

2021 SENATE ENERGY AND NATURAL RESOURCES

SB 2064

2021 SENATE STANDING COMMITTEE MINUTES

Senate Energy and Natural Resources Committee Peace Garden Room, State Capitol

SB 2064
1/7/2021

A BILL for an Act to amend and reenact subsection 11 of section 38-08-02 of the North Dakota Century Code, relating to the definition of person.
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Chairman Kreun calls meeting to order and takes the roll at 3:00pm.

Roll Call Senators	
Senator Curt Kreun	Y
Senator Merrill Piepkorn	Y
Senator Dale Patten	Y
Senator Jessica Bell	Y
Senator Jim Roers	Y
Senator Donald Schaible	Y

All Senators are present

Discussion Topics:

- Definition of personhood in regards to corporations
- Liability of oil companies

Lynn Helms, North Dakota Industrial Commission, submits written testimony #231 and provides oral testimony in favor of SB 2064 (3:01pm)

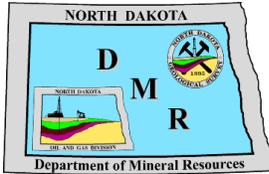
Todd Kranda, North Dakota Petroleum Council, submits written testimony #146 in opposition and provides oral testimony in opposition to SB 2064 (3:11pm)

Matt Gardner, GNDDOC, provides oral testimony in opposition (3:36pm)

Mike Rud, NDPMA, provides oral testimony in opposition to SB 2064 (3:38pm)

Chairman Kreun adjourns the hearing(3:52pm)

David Owen, Committee Clerk



**Testimony of Lynn D. Helms
Director, North Dakota Industrial Commission Department of Mineral Resources
January 7, 2021
Senate Natural Resources Committee
SB 2064**

The North Dakota Industrial Commission (NDIC) prefiled SB 2064 and urges a do pass.

The responsible corporate officer doctrine was first articulated by the Supreme Court in *United States v. Dotterweich*, 320 U.S. 277, 284, 64 S.Ct. 134 (1943), which held that a corporate officer is criminally liable under a public welfare statute—in *Dotterweich*, the Federal Food, Drug, and Cosmetic Act—if he had “a responsible share in the furtherance of the transaction which the statute outlaws.”

The Park Doctrine, also called the “Responsible Corporate Officer” Doctrine, is a doctrine under which potentially unassuming corporate officers whose companies engage in unlawful activities may be held strictly liable for violations. The Park Doctrine draws its name from a 1975 Supreme Court decision: *United States v. Park*, 421 U.S. 658 (1975). John Park was the president of a large national food chain that operated several warehouses that the FDA determined to be infested with rodents.

***United States v. Hodges X-Ray, Inc.*, 759 F.2d 557, 561 (6th Cir.1985):**

Courts have generally rejected the notion that the responsible corporate officer doctrine should only apply with respect to statutes imposing criminal penalties, rather than civil penalties. As the Sixth Circuit noted in a case involving another public welfare statute, the Radiation Control for Health and Safety Act of 1968:

[T]he rationale for holding corporate officers criminally responsible for acts of the corporation, which could lead to incarceration, is even more persuasive where only civil liability is involved, which at most would result in a monetary penalty. The fact that a corporate officer could be subjected to criminal punishment upon a showing of a responsible relationship to the acts of a corporation that violate health and safety statutes renders civil liability appropriate as well.

Federal courts have applied a similar theory to impose personal liability on corporate officers for violations of the RCRA. *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 745 (8th Cir.1986) (Corporate officers can be held “individually liable if they were personally involved in or directly responsible for corporate acts in violation of [the] RCRA.”

Franklin v. Birmingham Hide & Tallow Co., No. CV 98-BU-0259-S, 1999 WL 35235824 (N.D. Ala. Apr. 22, 1999):

The corporate-officer defendant argued that he could not be held personally liable for his company's violations of its National Pollution Discharge Elimination System permit. He argued that because the “responsible corporate officer” language is included only in the criminal penalties provision of the Clean Water Act (CWA), a responsible corporate officer can only be held criminally—not civilly—liable. See *id.* at *14. The district court denied the defendant's motion to dismiss, stating that “a number of courts have found that corporate officers who are responsible for violations of public health statutes, including the CWA, may be both civilly and criminally liable in their individual capacity for such violations, notwithstanding that the wrongful actions were undertaken on behalf of a corporate entity.” *Id.* at *13 (citing *United States v. Gulf Park Water Co.*, 972 F.Supp. 1056 (S.D.Miss.1997); *United States v. Mac's Muffler Shop, Inc.*, No. CIV.A. C85-138R, 1986 WL 15443 (N.D. Ga. Nov. 4, 1986).

Several states have established common law Responsible Corporate Officer Doctrines:

California:

People v. Roscoe, No. 02AS01581, 2008 WL 5378254 (Cal. Ct. App.)

Connecticut:

Celentano v. Rocque, 923 A.2d 709, 722 n.12 (Conn. 2007)

Delaware:

T.V. Spano Building Corp. v. Dep't of Natural Res., 628 A.2d 53, 61 (Del. 1993)

Indiana:

Indiana Dep't of Env'tl. Mgmt. v. RLG, Inc., 755 N.E.2d 556, 559 (Ind. 2001)

Comm'r, Indiana Dep't of Env'tl. Mgmt. v. RLG, Inc., 755 N.E.2d 556 (Ind. 2001)

Minnesota:

Matter of Dougherty, 482 N.W.2d 485, 488 (Minn. App. 1992)

Missouri:

State ex rel. Webster v. Missouri Resource Recovery, Inc., 825 S.W.2d 916, 925-26 (Mo. Ct. App. 1992)

Washington:

Washington State Dep't of Ecology v. Lundgren, 94 Wash. App. 236, 971 P.2d 948 (1999)

K.P. McNamara Nw., Inc. v. State, Washington Dep't of Ecology, 292 P.3d 812, 830–31 (2013)

Johnson v. Harrigan-Peach Land Dev. Co., 79 Wash.2d 745, 753, 489 P.2d 923 (1971)

State v. Ralph Williams' N.W. Chrysler Plymouth, Inc., 87 Wash.2d 298, 322, 553 P.2d 423 (1976)

Grayson v. Nordic Constr. Co., 92 Wash.2d 548, 551, 554, 599 P.2d 1271 (1979)

Two of the thirty-six complaints filed by the NDIC since 2015 are believed to involve responsible corporate officers. However, North Dakota has no common law or statutory definition:

An out of state corporation acquired several wells in North Dakota. The financing corporation assumed operation of the wells and a corporate officer negotiated new leases with mineral owners and filed a new Organization Report with the NDIC. When a serious spill occurred at one of the operated sites the response of the corporate officer was “we do not have a pumper for that location, we won’t have a pumper, and we do not plan to send anyone to address the issue”. The NDIC spent \$127,620.80 to respond to and remediate the spill. Then NDIC had to confiscate the orphaned well and site and pay for plugging the well and reclaiming the site. However, the corporation has refused to pay mineral owners, non-operated working interest owners, and vendors. All income has been transferred out of the corporation and it now has insufficient assets to reimburse the state for spill cleanup (\$127,621), plugging (\$62,947) and site remediation (\$65,680), or to pay the mineral owners, non-operated working interested owners, and vendors.

Another out of state corporation constructed and operated a facility in North Dakota where a willful spill incident occurred. A corporate officer dismissed the responsible employee then attempted to reduce remediation costs by violating additional regulations. Ultimately the facility was abandoned, and the NDIC has spent more than \$500,000 to remediate the spill and reclaim the abandoned site. All income has been transferred out of the corporation it now has insufficient assets to reimburse the state for spill and site remediation costs NDIC believes a statute change as significant as this one should originate in the legislature instead of through common law decisions.

In the common law cases provided, the courts imposed several factors that must be considered before holding a corporate officer personally responsible.

NDIC recommends that SB 2064 be amended to create a definition for Responsible Corporate Officer based upon those factors as follows:

SECTION 2. AMENDMENT. Subsection 18 of section 38-08-02 of the North Dakota Century Code is added as follows:

18. “Responsible Corporate Officer” means 1) a person in a position of responsibility which allows them to influence corporate policies or activities; 2) a person in a position with a nexus to the violation such that the person could have influenced the corporate actions or inactions which constituted the violation; and 3) a person who’s actions or inactions facilitated a violation involving serious actual or potential harm to the public.

Subsections 18-20 are renumber as subsections 19-21.

Addition of this definition should avoid excessive application of the Responsible Corporate Officer Doctrine.

**Testimony in Opposition to
SENATE BILL NO. 2064
Senate Energy and Natural Resources Committee
January 7, 2021**

Chairman Kreun, Senate Energy and Natural Resources Committee members, for the record my name is Todd D. Kranda. I am an attorney with the Kelsch Ruff Kranda Nagle & Ludwig Law Firm in Mandan. I appear before you today as a lobbyist on behalf of the North Dakota Petroleum Council (NDPC) to oppose SB 2064 which appears to be a simple change but actually has far reaching implications.

NDPC represents more than 650 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipelines, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota, and has been representing the energy industry since 1952.

SB 2064 modifies the definition of “person” within Chapter 38-08 which deals with the control of gas and oil resources. The change incorporates the clause “responsible corporate officer” as part of the definition and meaning of “person” which significantly and negatively impacts the longstanding and traditional legal liability standard with the protections afforded under the creation of a corporate entity. The application of the responsible corporate officer doctrine creates a strict liability standard for a corporate officer regardless of being aware or involved with the wrongful conduct.

For some additional perspective, the current ND Industrial Commission (NDIC) civil penalty provisions are strict liability statutes with no need to show any willful or negligent activity. If an incident happens on the well site the operator is responsible and therefore liable. Clearly, if

the operator is strictly liable, an officer or director of the corporate operator can also be held liable if he or she is negligent or commits a tort and the negligence or the tort results in the activity for which the operator is strictly liable. In other words, under current law you can “pierce the corporate veil” which is a legal process to assess liability beyond the corporate entity if there is some basis to show the officer or director was negligent or committed a tort.

Under SB 2064, the NDIC wants to carry strict liability from the operator to the corporate officer or director without any wrongful conduct by the officer or director. Therefore, if SB 2064 is enacted, the strict liability standard will carry through to the individual officers and directors.

If there is a change to the statute, it ought to be a change in that those who are responsible for the violation ought to be charged with the liability. Contractors and subcontractors who work for the operator ought to be responsible for their actions. Responsibility for those actions should not be pushed off to the operators and in this situation SB 2064 actually pushes the liability off to the individual officers and directors of the operators.

As an example, adopting SB 2064 would be similar to holding a corporate officer of a small fuel oil distribution company liable for civil penalties because a fuel tank was hit by lightning and fuel was released onto the ground. Strict liability exists for the company (no negligence and no tort by the company), and under SB 2064 strict liability would exist for the company officers and directors (no negligence or tort by the officers and directors).

The responsible corporate officer doctrine is inappropriate given the officer’s potential lack of intent or any actual wrongdoing, and could expose an individual to civil and criminal liability simply because of the title and position held by the individual without regard to any wrongful

conduct attributed directly to that corporate officer.

The responsible corporate officer doctrine should not be expanded as suggested under SB 2064 and the doctrine can be further summarized as follows: In general, corporate officers and shareholders are protected from direct personal liability for legal violations of the corporation entity itself. This concept is consistent with the notion that the corporation itself has a distinct separate legal identity. However, courts have evolved a concept called the "responsible corporate officer doctrine," under which individuals can be held legally liable for certain limited corporate misconduct without involvement in or even awareness of the wrongdoing.

During prior discussions it was indicated that state's like Washington, Delaware and one other liberal state have such a statute, but I would question whether those states are who ND wants to follow, and is that the direction ND wants to head in an attempt to grow and diversify our economy. Additionally, there was a list of internal standards that had been suggested by the proponents that must be met and suggested as a way to minimize the risk, but those internal standards are arbitrary and capricious, and in the hands of a different administration years down the road could be punitive.

Also, I have not heard of a specific issue that exists that is being fixed, and the NDIC has an abandon well and reclamation fund available, that is paid for with industry permitting fees, that exceeds \$20,000,000, which is the backstop for any recovery. The other issue that had been suggested with regard to a royalty payment for private mineral owners is not within the NDIC jurisdiction and clearly that is why we have a civil legal process to address those situations.

The modification as proposed in SB 2064 suggests that the regulatory authority, NDIC, is

pursuing a much more aggressive use of this doctrine and the elimination of the legal protections afforded by the formal creation of a separate legal entity such as a corporation structure, which has far reaching and disturbing implications.

Under the changes being proposed in SB 2064 an innocent party could be pursued and held civilly and criminally liable for a company debt or action simply because the person holds a certain title or position within the corporation entity itself regardless of any misconduct, culpable intent, actual wrongdoing or even awareness of the alleged wrongful conduct.

The purpose and basis for the creation of an independent legal entity such as a corporation typically include the consideration of the benefits of a specific tax structure and also a shield of direct personal liability. Further, there is already a legal tool and process available that can be used to pursue certain individuals who are bad actors within a corporate structure. That legal process is known as the “piercing of the corporate veil” for the pursuit of certain individuals within a corporate structure under certain circumstances when their conduct sufficiently demonstrates wrongdoing. That legal process is available as an appropriate means for pursuit of certain wrongdoers without the modification requested within SB 2064.

Furthermore, the proposed modification under SB 2064 is only directed at the oil and gas industry. Establishing such an isolated change focused on a single industry is not a reasonable policy change and is an unfair and unjust treatment of that specific industry.

In conclusion, NDPC urges your opposition to **SB 2064** and respectfully requests a **Do Not Pass** recommendation. Thank you and I would be happy to try to answer any questions.

2021 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Peace Garden Room, State Capitol

SB 2064
1/14/2021

A BILL for an Act to amend and reenact subsection 11 of section 38-08-02 of the North Dakota Century Code, relating to the definition of person.

Chairman Kreun called the committee to order at 10:30am.
Senators Piepkorn, Patten, J. Roers, Bell, Schaible, and Kreun all present

Discussion Topics:

- Definition of personhood in regards to corporations
- Liability of oil companies

Senator Patten moved DO NOT PASS [10:50]

Senator Roers seconded DO NOT PASS [10:51]

Motion passes 5-1-0

Senator Roers carries

Chairman Kreun adjourned [10:59]

David Owen, Committee Clerk

DO NOT PASS VOTE ON SB 2064	Vote
Senator Curt Kreun	Y
Senator Merrill Piepkorn	N
Senator Dale Patten	Y
Senator Jessica Bell	Y
Senator Jim Roers	Y
Senator Donald Schaible	Y

REPORT OF STANDING COMMITTEE

SB 2064: Energy and Natural Resources Committee (Sen. Kreun, Chairman)
recommends **DO NOT PASS** (5 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). SB
2064 was placed on the Eleventh order on the calendar.