2021 SENATE ENERGY AND NATURAL RESOURCES

SB 2070

2021 SENATE STANDING COMMITTEE MINUTES

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

SB 2070
1/7/2021

A BILL for an Act to create and enact sections 23.1-10-04, 23.1-10-05, 23.1-10-06, 23.1-10-07, 23.1-10-08, 23.1-10-09, 23.1-10-10, 23.1-10-11, 23.1-10-12, 23.1-10-13, 23.1-10-14, 23.1-10-15, 23.1-10-16, and 23.1-10-17 of the North Dakota Century Code, relating to the regulated substance response; to amend and reenact sections 11-33-01, 40-47-01, and 58-03-11 of the North Dakota Century Code, relating to the regulated substance response; and to repeal sections 23.1-04-04 and 23.1-10-01 of the North Dakota Century Code, relating to contaminated properties.

Chairman Kreun called the committee to order at 1:30pm

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 were present

Discussion Topics:
- Definition of contaminated properties
- Substance and pollution

David Glatt, Department of Energy Quality, provided written testimony #250 in favor of SB 2070, and provided oral testimony in favor of SB 2070 (1:32pm)

Troy Coons, NW Landowners Association, provided written testimony #237 in opposition of SB 2070 and provided oral testimony in opposition to SB 2070 (2:02pm)

Mike Rud, Oil Marketers Association, provided oral testimony in opposition to SB 2070 (2:09pm)

Brady Pelton, NDPC, provides testimony in opposition to SB 2070

Chairman Kreun adjourns the hearing at 2:16pm.

David Owen, Committee Clerk

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.”

Renumber accordingly.

Testimony ID#237

Troy Coons
Northwest Landowners Association
Energy and Natural Resources Committee
Testimony for SB 2070
January 6, 2021

Good afternoon, Senator Kreun and members of the committee, thank you for taking my testimony into consideration today.

My name is Troy Coons and I am the Chairman of the Northwest Landowners Association. Northwest Landowners Association represents over 560 farmers, ranchers, and property owners in North Dakota. Northwest Landowners Association is a nonprofit organization, and I am not a paid lobbyist.

Northwest Landowners Association supports this effort by the Department of Environmental Quality, and appreciates the thoughtfulness that went into developing this legislation. Although the landowners support the intent of this legislation, we do have serious concerns about the potential of placing liability for produced water spills and other similar contamination by oil and gas developers on landowners. This is especially concerning because many of these landowners have not agreed to the use of their surface estate, and do not own minerals, and therefore never had any say in whether their land was used for development or not.

We are hopeful that these concerns can be addressed working cooperatively with the Department of Environmental Quality. Briefly, there is a burden on landowners in this legislation to do some due diligence in order to avoid liability. There is no clear action that is apparent from the language, so landowners are left to figure out for themselves how much investigation of potential contamination is enough. Even more concerning, this is also true when the kids inherit the property – if they don't do some environmental due diligence, they have a decision of possibly being liable for contamination, or they can disclaim the inheritance. We were unfortunately unable to consult with legal counsel and the DEQ prior to today's hearings so that we could provide a proposed amendment. If this committee decides to move forward with this bill, we are hopeful that we may have an opportunity to propose amendments to address our concerns, and we would try to work with DEQ on language that is acceptable and meets their needs.

Thank you for taking the time to consider our comments.

Sincerely,

Troy Coons, Chairman
Northwest Landowners Association

2021 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Peace Garden Room, State Capitol

SB 2070
1/21/2021

A BILL for an Act to create and enact sections 23.1-10-04, 23.1-10-05, 23.1-10-06, 23.1-10-07, 23.1-10-08, 23.1-10-09, 23.1-10-10, 23.1-10-11, 23.1-10-12, 23.1-10-13, 23.1-10-14, 23.1-10-15, 23.1-10-16, and 23.1-10-17 of the North Dakota Century Code, relating to the regulated substance response; to amend and reenact sections 11-33-01, 40-47-01, and 58-03-11 of the North Dakota Century Code, relating to the regulated substance response; and to repeal sections 23.1-04-04 and 23.1-10-01 of the North Dakota Century Code, relating to contaminated properties.

Chairman Kreun called the hearing to order (2:57pm)

Discussion Topics:

- Status update on the bill

Chairman Kreun asked for a status report on SB 2070 (2:57pm)

Senator Patten informed the committee on the status of SB 2070 (2:57pm)

Chairman Kreun adjourned the hearing at 2:58pm

Dave Owen, Committee Clerk

2021 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Peace Garden Room, State Capitol

2070
2/5/2021 AM

A BILL for an Act to create and enact sections 23.1-10-04, 23.1-10-05, 23.1-10-06, 23.1-10-07, 23.1-10-08, 23.1-10-09, 23.1-10-10, 23.1-10-11, 23.1-10-12, 23.1-10-13, 23.1-10-14, 23.1-10-15, 23.1-10-16, and 23.1-10-17 of the North Dakota Century Code, relating to the regulated substance response; to amend and reenact sections 11-33-01, 40-47-01, and 58-03-11 of the North Dakota Century Code, relating to the regulated substance response; and to repeal sections 23.1-04-04 and 23.1-10-01 of the North Dakota Century Code, relating to contaminated properties.

Chairman Kreun called the committee work to order (9:00am).
Senators Patten, Roers, Bell, Schaible, Piepkorn and Kreun present

Discussion Topics:

- Refresher
- Split Estate Issue

Senator Patten stated that David Glatt would explain an amendment #21.8041.01001 (9:00am)

David Glatt, Department of Environmental Quality, Director, provided an update and testified in favor of the amendment. (9:01am)

Senator Patten moved to adopt the amendment #21.8041.01001 (9:06)

Senator Piepkorn seconded to adopt the amendment (9:06am)

Senators	Vote
Senator Curt Kreun	Y
Senator Jim P. Roers	Y
Senator Dale Patten	Y
Senator Merrill Piepkorn	Y
Senator Donald Schaible	Y
Senator Jessica Unruh Bell	Y

Motion Passed 6-0-0

Senator Patten moved DO PASS AS AMENDED (9:07am)

Senator Piepkorn seconded DO PASS AS AMENDED (9:07am)

Senators	Vote
Senator Curt Kreun	Y
Senator Jim P. Roers	Y
Senator Dale Patten	Y
Senator Merrill Piepkorn	Y
Senator Donald Schaible	Y
Senator Jessica Unruh Bell	Y

Motion Passed 6-0-0

Senator Patten will carry

Chairman Kreun called the committee work to a close at 9:08am

Dave Owen, Committee Clerk

21.8041.01001
Title.02000

Prepared by the Legislative Council staff for
Senator Patten
January 29, 2021

PROPOSED AMENDMENTS TO SENATE BILL NO. 2070

Page 1, line 4, after the first comma insert "23.1-10-02,"

Page 1, line 5, remove "and"

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 moneys placed in the fund under this section and section 23.1-10-05 are appropriated to the department on a continuing basis."

Page 4, line 30, remove "regulated substance response"

Page 5, line 23, remove "and had"

Page 5, line 24, remove "no reason to know"

Page 5, line 25, after "property" insert "; or is the owner of the surface estate and the regulated substance was released as a result of oil or gas drilling and production operations, or other operation authorized by chapter 38-08, and the owner of the surface estate is not and has never been an operator of oil and gas wells permitted under chapter 38-08"

Page 6, line 3, replace "contamination" with "regulated substances"

Page 6, line 4, replace "contamination" with "regulated substances"

Page 8, line 6, replace "constitutes" with "may constitute"

Page 8, line 22, remove "regulated substance response"

Page 8, line 27, remove "response"

Page 13, after line 26, insert:

"**SECTION 20. RETROACTIVE APPLICATION.** This Act is retroactive in application."

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2070: Energy and Natural Resources Committee (Sen. Kreun, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2070 was placed on the Sixth order on the calendar.

Page 1, line 4, after the first comma insert "23.1-10-02,"

Page 1, line 5, remove "and"

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 moneys placed in the fund under this section and section 23.1-10-05 are appropriated to the department on a continuing basis."

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Page 13, after line 26, insert:

"**SECTION 20. RETROACTIVE APPLICATION.** This Act is retroactive in application."

Renumber accordingly

2021 HOUSE ENERGY AND NATURAL RESOURCES

SB 2070

2021 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau AB Room, State Capitol

SB 2070
3/4/2021

Relating to the regulated substance response; to contaminated properties; to provide a continuing appropriation and to provide for retroactive application

9:16 AM

Present: Representatives Porter, Damschen, Anderson, Devlin, Heinert, Keiser, Lefor, Marschall, M Ruby, Zubke, Guggisberg, and Ista. Absent: Rep Bosch

Discussion Topics:

- Mitigation of adverse environmental impacts
- Contaminated properties
- Superfund program
- Abandoned or underutilized property
- Conducting assessments
- Regulatory coverage of the Restoration Fund
- Revenue to the fund
- Responsible parties
- Duty to provide information-inspections
- Remediation requirements
- injunctive relief
- Cost recovery
- Corrective action costs
- Zoning regulations
- Liability protection

#7313 David Glatt, Director, ND Dept of Environmental Quality
Oral Maggie Olson, attorney, ND Attorney General's office- answering questions
#7388 Brady Pelton,

9:46 AM hearing closed.

Kathleen Davis, Committee Clerk

NORTH Dakota Be Legendary.™ | Environmental Quality

Testimony in Support of
Senate Bill No. 2070
House Energy & Natural Resources Committee
March 4, 2021

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 2021.

NORTH DAKOTA PETROLEUM COUNCIL
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Engrossed Senate Bill 2070

Testimony of Brady Pelton

House Energy and Natural Resources Committee

March 4, 2021

Chairman Porter and members of the House Energy and Natural Resources Committee, my name is Brady Pelton, government affairs director of the North Dakota Petroleum Council. The North Dakota Petroleum Council represents more than 650 companies in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota. I appear before you today in general support of Engrossed Senate Bill 2070.

One focus of this bill is on N.D.C.C. Chapter 23.1-10, which provides a mechanism for environmental emergency costs to be addressed. Specifically, the bill broadens the existing cleanup insurance fund for instances of regulated substance release in the event a responsible party cannot be identified and held accountable. Having state resources reserved in this type of fund is an important precaution to ensuring continued environmental health and safety, particularly in events when there exists no responsible party that can cover cleanup and reclamation costs. The safety net created by Senate Bill 2070 provides a useful backstop by allocating funds specifically to this type of situation.

We therefore urge a **Do Pass** recommendation on Engrossed Senate Bill 2070. I would be happy to try to answer any questions.

2021 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau AB Room, State Capitol

SB 2070
3/11/2021

Relating to the regulated substance response; to contaminated properties; to provide a continuing appropriation and to provide for retroactive application

11:16 AM

Chairman Porter opened the hearing. Present: Representatives Porter, Damschen, D Anderson, Roers Jones, Bosch, Devlin, Heinert, Keiser, Lefor, Marschall, Zubke, Guggisberg, and Ista. Absent: Rep M Ruby.

Rep D. Anderson moved a Do Pass, seconded by Rep Guggisberg.

Representatives	Vote
Representative Todd Porter	Y
Representative Chuck Damschen	Y
Representative Dick Anderson	Y
Representative Glenn Bosch	Y
Representative Bill Devlin	Y
Representative Ron Guggisberg	Y
Representative Pat D. Heinert	Y
Representative Zachary Ista	Y
Representative George Keiser	Y
Representative Mike Lefor	Y
Representative Andrew Marschall	Y
Representative Shannon Roers Jones	Y
Representative Matthew Ruby	AB
Representative Denton Zubke	Y

Motion carried. 13 – 0 – 1 Rep D Anderson is carrier.

11:18 AM hearing closed.

Kathleen Davis, Committee Clerk

REPORT OF STANDING COMMITTEE

SB 2070, as engrossed: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2070 was placed on the Fourteenth order on the calendar.