

LEGISLATURE OF NEBRASKA  
ONE HUNDRED SEVENTH LEGISLATURE  
SECOND SESSION

**LEGISLATIVE BILL 1102**

Introduced by Bostelman, 23.

Read first time January 19, 2022

Committee:

- 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.