

June 17, 2022

**VIA Email: [jillgrossman@ndlegis.gov](mailto:jillgrossman@ndlegis.gov)**

Jill Grossman  
Legal Counsel  
North Dakota Legislative Council  
State Capitol  
600 East Boulevard, 2nd Floor  
Bismarck, ND 58505-0360

Dear Ms. Grossman:

The Notice of Intent to Adopt Administrative Rules and a copy of the proposed rules are enclosed as required by N.D.C.C. § 28-32-10(1).

If you have any questions, please contact me at 701-328-5225.

Thank you.

Sincerely,



Karl Rockeman, P.E.  
Division Director, Water Quality

KR:cal

Enclosures

FULL NOTICE OF INTENT TO ADOPT ADMINISTRATIVE RULES RELATING  
TO ARTICLE 33.1-04 - ENVIRONMENTAL RESTORATION

TAKE NOTICE that the North Dakota Department of Environmental Quality will hold a public hearing to address proposed **new** N.D. Admin. Code **article 33.1-04** at **1:30 PM - CST** on August 4th, 2022 at the Department's office building located at 4201 Normandy St., Bismarck, ND. Meeting room 223 will be available to the public for this meeting.

The purpose of the proposed **rule** is to establish the process to utilize the Environmental Quality Restoration Fund based on the provisions of N.D.C.C. 23.1-10-15 and other changes adopted by Senate Bill 2070 during the 2021 Regular Legislative Session. The proposed **rules** address the procedure for using environmental quality restoration funds at sites on the North Dakota Environmental Priorities List whose eligibility will be determined by the Department.

The proposed **rules are not** expected to have an impact on the regulated community in excess of \$50,000.

The proposed rules and regulatory analysis may be obtained by visiting the Department's public notice website link at [deq.nd.gov/PublicNotice.aspx](http://deq.nd.gov/PublicNotice.aspx), writing to the Department at 4201 Normandy St., Bismarck, ND 58503-1324, sending an email to [krockema@nd.gov](mailto:krockema@nd.gov), or calling 701.328.5210. Also, written or oral comments on the proposed rules sent to the above address, email, or telephone number and received by August 22, 2022 will be fully considered.

If you plan to attend the public hearing and will need special facilities or assistance relating to a disability, please contact the Department at the above telephone number or address at least two days prior to the public hearing.

Dated this 17th day of June, 2022.

Karl Rockeman, P.E., Director  
Division of Water Quality  
North Dakota Department of Environmental Quality

REGULATORY ANALYSIS PURSUANT TO  
NORTH DAKOTA CENTURY CODE 28-32-08  
TO ADOPT NORTH DAKOTA ADMINISTRATIVE CODE ARTICLE 33.1-04  
ENVIRONMENTAL RESTORATION

**Classes of People Probably Affected**

The proposed rules administering the Environmental Quality Restoration Fund have the potential to affect new and existing industries, and property owners.

**Probable Impact**

The Department will be able use the fund for activities for remedial actions or investigative activities. The Department will determine on a case-by-case basis if a location is appropriate for the above activities and will be added to the North Dakota Environmental Priorities List. The Department will determine eligibility pending the following:

1. The contaminant of concern at the subject property should be identified. If no contaminant of concern has been identified, there should be at least one recognized environmental condition documented at the site.
2. The subject property must be assessed by the Department to determine if the site conditions support the listing of the site, and to determine the priority of the listed site.
3. The subject property must not be eligible for, or should have exhausted, any other state or federal funding sources. Private funding sources may still be available.
4. The responsible party must be identified, if possible.
5. Any other information the Department deems relevant.

The inclusion of a site on the North Dakota Environmental Priorities List does not guarantee any funding or corrective action will be completed. The Department will post on its website the North Dakota Priorities List and any revisions to the list.

**Economic Impact**

This action is not expected to have an impact on the regulated community in excess of \$50,000. Other than the expenditures for investigative work/remedial action and creation of a priorities list, there is no anticipated economic impact on regulated entities.

The proposed rule will provide an economic gain by adding value to previously contaminated properties that were previously restricted in their use.

### **Cost to Agency and Effect on State Revenues**

Additional staff time required to implement and enforce the changes to the rules will be minimal as the Department already has the responsibility to oversee remediation work.

### **Alternative Methods Considered**

The Department could choose to not adopt the changes. If this occurred, there would be no method to prioritize sites that may have no other way of addressing contamination on the property or to engage in partnership with private entities.

### **Data Assessments**

Current Department practices were reviewed along with the history of past cleanup activities.

TAKINGS ASSESSMENT PURSUANT TO  
NORTH DAKOTA CENTRURY CODE 28-32-09  
TO ADOPT NORTH DAKOTA ADMINSTRATIVE CODE ARTICLE 33.1-04  
ENVIRONMENTAL RESTORATION

**Assessment**

The proposed rules establish the process to utilize the Environmental Quality Restoration Fund. The proposed rules will not limit the use of a landowner's private real property and will therefore not result in a regulatory taking.

**Purpose**

The purpose of the proposed rules is to create a procedure for using environmental quality restoration funds at sites on the North Dakota Environmental Priorities List. The Department will only use the environmental quality restoration funds to fund activities authorized under NDCC Chapter 23.1-10.

**Alternative**

No alternative is available.

**Potential Costs**

There will be no additional costs since the proposed rules do not raise any additional revenue. There will not be an increase to staff since there is minimum estimated increased workload.

**Source of Payment**

There will be no source of payment within the agency's or board's budget since there will be no potential takings costs to the Department.

**Cost Benefit**

Since there will be no additional cost associated with the rules, any benefits achieved will exceed the costs.

SMALL ENTITY ECONOMIC IMPACT STATEMENT PURSUANT TO  
NORTH DAKOTA CENTURY CODE 28-32-08.1  
TO ADOPT NORTH DAKOTA ADMINISTRATIVE CODE ARTICLE 33.1-04  
ENVIRONMENTAL RESTORATION

The following statement is prepared to comply with the requirements for changes to the North Dakota Administrative Code (N.D.A.C.) Chapter 33.1-04, Environmental Restoration

The small entity economic impact state examines the economic impact from proposed rules on small entities. The small entity economic impact statement must contain the following:

Which small entities may be subject to the proposed rule: All entities that are defined as small in N.D.C.C. § 28-32-08.1 that are determined to be eligible for the Environmental Priorities List.

Administrative or other cost will be required for small entities to comply with the proposed rule:

The Department may enter into a cost-sharing agreement with an owner of a listed site that is not a responsible party. Cost-sharing agreements involve the site owner voluntarily conducting Department-approved activities and receiving partial reimbursement from the Department for the costs of those approved activities.

Violation of cost-sharing requirements. The site owner must repay cost-share funds to the Department if:

1. Response actions have been conducted in a way or manner that is not in compliance with the voluntary response action plan;
2. The site owner has failed to comply with, or violated, the voluntary cleanup agreement;
3. The site owner fails to comply with the terms and conditions of the cost-sharing agreement;
4. The site owner's remedial actions cause, or contribute to, additional contamination of the listed property; or
5. The site owner's remedial actions cause, or contribute to, contamination at properties other than the subject property.

All other proposed changes to the rule are not expected to have any economic impact on small entities.

Probable cost and benefit to private persons and consumers who may be affected by the proposal: No effect on the consumer or private persons that do not own the site in question.

Probable effect of the proposed rules on State revenue: No effect on state revenues is anticipated.

Are there less intrusive or costly ways of achieving the proposed rule's purpose: By adopting the ability to use voluntary response agreements to partner with private entities, this is the least intrusive option.

SMALL ENTITY REGULATORY ANALYSIS PURSUANT TO  
NORTH DAKOTA CENTURY CODE SECTION 28-32-08.1  
TO ADOPT NORTH DAKOTA ADMINISTRATIVE CODE ARTICLE 33.1-04  
ENVIRONMENTAL RESTORATION

The following analysis is prepared to comply with the requirements for adoption of North Dakota Administrative Code (N.D.A.C.) Article 33.1-04, Environmental Restoration.

The small entity regulatory analysis considers each of the possible ways the NDDEQ can enact rules that minimize the adverse impact on small entities by:

1. Establishing less stringent compliance or reporting requirements,
2. Establishing less stringent schedules or deadlines for compliance or reporting requirements,
3. Consolidating or simplifying compliance or reporting requirements,
4. Establishing performance standards that replace design or operational standards required in the proposed rule, and
5. Exempting from all or part of the rule's requirement.

The rules being enacted by the DEQ implement a voluntary program allowing current or future owners, who are not responsible for contamination, to partner with the DEQ to clean up contaminated property. As such there are no specific deadlines for compliance or reporting requirements and exemption from the rules would have the opposite effect of precluding their participation in this plan. The requirements that are included are the minimum necessary to ensure that funds expended on the cleanup are used appropriately, and that these rules do not incentivize polluters.



FISCAL NOTE PURSUANT TO  
NORTH DAKOTA CENTURY CODE SECTION 28-32-08.2  
TO ADOPT NORTH DAKOTA ADMINISTRATIVE CODE ARTICLE 33.1-04  
ENVIRONMENTAL RESTORATION

**BACKGROUND**

North Dakota Century Code (N.D.C.C.) §28-32-08.2, requires the North Dakota Department of Environmental Quality (NDDEQ) to provide the Administrative Rules Committee with a fiscal note reflecting the effect of the rule changes on state revenues and expenditures, including any effect on funds controlled by the agency, or a statement that the rules have no fiscal effect.

**COST TO AGENCY AND EFFECT ON STATE REVENUES**

It is anticipated that there will be no significant fiscal cost to the agency to implement and enforce the proposed rules. The proposed rules will require no additional staff. The rules will require a small amount of additional time to implement. The additional time will be absorbed without adding staff, increasing management duties or employee training. No fiscal effect.

**ARTICLE 33.1-04  
ENVIRONMENTAL RESTORATION**

Chapter	
33.1-04-01	General Provisions
33.1-04-02	North Dakota Environmental Priorities List

**CHAPTER 33.1-04-01  
GENERAL PROVISIONS**

Section	
33.1-04-01-01	Scope
33.1-04-01-02	Definitions
33.1-04-01-03	Actions approvable for funding
33.1-04-01-04	Use of fund for actions at contaminated sites
33.1-04-01-05	Use of fund for mitigation activities
33.1-04-01-06	Cost recovery
33.1-04-01-07	Identifying responsible parties

**33.1-04-01-01. Scope.**

Nothing in this article is intended to limit the Department from using the fund for any purpose consistent with North Dakota Century Code chapter 23.1-10, even if such purpose is not addressed in these rules. The Department reserves the right to take any action necessary to protect human health and the environment available to it under any statutory authority.

**33.1-04-01-02. Definitions.**

The terms used throughout this article have the same meaning as in North Dakota Century Code chapter 23.1-10, except:

1. "Applicant" means any person seeking, by site, the use of environmental quality restoration fund monies or seeking Department approval of a voluntary response action plan under North Dakota Century Code section 23.1-10-15.
2. "Approvable action" means any action for which the Director may approve the use of environmental quality restoration fund monies.
3. "Contaminant of concern" refers to the regulated substance leading to a site's contamination.
4. "Contaminant source" means a containment unit, process, or any activity which contributed to, solely or in part, a release of a regulated substance to the environment.
5. "Delisted site" means any site removed from the North Dakota Environmental Priorities List.

6. “Director” means the North Dakota Department of Environmental Quality Director, or their designated representative.
7. “Environmental hazard” means any condition existing at a site that may represent a hazard to human or environmental health.
8. “Listed site” means any property included in the North Dakota Environmental Priorities List.
9. “North Dakota Environmental Priorities List” is a list of contaminated sites that the Department has determined may be subject to Department response using the environmental quality restoration fund.
10. “Priority” means a qualitative ranking of a listed site.
11. “Recognized environmental condition” means the presence, or likely presence, of any regulated substances in, on, or at a property due to a release to the environment; conditions indicative of a release to the environment; or under conditions that pose a threat of a future release to the environment.
12. “Subject property” means any property that is the subject of any remedial action, restoration, assessment, corrective action, mitigation, or monitoring, being conducted with environmental quality restoration fund monies or under voluntary response action conditions.
13. “Unlisted site” means any site that has not been added to the North Dakota Environmental Priorities List.

**33.1-04-01-03. Actions approvable for funding.**

The Director must approve any use of monies from the environmental quality restoration fund. Approvable actions include:

1. ***Assessment.*** Assessment activities gather information about current conditions at a site.
2. ***Abatement.*** Abatement activities are conducted to reduce or remove environmental hazards at a subject site. Abatement activities may or may not remove all environmental hazards or contaminant sources. Disposal of waste materials is included in this action.
3. ***Contaminant source removal.*** Contaminant source removal involves the removal and disposal of a contaminant source. This may or may not remove all environmental hazards. Contaminant source removal is not likely to address existing contamination.
4. ***Emergency remedial efforts.*** Emergency remedial efforts are activities taken to address imminent danger or the threat of imminent danger.
5. ***Institutional controls.*** Institutional controls may be engineered systems (such as vapor mitigation systems), land use requirements (through zoning or environmental covenants), or binding legal agreements that reduce the risk of human or environmental health being negatively impacted by contamination at a subject property.

6. **Mitigation.** Mitigation involves activities to avoid, reduce, or minimize environmental damage resulting from a release. These activities may be taken at the subject property or another property.
7. **Monitoring.** Monitoring involves collecting environmental data at a site over a period of time. Monitoring may be conducted to determine the effectiveness of remedial efforts, the effectiveness of institutional controls, and other activities. Monitoring activities may be conducted jointly, or in addition to, remediation or monitoring activities of responsible parties.
8. **Remediation.** Remediation involves all activities conducted to reduce, remove, or repair environmental contamination at a subject property. Disposal of contaminated media is included in this action.

**33.1-04-01-04. Use of fund for actions at contaminated sites.**

Chapter 33.1-04-02 contains the procedures for using environmental quality restoration fund monies at sites on the North Dakota Environmental Priorities List. Generally, at contaminated or potentially contaminated sites not on the North Dakota Environmental Priorities List, the Department will only use environmental quality restoration fund monies to fund emergency remedial actions or investigative activities to determine whether listing is appropriate.

**33.1-04-01-05. Use of fund for mitigation activities.**

The Department may use the fund for activities to mitigate environmental damage at the location of the release or at another appropriate location where the Department determines that harm caused by the release necessitates mitigation. The Department will determine on a case-by-case basis if a location is appropriate for mitigation activities. Mitigation locations are not included on the North Dakota Environmental Priorities List.

**33.1-02-01-06. Cost recovery.**

The Department reserves the right to conduct cost recovery activities in accordance with North Dakota Century Code section 23.1-10-12, where appropriate. Nothing in this article is intended to limit the Department's ability to recover costs.

**33.1-04-01-07. Identifying responsible parties.**

The Department shall undertake reasonable efforts to identify responsible parties for subject properties, including examining property records, reviewing historical spill information and other documents, conducting site investigations and sampling, and requesting information from relevant persons. A person that acquires property may show that they made "all appropriate inquiries into the previous ownership" under North Dakota Century Code 23.1-10-08 by providing documentation that they

followed the process for assessing the environmental conditions of a property presented in the United States environmental protection agency's All Appropriate Inquiries Final Rule, 40 C.F.R. Part 312, or ASTM International's Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process (E 1527-13).

**CHAPTER 33.1-04-02  
NORTH DAKOTA ENVIRONMENTAL PRIORITIES LIST**

Section	
33.1-04-02-01	Purpose
33.1-04-02-02	Eligibility
33.1-04-02-03	Adding sites to the North Dakota Environmental Priorities List
33.1-04-02-04	Delisting sites
33.1-04-02-05	Actions at listed sites
33.1-04-02-06	Cost-sharing agreements

**33.1-04-02-01. Purpose.**

This chapter contains the procedures the Department will generally follow when determining whether to list or delist a site. Such decisions are wholly within the Department's discretion and do not convey any legal right or interest to any person.

**33.1-04-02-02. Eligibility.**

The Department may add a site to the North Dakota Environmental Priorities List on its own initiative or upon application from a person that is not a responsible person for the site. In determining whether to add a site to the North Dakota Environmental Priorities List, the Department will consider the following criteria:

1. The contaminant of concern at the subject property should be identified. If no contaminant of concern has been identified, there should be at least one recognized environmental condition documented at the site.
2. The subject property must be assessed by the Department to determine if the site conditions support the listing of the site, and to determine the priority of the listed site.
3. The subject property must not be eligible for, or should have exhausted, any other state or federal funding sources. Private funding sources may still be available.
4. The responsible party must be identified, if possible.

5. Any other information the Department deems relevant.

**33.1-04-02-03. Adding sites to the North Dakota Environmental Priorities List.**

1. The Department may add eligible sites to the North Dakota Environmental Priorities List on a case-by-case basis.
2. The Department must complete a priority determination for a listed site. Sites that the Department determines have a higher potential for environmental harm generally will be given higher priority for corrective action by the Department, though the Department may consider other factors such as local priorities.
3. The inclusion of a site on the North Dakota Environmental Priorities List does not guarantee any funding or corrective action will be completed.
4. The Department will post on its website the North Dakota Environmental Priorities List and any revisions to the list. When a new site is listed, the Department will post on its website an eligibility determination, priority determination, and site summary. The site summary must include:
  - a. The county in which the site is located;
  - b. The nearest incorporated city;
  - c. The name of the applicant, if applicable; and
  - d. Contact information including the name, phone number, mailing address, and e-mail address of the applicant point of contact, if applicable.

**33.1-04-02-04. Delisting sites.**

The Department may remove sites from the North Dakota Environmental Priorities List based on new information or revision of Department priorities. Delisting does not relieve any person liable from the responsibility to complete corrective action or from compliance with any environmental law.

**33.1-04-02-05. Actions at listed sites.**

The environmental quality restoration fund may be used to fund approvable actions at listed sites. The Department has discretion to determine the amount of funding that will be used at a site and types of approvable actions that will be funded. The Department may seek cost recovery from responsible parties. Listed sites will be addressed according to the site's ranking on the North Dakota Environmental Priorities List, but the Department reserves the right at any time to:

1. Modify the order of processing, payment, and approval of activities;  
or
2. Modify the ranking of sites based on new information or revision of Department priorities.

### 33.1-04-02-06. Cost-sharing agreements.

The Department may enter into a cost-sharing agreement with an owner of a listed site that is not a responsible party. Cost-sharing agreements involve the site owner conducting Department-approved activities and receiving partial reimbursement from the Department for the costs of those approved activities.

1. ***Eligibility.*** The following criteria must be met for a site owner to be eligible for a cost-sharing agreement:
  - a. The cost-sharing activities are approvable actions;
  - b. The listed site owner has prepared a voluntary response action plan meeting the requirements of North Dakota Century Code section 23.1-10-15;
  - c. The Department and listed site owner have entered into a voluntary cleanup agreement under North Dakota Century Code section 23.1-10-15;
  - d. The approvable actions will be conducted in accordance with the voluntary response action plan; and
  - e. The Department has no open enforcement actions involving the site owner or an entity controlled by the site owner.
2. ***Agreement.*** The Department and a site owner may enter into a cost-sharing agreement if the eligibility requirements of subsection 1 are met. The cost-sharing agreement must include:
  - a. A description of the approvable actions planned for the site;
  - b. A cost-estimate for the approvable actions;
  - c. Statement of maximum Department contribution amount, not to exceed fifty percent of the total real cost of the approvable actions; and
  - d. Any terms or conditions required by the Department to enter into the agreement.
  - e. A certificate of completion for the voluntary response actions is issued to the listed site owner within an approved timeline.
  - f.
3. ***Violation of cost-sharing requirements.*** The site owner must repay cost-share funds to the Department if:
  - a. Response actions have been conducted in a way or manner that is not in compliance with the voluntary response action plan;
  - b. The site owner has failed to comply with, or violated, the voluntary cleanup agreement;
  - c. The site owner fails to comply with the terms and conditions of the cost-sharing agreement;
  - d. The site owner's remedial actions cause, or contribute to, additional contamination of the listed property; or
  - e. The site owner's remedial actions cause, or contribute to, contamination at properties other than the subject property.