to compel a responsible party to complete corrective action. With no other state or federal alternatives, many smaller contaminated sites can remain unaddressed, abandoned and a continuing threat to public and environmental health.

To address the growing number of abandoned or underutilized properties and the need to initiate timely response actions in the absence of a responsible party, many states have enacted their own state-run programs modeled after the federal Superfund program. Many of these state programs are referred to as “mini Superfund” programs with unique provisions tailored to meet state specific needs. State statutes typically give state environmental agencies authority similar to that provided to the federal government with the ability to compel cleanups, seek reimbursement or initiate 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 does have existing 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 or investors to 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 regulatory coverage of the long-standing Environmental Quality Restoration Fund. The original fund was limited in scope, being restricted 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 NDDEQ to address serious environmental issues that do not necessarily qualify as “emergencies” under current law and will increase the chances of returning contaminated property to beneficial use.
- In cases where there is a viable but recalcitrant responsible party, SB 2070 authorizes NDDEQ to take action to compel the responsible party to initiate cleanup or to facilitate a state lead corrective action after appropriate notice. Similar to the federal Superfund, this bill also enables NDDEQ 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:

The statutory reference has been amended to reflect a change in the statute deleting 23.1-04-04 and replacing it with 23.1-10-04 Definitions.

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 and in some cases if left unaddressed, over time is likely to result in environmental contamination, posing a risk to public or environmental health.

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 this section have been identified. It is noted that these actions can occur once the fund is less than five million dollars.

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 funds in the NDPTRCF.

Section 6: 23.1-10-08. Responsible parties

This portion of the bill has received some comment as it relates 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.

The intent of this section is to ensure that 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 provides clarification when a landowner can, and under what circumstances claim to be an innocent landowner.

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 has the duty to 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 endpoints 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 endpoints.

Section 9: 23.1 Action to compel performance – Injunctive relief

This section identifies the ability of the department to make a written request for corrective action to a responsible party outlining the reasons for the action and appropriate timelines for completion to protect public and environmental health. 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 property owned by a responsible party. The lien will address documented costs associated with the implementation of corrective action and associated activities.

Section 12: 23.1-20-14 Other remedies

This chapter does not limit the powers of the department 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 to be 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 aggravate or contribute to the release or potential release) were 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.
- Provides 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.

This ends my testimony. I will now stand for any questions relating to SB 2070.