

## LEGISLATIVE BILL 1102

Approved by the Governor April 18, 2022

Introduced by Bostelman, 23.

A BILL FOR AN ACT relating to environmental protection; to amend sections 81-1507 and 81-1508, Reissue Revised Statutes of Nebraska; to adopt the Nebraska Environmental Response Act; to change provisions relating to enforcement of environmental protection provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 11 of this act shall be known and may be cited as the Nebraska Environmental Response Act.

Sec. 2. For purposes of the Nebraska Environmental Response Act:

(1) Cleanup means all actions necessary to contain, collect, secure, control, identify, prevent, mitigate, analyze, treat, disperse, remove, or dispose of a pollutant necessary to restore the environment to the extent practicable and to minimize the harmful effects from the release in conformance with applicable federal and state environmental standards and substantive requirements;

(2) Cleanup costs means all costs incurred by the state, a political subdivision of the state, an agent of the state, or any other person participating, with the approval of the department, in the prevention, mitigation, or cleanup of a release of a pollutant, including a proportionate share of those costs necessary to maintain the services authorized in the act. Costs include oversight of the cleanup, staff time, and materials and supplies used to secure and mitigate the release of pollutants;

(3) Department means the Department of Environment and Energy;

(4) Director means the Director of Environment and Energy;

(5) Environmental lien means a lien for cleanup costs;

(6) Person has the same meaning as provided in section 81-1502;

(7) Pollutant means one or more substances or combinations of substances that alter the natural physical, chemical, or biological properties of any air, land, or waters of the state in such quantities that are harmful, detrimental, or injurious to plant or animal life, property, or the public health, safety, or welfare;

(8) Release means any emission, discharge, spill, leak, pumping, pouring, escaping, emptying, or dumping of a pollutant into or onto the air, land, or waters of the state, except when performed in compliance with the conditions of a federal or state environmental permit; and

(9) Waters of the state has the same meaning as provided in section 81-1502.

Sec. 3. The Nebraska Environmental Response Cash Fund is created. The fund shall consist of transfers authorized by the Legislature, grants, contributions designated for the purpose of the fund, and money recovered under the Nebraska Environmental Response Act. The fund shall be administered by the department and used for control, abatement, analysis, cleanup, prevention, mitigation, investigation, and other reasonable costs incurred when responding to a release. All other costs of the department necessary to carry out the Nebraska Environmental Response Act shall be paid from the fund. The fund shall not be used to pay for the costs of releases for which costs are paid under the Petroleum Release Remedial Action Act. On or before June 30, 2023, the State Treasurer shall transfer three hundred thousand dollars from the General Fund to the Nebraska Environmental Response Cash Fund on such date as directed by the budget administrator of the budget division of the Department of Administrative Services. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

Sec. 4. For purposes of cleanup under the Nebraska Environmental Response Act, the director may:

(1) Issue orders requiring a person responsible for a release to clean up the release;

(2) Take necessary action to clean up or terminate the release of a pollutant if a person responsible for a release fails or refuses to take reasonable actions required by the director;

(3) Take those actions necessary to clean up a release if a person responsible for a release cannot be identified or contacted within a reasonable amount of time;

(4) Issue orders requiring a person responsible for a release to take such corrective actions as may be reasonably required to prevent a recurrence of a release;

(5) Take necessary action, including issuing orders for corrective action or cleanup of any release of a pollutant;

(6) Issue orders to a responsible person to pay cleanup costs assessed with documentation due thirty days after receipt of the director's order unless the payment period is extended by the director for good cause shown; and

(7) Assess an administrative penalty under section 10 of this act.

Sec. 5. The director may adopt and promulgate rules and regulations necessary to carry out the Nebraska Environmental Response Act.

Sec. 6. No person shall refuse entry to, or access by, an authorized representative of the department to property for the purpose of responding to a release of a pollutant or cleanup of a release if such authorized representative presents appropriate credentials. No person shall hamper or obstruct an authorized representative of the department that is responding, or taking action, to clean up a release of a pollutant.

Sec. 7. (1) Whenever a pollutant is released, a person responsible for the release shall be responsible for the cleanup of the release.

(2) If the state responds to a release, a person responsible for the release shall be liable to the state for the reasonable cleanup costs incurred by the state.

(3) Prompt and good faith notification to the director by a person responsible for a release that such person does not have the resources or managerial capability to begin or continue cleanup activities, or make a good faith effort to clean up, does not relieve a person of liability for the cleanup costs.

(4) In determining whether to assess an administrative penalty, the director may consider any good faith efforts made by a responsible person to clean up a release or to pay cleanup costs in a timely manner.

(5) The director shall keep a record of all expenses incurred in carrying out any project or activity authorized by the Nebraska Environmental Response Act.

(6) If a responsible person fails to pay an assessment or administrative penalty ordered pursuant to section 4 or 10 of this act, the amount owed shall be recoverable in an action brought by the Attorney General in the district court of Lancaster County. An action for recovery of the amount owed may be commenced at any time after the amount owed has been incurred or becomes due, but no later than six years after completion of a cleanup. An action to enforce any other order of the director under section 4 or 10 of this act may be commenced at any time.

(7) A person otherwise liable under the provisions of the Nebraska Environmental Response Act is not liable if the release occurred solely as the result of an act of God, an act of war, or an act of an independent third party not affiliated with or controlled by a person otherwise liable. For purposes of the Nebraska Environmental Response Act, no employee, agent, or independent contractor employed by a person otherwise liable shall be considered a third party. If multiple persons are liable under the act, liability shall be joint and several.

Sec. 8. In lieu of issuing an order under section 4 of this act, the director may allow the responsible person or any other person to voluntarily remediate site conditions under the Remedial Action Plan Monitoring Act. A person that voluntarily chooses to apply under section 81-15,184 must meet all requirements of such section. Based on the nature of the release, the director may require such person to pay for a contractor to oversee remedial work hired or approved by the department.

Sec. 9. (1) All cleanup costs for which a person is liable to the state under section 7 of this act shall constitute a lien in favor of the state upon any real property that is owned by such person and subject to or affected by the cleanup.

(2) An environmental lien attaches when:

(a) Cleanup costs are first incurred by the state;

(b) Such person is provided written notice by certified or registered mail of potential liability; and

(c) A lien notice is filed in compliance with this section.

(3) An environmental lien notice shall state:

(a) The name of the record owner of the real property to which the environmental lien is attached;

(b) The legal description of the real property to which the environmental lien is attached;

(c) If the real property against which the lien is attached is not the property where the cleanup occurred, the legal description of the property where the cleanup occurred;

(d) An itemized statement detailing the cleanup costs incurred by the state; and

(e) A statement that an environmental lien has attached to the described real property.

(4) The environmental lien notice shall be filed with the register of deeds in each county in Nebraska where the responsible person owns or holds an interest in real property.

(5) An environmental lien is subject to the rights of any other person whose interest is perfected before an environmental lien notice has been filed.

(6) A person shall be relieved from an environmental lien when liability for cleanup costs is satisfied.

Sec. 10. Whenever the director has reason to believe that a violation has occurred of any provision of the Nebraska Environmental Response Act, an order issued under the act, or any rule or regulation adopted and promulgated under the act, the director may cause an administrative order to be served upon the violator. Such order shall specify the violation and the facts alleged to constitute a violation and may assess an administrative penalty to be paid within thirty days or as otherwise stated in the order. The order shall set forth the circumstances and factors considered in assessing the administrative

penalty which may include the severity of the violation, good faith efforts of the violator, and any other factors deemed relevant by the director. Administrative penalties assessed under this section shall not exceed five thousand dollars per day per violation. Each day a violation continues shall constitute a separate violation. An order under this section imposing an administrative penalty may be appealed to the director. The appeal shall be in the manner provided in the Administrative Procedure Act. Any administrative penalty paid pursuant to the Nebraska Environmental Response Act shall be remitted to the State Treasurer for distribution in accordance with Article VII, section 5, of the Constitution of Nebraska. An action may be brought in the district court of Lancaster County to collect any unpaid administrative penalty and costs incurred directly in the collection of the penalty plus any statutory interest rate applicable to judgments, which shall run from the date the administrative penalty accrued.

Sec. 11. Nothing in the Nebraska Environmental Response Act precludes the director or department from taking any other action allowed by law, including seeking enforcement for injunctive relief or seeking civil or criminal penalties for any violation that may have occurred.

Sec. 12. Section 81-1507, Reissue Revised Statutes of Nebraska, is amended to read:

81-1507 (1) Whenever the director has reason to believe that a violation of any provision of the Environmental Protection Act, the Integrated Solid Waste Management Act, the Livestock Waste Management Act, a rule or regulation pursuant to such acts, or any order of the department has occurred, he or she may cause a written complaint to be served upon the alleged violator or violators or he or she may bring a criminal or civil action under section 81-1508.01 or 81-1508.02. The complaint shall specify the provision of the act, rule or regulation, or order alleged to be violated and the facts alleged to constitute a violation thereof and shall order that necessary corrective action be taken within a reasonable time to be prescribed in such order. Any such order shall become final unless each person named therein requests in writing a hearing before the director no later than thirty days after the date such order is served. In lieu of such order, the director may require that the alleged violator appear before the director at a time and place specified in the notice and answer the charges complained of. The notice shall be delivered to the alleged violator or violators in accordance with the provisions of subsection (5) of this section not less than thirty days before the time set for the hearing.

Whenever, on the basis of any information, the director determines that there is or has been a release of hazardous waste or hazardous constituents into the environment from a facility authorized to operate under the Environmental Protection Act or from a facility subject to hazardous waste management regulations adopted and promulgated under the act, the director may issue an order requiring the owner or operator to monitor, investigate, and undertake corrective action or such other response at the facility or beyond the facility boundary where necessary to protect human health and the environment. In the case of any facility or site not in operation at the time a determination is made to require corrective action, if the director finds that the owner could not reasonably be expected to have actual knowledge of the presence of hazardous waste at the site, the director may issue an order requiring any previous owner or operator who could reasonably be expected to have actual knowledge to carry out the necessary monitoring, investigation, and corrective action.

(2) The director shall afford an opportunity for a fair hearing, in accordance with the provisions of the Environmental Protection Act, the Integrated Solid Waste Management Act, or the Livestock Waste Management Act, to the alleged violator or violators at the time and place specified in the notice or any modification thereof. On the basis of the evidence produced at the hearing, the director or hearing officer shall make findings of fact and conclusions of law and enter such order as in his or her opinion will best further the purposes of the acts and shall give written notice of such order to the alleged violator and to such other persons who appear at the hearing and make written request for notice of the order. If the hearing is held before any person other than the director, such person shall transmit a record of the hearing together with findings of fact and conclusions of law to the director. The director, prior to entering his or her order on the basis of such record, shall provide opportunity to the parties to submit for his or her consideration exceptions to the findings or conclusions and supporting reasons for such exceptions. The order of the director shall become final and binding on all parties unless appealed to the courts as provided in section 81-1509 within thirty days after notice has been sent to the parties.

(3) Any person who is denied a permit by the director or who has such permit revoked or modified shall be afforded an opportunity for a fair hearing as provided in subsection (2) of this section in connection therewith upon written application to the director within thirty days after receipt of notice from the director of such denial, revocation, or modification. On the basis of such hearing the director shall affirm, modify, or revoke his or her previous determination.

(4) Whenever the director finds that an emergency exists requiring immediate action to protect the public health and welfare, the director may, without notice or hearing, issue an order reciting the existence of such an emergency and requiring that such action be taken as the director deems necessary to meet the emergency. Notwithstanding the provisions of subsection

(2) of this section, such order shall be effective immediately. Any person to whom such order is directed shall comply therewith immediately but on application to the director shall be afforded a hearing as soon as possible and not later than ten days after such application by such affected person. On the basis of such hearing, the director shall continue such order in effect, revoke it, or modify it.

(5) Except as otherwise expressly provided, any notice, order, or other instrument issued by or under authority of the director shall be served on any person affected thereby in a manner provided for service of a summons in a civil action. Proof of service shall be filed in the office of the department.

Every certificate or affidavit of service made and filed as provided in this section shall be prima facie evidence of the facts therein stated, and a certified copy thereof shall have like force and effect.

(6) The hearings provided for in this section may be conducted by the director or by any member of the department acting in his or her behalf, or the director may designate hearing officers who shall have the power and authority to conduct such hearings in the name of the director at any time and place. A verbatim record of the proceedings of such hearings shall be taken and filed with the director, together with findings of fact and conclusions of law made by the director or hearing officer. Witnesses who are subpoenaed shall receive the same fees as in civil actions in the district court and mileage as provided in section 81-1176. In case of contumacy or refusal to obey a notice of hearing or subpoena issued under the provisions of this section, the district court shall have jurisdiction, upon application of the director, to issue an order requiring such person to appear and testify or produce evidence as the case may require and any failure to obey such order of the court may be punished by such court as contempt thereof.

If requested to do so by any party concerned with such hearing, the full stenographic notes, or tapes of an electronic transcribing device, of the testimony presented at such hearing shall be taken and filed. The stenographer shall, upon the payment of the stenographer's fee allowed by the court therefor, furnish a certified transcript of the whole or any part of the stenographer's notes to any party to the action requiring and requesting the same.

(7)(a) If the director finds that any person has performed or failed to perform any act that presents or may present a substantial harm to the environment, the director may issue a cease and desist order to such person to take effect immediately, without notice, hearing, or submission, to take or cease all actions necessary to come into compliance. The order shall specify a time for compliance.

(b) Upon issuance of a cease and desist order, the director shall promptly notify in writing all persons to whom the order is directed and include the reasons for the order. Any person to whom the order is directed may request a hearing in writing within fifteen business days after the date of the issuance of the order. The matter shall be set for hearing within ten business days after receipt of such hearing request by the director, unless the parties agree to a later date or the director or hearing officer sets a later date for good cause. If a hearing is requested, the director or hearing officer shall, after notice and hearing, issue written findings of fact and conclusions of law within ten business days after the hearing and may affirm, vacate, or modify the order. Until the director or hearing officer issues written findings of fact and conclusions of law, the cease and desist order shall continue in effect.

(c) If a hearing is not requested as provided in subdivision (7)(b) of this section, the cease and desist order of the director shall automatically become final and shall remain in effect until modified or vacated by the director.

(d) Any person who violates a cease and desist order of the director under this subsection may be subject to:

(i) A civil penalty under section 81-1508.02;

(ii) Suspension or revocation of environmental permits issued by the department; and

(iii) Further enforcement action.

Sec. 13. Section 81-1508, Reissue Revised Statutes of Nebraska, is amended to read:

81-1508 (1) Any person who violates any of the provisions of the Environmental Protection Act, the Integrated Solid Waste Management Act, or the Livestock Waste Management Act, fails to perform any duty imposed by either act or any rule or regulation issued thereunder, or violates any order or determination of the director promulgated pursuant to either act and causes the death of fish or other wildlife shall, in addition to the penalties provided in sections 81-1508.01 and 81-1508.02, be liable to pay to the state an additional amount equal to the sum of money reasonably necessary to restock waters with fish or replenish such wildlife as determined by the director after consultation with the Game and Parks Commission. Such amount may be recovered by the director on behalf of the state in a civil action brought in the district court of the county in which such violation or failure to perform the duty imposed occurred.

(2) Except as provided for in subsection (3) of this section for the handling, storage, treatment, transportation, or disposal of solid or hazardous waste, in addition to the penalties provided by this section and sections 81-1508.01 and 81-1508.02, the director, whenever he or she has reason to believe that any person, firm, or corporation is violating or threatening to

violate any provision of the acts, any rule or regulation adopted and promulgated thereunder, or any order of the director, may petition the district court for an injunction. It shall be the duty of each county attorney or the Attorney General to whom the director reports a violation to cause appropriate proceedings to be instituted without delay to assure compliance with the acts.

(3) Upon receipt of evidence that the past or present handling, storage, treatment, transportation, or disposal of any solid waste or hazardous waste may present ~~is presenting~~ an imminent and substantial endangerment to the health of humans or animals or to the environment, the director may petition the district court for an injunction to immediately restrain any person who has contributed or who is ~~from~~ contributing to the alleged acts, to stop such handling, storage, treatment, transportation, or disposal, and to take such other action as may be necessary. It shall be the duty of each county attorney or the Attorney General to whom the director reports a violation to cause appropriate proceedings to be instituted without delay to assure compliance with the Environmental Protection Act, the Integrated Solid Waste Management Act, and the Livestock Waste Management Act.

Sec. 14. Original sections 81-1507 and 81-1508, Reissue Revised Statutes of Nebraska, are repealed.