

LEGISLATURE OF NEBRASKA
ONE HUNDRED SEVENTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 1102

Introduced by Bostelman, 23.

Read first time January 19, 2022

Committee: Natural Resources

- 1 A BILL FOR AN ACT relating to environmental protection; to amend sections
- 2 81-1507 and 81-1508, Reissue Revised Statutes of Nebraska; to adopt
- 3 the Nebraska Environmental Response Act; to change provisions
- 4 relating to enforcement of environmental protection provisions; and
- 5 to repeal the original sections.
- 6 Be it enacted by the people of the State of Nebraska,

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

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

4 (1) Cleanup means all actions necessary to contain, collect, secure,
5 control, identify, prevent, mitigate, analyze, treat, disperse, remove,
6 or dispose of a pollutant necessary to restore the environment to the
7 extent practicable and to minimize the harmful effects from the release;

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

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

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

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

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

19 (7) Pollutant means one or more substances or combinations of
20 substances that alter the natural physical, chemical, or biological
21 properties of any air, land or waters of the state which is harmful,
22 detrimental, or injurious to property or the public health, safety, or
23 welfare;

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

28 (9) Waters of the state has the same meaning as provided in section
29 81-1502.

30 Sec. 3. The Nebraska Environmental Response Cash Fund is created.
31 The fund shall consist of transfers authorized by the Legislature,

1 grants, contributions designated for the purpose of the fund, and money
2 recovered under the Nebraska Environmental Response Act. The fund shall
3 be administered by the department and used for control, abatement,
4 analysis, cleanup, prevention, mitigation, investigation, and other
5 reasonable costs incurred when responding to a release. All other costs
6 of the department necessary to carry out the Nebraska Environmental
7 Response Act shall be paid from the fund. The fund shall not apply to
8 spills for which costs are paid under the Petroleum Release Remedial
9 Action Act. Any money in the fund available for investment shall be
10 invested by the state investment officer pursuant to the Nebraska Capital
11 Expansion Act and the Nebraska State Funds Investment Act.

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

14 (1) Issue orders requiring a person responsible for a release to
15 cleanup the release;

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

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

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

25 (5) Take necessary action, issue orders for corrective action or
26 cleanup of any release of a pollutant;

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

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

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

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

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

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

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

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

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

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

1 of a cleanup. An action to enforce any other order of the director under
2 section 4 or 6 of this act may be commenced at any time.

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

11 Sec. 8. In lieu of issuing an order under section 4 of this act,
12 the director may allow another person, entity, or responsible party to
13 voluntarily remediate site conditions under the Remedial Action Plan
14 Monitoring Act. An entity that voluntarily chooses to apply under section
15 81-15,184 must meet all requirements unless waived by the director. Based
16 on the nature of the release, the director may require the person,
17 entity, or responsible party to pay for a contractor to oversee remedial
18 work hired or approved by the department.

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

23 (2) An environmental lien attaches when:

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

25 (b) The responsible person is provided written notice by certified
26 or registered mail of potential liability; and

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

28 (3) An environmental lien notice shall state:

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

31 (b) The legal description of the real property to which the

1 environmental lien is attached;

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

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

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

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

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

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

17 Sec. 10. Whenever the director has reason to believe that a
18 violation of any provision of or order issued under the Nebraska
19 Environmental Response Act, or any rule or regulation adopted and
20 promulgated under the act, has occurred, the director may cause an
21 administrative order to be served upon the violator. Such order shall
22 specify the violation and the facts alleged to constitute a violation of
23 the act and may assess an administrative penalty to be paid within thirty
24 days or as otherwise stated in the order. The order shall set forth the
25 circumstances and factors considered in assessing the administrative
26 penalty which may include the severity of the violation, good faith
27 efforts of the violator, and any other factors deemed relevant by the
28 director. Administrative penalties assessed under this section shall not
29 exceed five thousand dollars per day per violation. Each day a violation
30 continues shall constitute a separate violation. An order under this
31 section imposing an administrative penalty may be appealed to the

1 director. The appeal shall be in the manner provided in the
2 Administrative Procedure Act. Any administrative penalty paid pursuant to
3 the act shall be remitted to the State Treasurer for distribution in
4 accordance with Article VII, section 5, of the Constitution of Nebraska.
5 An action may be brought in the district court of Lancaster County to
6 collect any unpaid administrative penalty and costs incurred directly in
7 the collection of the penalty plus any statutory interest rate applicable
8 to judgments, which shall run from the date the administrative penalty
9 accrued.

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

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

16 81-1507 (1) Whenever the director has reason to believe that a
17 violation of any provision of the Environmental Protection Act, the
18 Integrated Solid Waste Management Act, the Livestock Waste Management
19 Act, a rule or regulation pursuant to such acts, or any order of the
20 department has occurred, he or she may cause a written complaint to be
21 served upon the alleged violator or violators or he or she may bring a
22 criminal or civil action under section 81-1508.01 or 81-1508.02. The
23 complaint shall specify the provision of the act, rule or regulation, or
24 order alleged to be violated and the facts alleged to constitute a
25 violation thereof and shall order that necessary corrective action be
26 taken within a reasonable time to be prescribed in such order. Any such
27 order shall become final unless each person named therein requests in
28 writing a hearing before the director no later than thirty days after the
29 date such order is served. In lieu of such order, the director may
30 require that the alleged violator appear before the director at a time
31 and place specified in the notice and answer the charges complained of.

1 The notice shall be delivered to the alleged violator or violators in
2 accordance with the provisions of subsection (5) of this section not less
3 than thirty days before the time set for the hearing.

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

20 (2) The director shall afford an opportunity for a fair hearing, in
21 accordance with the provisions of the Environmental Protection Act, the
22 Integrated Solid Waste Management Act, or the Livestock Waste Management
23 Act, to the alleged violator or violators at the time and place specified
24 in the notice or any modification thereof. On the basis of the evidence
25 produced at the hearing, the director or hearing officer shall make
26 findings of fact and conclusions of law and enter such order as in his or
27 her opinion will best further the purposes of the acts and shall give
28 written notice of such order to the alleged violator and to such other
29 persons who appear at the hearing and make written request for notice of
30 the order. If the hearing is held before any person other than the
31 director, such person shall transmit a record of the hearing together

1 with findings of fact and conclusions of law to the director. The
2 director, prior to entering his or her order on the basis of such record,
3 shall provide opportunity to the parties to submit for his or her
4 consideration exceptions to the findings or conclusions and supporting
5 reasons for such exceptions. The order of the director shall become final
6 and binding on all parties unless appealed to the courts as provided in
7 section 81-1509 within thirty days after notice has been sent to the
8 parties.

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

16 (4) Whenever the director finds that an emergency exists requiring
17 immediate action to protect the public health and welfare, the director
18 may, without notice or hearing, issue an order reciting the existence of
19 such an emergency and requiring that such action be taken as the director
20 deems necessary to meet the emergency. Notwithstanding the provisions of
21 subsection (2) of this section, such order shall be effective
22 immediately. Any person to whom such order is directed shall comply
23 therewith immediately but on application to the director shall be
24 afforded a hearing as soon as possible and not later than ten days after
25 such application by such affected person. On the basis of such hearing,
26 the director shall continue such order in effect, revoke it, or modify
27 it.

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

1 office of the department.

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

5 (6) The hearings provided for in this section may be conducted by
6 the director or by any member of the department acting in his or her
7 behalf, or the director may designate hearing officers who shall have the
8 power and authority to conduct such hearings in the name of the director
9 at any time and place. A verbatim record of the proceedings of such
10 hearings shall be taken and filed with the director, together with
11 findings of fact and conclusions of law made by the director or hearing
12 officer. Witnesses who are subpoenaed shall receive the same fees as in
13 civil actions in the district court and mileage as provided in section
14 81-1176. In case of contumacy or refusal to obey a notice of hearing or
15 subpoena issued under the provisions of this section, the district court
16 shall have jurisdiction, upon application of the director, to issue an
17 order requiring such person to appear and testify or produce evidence as
18 the case may require and any failure to obey such order of the court may
19 be punished by such court as contempt thereof.

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

27 (7)(a) If the director finds that any person has performed or failed
28 to perform any act that presents or may present a substantial harm to the
29 environment, the director may issue a cease and desist order to such
30 person to take effect immediately, without notice, hearing, or
31 submission, to take or cease all actions necessary to come into

1 compliance and shall specify a time for compliance.

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

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

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

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

22 (ii) Suspension or revocation of environmental permits issued by the
23 Department of Environment and Energy; and

24 (iii) Further enforcement action.

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

27 81-1508 (1) Any person who violates any of the provisions of the
28 Environmental Protection Act, the Integrated Solid Waste Management Act,
29 or the Livestock Waste Management Act, fails to perform any duty imposed
30 by either act or any rule or regulation issued thereunder, or violates
31 any order or determination of the director promulgated pursuant to either

1 act and causes the death of fish or other wildlife shall, in addition to
2 the penalties provided in sections 81-1508.01 and 81-1508.02, be liable
3 to pay to the state an additional amount equal to the sum of money
4 reasonably necessary to restock waters with fish or replenish such
5 wildlife as determined by the director after consultation with the Game
6 and Parks Commission. Such amount may be recovered by the director on
7 behalf of the state in a civil action brought in the district court of
8 the county in which such violation or failure to perform the duty imposed
9 occurred.

10 (2) Except as provided for in subsection (3) of this section for the
11 handling, storage, treatment, transportation, or disposal of solid or
12 hazardous waste, in addition to the penalties provided by this section
13 and sections 81-1508.01 and 81-1508.02, the director, whenever he or she
14 has reason to believe that any person, firm, or corporation is violating
15 or threatening to violate any provision of the acts, any rule or
16 regulation adopted and promulgated thereunder, or any order of the
17 director, may petition the district court for an injunction. It shall be
18 the duty of each county attorney or the Attorney General to whom the
19 director reports a violation to cause appropriate proceedings to be
20 instituted without delay to assure compliance with the acts.

21 (3) Upon receipt of evidence that the past or present handling,
22 storage, treatment, transportation, or disposal of any solid waste or
23 hazardous waste may present ~~is presenting~~ an imminent and substantial
24 endangerment to the health of humans or animals or to the environment,
25 the director may petition the district court for an injunction to
26 immediately restrain any person who has contributed or who is from
27 contributing to the alleged acts, to stop such handling, storage,
28 treatment, transportation, or disposal, and to take such other action as
29 may be necessary. It shall be the duty of each county attorney or the
30 Attorney General to whom the director reports a violation to cause
31 appropriate proceedings to be instituted without delay to assure

1 compliance with the Environmental Protection Act, the Integrated Solid
2 Waste Management Act, and the Livestock Waste Management Act.

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