

LEGISLATURE OF NEBRASKA
ONE HUNDRED SEVENTH LEGISLATURE
SECOND SESSION

LEGISLATIVE BILL 1102

FINAL READING

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 in conformance with applicable federal and state environmental standards
9 and substantive requirements;

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

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

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

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

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

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

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

31 (9) Waters of the state has the same meaning as provided in section

1 81-1502.

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

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

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

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

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

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

1 recurrence of a release;

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

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

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

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

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

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

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

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

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

31 (5) The director shall keep a record of all expenses incurred in

1 carrying out any project or activity authorized by the Nebraska
2 Environmental Response Act.

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

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

19 Sec. 8. In lieu of issuing an order under section 4 of this act,
20 the director may allow the responsible person or any other person to
21 voluntarily remediate site conditions under the Remedial Action Plan
22 Monitoring Act. A person that voluntarily chooses to apply under section
23 81-15,184 must meet all requirements of such section. Based on the nature
24 of the release, the director may require such person to pay for a
25 contractor to oversee remedial work hired or approved by the department.

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

30 (2) An environmental lien attaches when:

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

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

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

4 (3) An environmental lien notice shall state:

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

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

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

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

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

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

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

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

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

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

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

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

23 81-1507 (1) Whenever the director has reason to believe that a
24 violation of any provision of the Environmental Protection Act, the
25 Integrated Solid Waste Management Act, the Livestock Waste Management
26 Act, a rule or regulation pursuant to such acts, or any order of the
27 department has occurred, he or she may cause a written complaint to be
28 served upon the alleged violator or violators or he or she may bring a
29 criminal or civil action under section 81-1508.01 or 81-1508.02. The
30 complaint shall specify the provision of the act, rule or regulation, or
31 order alleged to be violated and the facts alleged to constitute a

1 violation thereof and shall order that necessary corrective action be
2 taken within a reasonable time to be prescribed in such order. Any such
3 order shall become final unless each person named therein requests in
4 writing a hearing before the director no later than thirty days after the
5 date such order is served. In lieu of such order, the director may
6 require that the alleged violator appear before the director at a time
7 and place specified in the notice and answer the charges complained of.
8 The notice shall be delivered to the alleged violator or violators in
9 accordance with the provisions of subsection (5) of this section not less
10 than thirty days before the time set for the hearing.

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

27 (2) The director shall afford an opportunity for a fair hearing, in
28 accordance with the provisions of the Environmental Protection Act, the
29 Integrated Solid Waste Management Act, or the Livestock Waste Management
30 Act, to the alleged violator or violators at the time and place specified
31 in the notice or any modification thereof. On the basis of the evidence

1 produced at the hearing, the director or hearing officer shall make
2 findings of fact and conclusions of law and enter such order as in his or
3 her opinion will best further the purposes of the acts and shall give
4 written notice of such order to the alleged violator and to such other
5 persons who appear at the hearing and make written request for notice of
6 the order. If the hearing is held before any person other than the
7 director, such person shall transmit a record of the hearing together
8 with findings of fact and conclusions of law to the director. The
9 director, prior to entering his or her order on the basis of such record,
10 shall provide opportunity to the parties to submit for his or her
11 consideration exceptions to the findings or conclusions and supporting
12 reasons for such exceptions. The order of the director shall become final
13 and binding on all parties unless appealed to the courts as provided in
14 section 81-1509 within thirty days after notice has been sent to the
15 parties.

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

23 (4) Whenever the director finds that an emergency exists requiring
24 immediate action to protect the public health and welfare, the director
25 may, without notice or hearing, issue an order reciting the existence of
26 such an emergency and requiring that such action be taken as the director
27 deems necessary to meet the emergency. Notwithstanding the provisions of
28 subsection (2) of this section, such order shall be effective
29 immediately. Any person to whom such order is directed shall comply
30 therewith immediately but on application to the director shall be
31 afforded a hearing as soon as possible and not later than ten days after

1 such application by such affected person. On the basis of such hearing,
2 the director shall continue such order in effect, revoke it, or modify
3 it.

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

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

12 (6) The hearings provided for in this section may be conducted by
13 the director or by any member of the department acting in his or her
14 behalf, or the director may designate hearing officers who shall have the
15 power and authority to conduct such hearings in the name of the director
16 at any time and place. A verbatim record of the proceedings of such
17 hearings shall be taken and filed with the director, together with
18 findings of fact and conclusions of law made by the director or hearing
19 officer. Witnesses who are subpoenaed shall receive the same fees as in
20 civil actions in the district court and mileage as provided in section
21 81-1176. In case of contumacy or refusal to obey a notice of hearing or
22 subpoena issued under the provisions of this section, the district court
23 shall have jurisdiction, upon application of the director, to issue an
24 order requiring such person to appear and testify or produce evidence as
25 the case may require and any failure to obey such order of the court may
26 be punished by such court as contempt thereof.

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

1 part of the stenographer's notes to any party to the action requiring and
2 requesting the same.

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

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

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

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

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

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

1 (iii) Further enforcement action.

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

4 81-1508 (1) Any person who violates any of the provisions of the
5 Environmental Protection Act, the Integrated Solid Waste Management Act,
6 or the Livestock Waste Management Act, fails to perform any duty imposed
7 by either act or any rule or regulation issued thereunder, or violates
8 any order or determination of the director promulgated pursuant to either
9 act and causes the death of fish or other wildlife shall, in addition to
10 the penalties provided in sections 81-1508.01 and 81-1508.02, be liable
11 to pay to the state an additional amount equal to the sum of money
12 reasonably necessary to restock waters with fish or replenish such
13 wildlife as determined by the director after consultation with the Game
14 and Parks Commission. Such amount may be recovered by the director on
15 behalf of the state in a civil action brought in the district court of
16 the county in which such violation or failure to perform the duty imposed
17 occurred.

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

29 (3) Upon receipt of evidence that the past or present handling,
30 storage, treatment, transportation, or disposal of any solid waste or
31 hazardous waste may present ~~is presenting~~ an imminent and substantial

1 endangerment to the health of humans or animals or to the environment,
2 the director may petition the district court for an injunction to
3 immediately restrain any person who has contributed or who is from
4 contributing to the alleged acts, to stop such handling, storage,
5 treatment, transportation, or disposal, and to take such other action as
6 may be necessary. It shall be the duty of each county attorney or the
7 Attorney General to whom the director reports a violation to cause
8 appropriate proceedings to be instituted without delay to assure
9 compliance with the Environmental Protection Act, the Integrated Solid
10 Waste Management Act, and the Livestock Waste Management Act.

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