

E AND R AMENDMENTS TO LB 1102

Introduced by McKinney, 11, Chairman Enrollment and Review

1 1. Strike the original sections and all amendments thereto and
2 insert the following new sections:

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

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

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

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

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

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

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

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

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

1 (8) Release means any emission, discharge, spill, leak, pumping,
2 pouring, escaping, emptying, or dumping of a pollutant into or onto the
3 land, air, or waters of the state, except when performed in compliance
4 with the conditions of a federal or state environmental permit; and
5 (9) Waters of the state has the same meaning as provided in section
6 81-1502.

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

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

- 27 (1) Issue orders requiring a person responsible for a release to
28 clean up the release;
- 29 (2) Take necessary action to clean up or terminate the release of a
30 pollutant if a person responsible for a release fails or refuses to take
31 reasonable actions required by the director;

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

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

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

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

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

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

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

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

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

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

1 the cleanup costs.

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

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

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

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

24 Sec. 8. In lieu of issuing an order under section 4 of this act,
25 the director may allow another person, entity, or responsible person to
26 voluntarily remediate site conditions under the Remedial Action Plan
27 Monitoring Act. An entity that voluntarily chooses to apply under section
28 81-15,184 must meet all requirements of such section. Based on the nature
29 of the release, the director may require the person, entity, or
30 responsible person to pay for a contractor to oversee remedial work hired
31 or approved by the department.

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

5 (2) An environmental lien attaches when:
6 (a) Cleanup costs are first incurred by the state;
7 (b) The responsible person is provided written notice by certified
8 or registered mail of potential liability; and
9 (c) A lien notice is filed in compliance with this section.

10 (3) An environmental lien notice shall state:
11 (a) The name of the record owner of the real property to which the
12 environmental lien is attached;
13 (b) The legal description of the real property to which the
14 environmental lien is attached;
15 (c) If the real property against which the lien is attached is not
16 the property where the cleanup occurred, the legal description of the
17 property where the cleanup occurred;
18 (d) An itemized statement detailing the cleanup costs incurred by
19 the state; and
20 (e) A statement that an environmental lien has attached to the
21 described real property.

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

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

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

30 Sec. 10. Whenever the director has reason to believe that a
31 violation of any provision of or order issued under the Nebraska

1 Environmental Response Act, or any rule or regulation adopted and
2 promulgated under the act, has occurred, the director may cause an
3 administrative order to be served upon the violator. Such order shall
4 specify the violation and the facts alleged to constitute a violation of
5 the act and may assess an administrative penalty to be paid within thirty
6 days or as otherwise stated in the order. The order shall set forth the
7 circumstances and factors considered in assessing the administrative
8 penalty which may include the severity of the violation, good faith
9 efforts of the violator, and any other factors deemed relevant by the
10 director. Administrative penalties assessed under this section shall not
11 exceed five thousand dollars per day per violation. Each day a violation
12 continues shall constitute a separate violation. An order under this
13 section imposing an administrative penalty may be appealed to the
14 director. The appeal shall be in the manner provided in the
15 Administrative Procedure Act. Any administrative penalty paid pursuant to
16 the act shall be remitted to the State Treasurer for distribution in
17 accordance with Article VII, section 5, of the Constitution of Nebraska.
18 An action may be brought in the district court of Lancaster County to
19 collect any unpaid administrative penalty and costs incurred directly in
20 the collection of the penalty plus any statutory interest rate applicable
21 to judgments, which shall run from the date the administrative penalty
22 accrued.

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

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

29 81-1507 (1) Whenever the director has reason to believe that a
30 violation of any provision of the Environmental Protection Act, the
31 Integrated Solid Waste Management Act, the Livestock Waste Management

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

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

1 and corrective action.

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

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

29 (4) Whenever the director finds that an emergency exists requiring
30 immediate action to protect the public health and welfare, the director
31 may, without notice or hearing, issue an order reciting the existence of

1 such an emergency and requiring that such action be taken as the director
2 deems necessary to meet the emergency. Notwithstanding the provisions of
3 subsection (2) of this section, such order shall be effective
4 immediately. Any person to whom such order is directed shall comply
5 therewith immediately but on application to the director shall be
6 afforded a hearing as soon as possible and not later than ten days after
7 such application by such affected person. On the basis of such hearing,
8 the director shall continue such order in effect, revoke it, or modify
9 it.

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

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

18 (6) The hearings provided for in this section may be conducted by
19 the director or by any member of the department acting in his or her
20 behalf, or the director may designate hearing officers who shall have the
21 power and authority to conduct such hearings in the name of the director
22 at any time and place. A verbatim record of the proceedings of such
23 hearings shall be taken and filed with the director, together with
24 findings of fact and conclusions of law made by the director or hearing
25 officer. Witnesses who are subpoenaed shall receive the same fees as in
26 civil actions in the district court and mileage as provided in section
27 81-1176. In case of contumacy or refusal to obey a notice of hearing or
28 subpoena issued under the provisions of this section, the district court
29 shall have jurisdiction, upon application of the director, to issue an
30 order requiring such person to appear and testify or produce evidence as
31 the case may require and any failure to obey such order of the court may

1 be punished by such court as contempt thereof.

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

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

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

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

1 (d) Any person who violates a cease and desist order of the director
2 under this subsection may be subject to:
3 (i) A civil penalty under section 81-1508.02;
4 (ii) Suspension or revocation of environmental permits issued by the
5 Department of Environment and Energy; and
6 (iii) Further enforcement action.

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

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

23 (2) Except as provided for in subsection (3) of this section for the
24 handling, storage, treatment, transportation, or disposal of solid or
25 hazardous waste, in addition to the penalties provided by this section
26 and sections 81-1508.01 and 81-1508.02, the director, whenever he or she
27 has reason to believe that any person, firm, or corporation is violating
28 or threatening to violate any provision of the acts, any rule or
29 regulation adopted and promulgated thereunder, or any order of the
30 director, may petition the district court for an injunction. It shall be
31 the duty of each county attorney or the Attorney General to whom the

1 director reports a violation to cause appropriate proceedings to be
2 instituted without delay to assure compliance with the acts.

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

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