

**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.