



**QUALIFICATION FOR RESPONSIBILITY EXEMPTION/REGULATORY  
ASSURANCE PURSUANT TO NORTH DAKOTA CENTURY CODE §23-20.03**

NORTH DAKOTA DEPARTMENT OF HEALTH  
ENVIRONMENTAL HEALTH SECTION

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This document describes the steps involved in qualifying for a letter of no further remediation, a letter of no further action or a letter of regulatory assurance under the provisions of North Dakota Century Code, Section 23-20.3-03.1.

The North Dakota Department of Health issues these letters in order to provide owners, operators and lenders with liability protection and exemptions from responsibility for environmental remediation under applicable North Dakota laws and rules.

An owner or operator of a site or property that qualifies for a letter of no further remediation or no further action and who complies with the conditions required by the Department of Health will have a partial or complete exemption from responsibility for remediation or further action on a contaminated property or at a contaminated site. In general, a responsible party who caused the contamination will not be eligible for a responsibility exemption; however, a subsequent property owner would be eligible to apply.

Similarly, a lender who receives a letter of regulatory assurance will have the Department of Health's assurance that it will not be subject to any enforcement of North Dakota's environmental laws or rules relating to existing contamination or pollution on a property or site.

**Application/Request**

The person requesting the exemption must fill out the Department of Health's application form providing basic information about the applicant and the property. Application for a letter of no further remediation or no further action must be made by the business entity or individual that owns or is purchasing the property, and whose name will be on the deed as the legal owner. The person signing the final agreements on behalf of the business entity must have the authority to do so. Generally, the Department will accept signatures by the following: the president on behalf of a corporation, a partner on behalf of a partnership, a general partner on behalf of a general partnership or limited liability limited partnership, and a manager on behalf of a limited liability company. The business entity should submit information to the Department showing that the person has the authority to sign, such as a copy of the bylaws, articles of incorporation, or resolution of the board. If the person submitting the application is not the person who has authority to sign the final agreements, the name and title of the person who will be signing should be included in the comment section of the application form.

In order to make a final determination on the request, the department must have adequate information to assess the environmental conditions at the site. In some cases, the department may have adequate data already on file from a previous site assessment. In other cases, there may be data from previous investigations, but some additional data may be needed to document current site conditions. Please check with the Department of Health to see what data is available. If there is not data on file to adequately assess the site conditions, it is the responsibility of the applicant to submit an environmental assessment of the property satisfying the intent of ASTM E1903-97 Phase II Environmental Site Assessment Process

or comparable information, as determined by the Department of Health. It should be noted that financial lenders who are seeking a letter of regulatory assurance are not required to submit environmental data.

### **Environmental Site Assessment**

To review and process the application, the Department of Health will require:

- a. Delineation of the vertical and horizontal extent and concentration of the pollution or contamination in soil and groundwater. The department has guidelines for both the investigation and the report on its web-site. A “Phase I” site investigation is generally not sufficient to grant a responsibility exemption unless it is followed up with a complete Phase II investigation as described in the guidelines listed below.
  - [www.ndhealth.gov/wm/Publications/InvestigationsOfContaminantReleaseSites.pdf](http://www.ndhealth.gov/wm/Publications/InvestigationsOfContaminantReleaseSites.pdf)
  - [www.ndhealth.gov/wm/Publications/EnvironmentalSiteInvestigationReport.pdf](http://www.ndhealth.gov/wm/Publications/EnvironmentalSiteInvestigationReport.pdf)
- b. Identification of contiguous property owners.
- c. Identification of potential individuals or receptors that may be impacted by the pollution or contamination, evaluation of the potential for movement or migration of the pollution or contamination and potential pathways of exposure, and identification of any potential health or environmental impacts to individuals or receptors based on the proposed property use. Guidelines for the receptor survey are included in the above-referenced guidelines for the site assessment and report.
- d. Identification of the past and current uses of the property, the current uses of contiguous properties, and zoning restrictions or regulations that may apply to the property and contiguous properties.
- e. Identification of any surface water or groundwater uses or groundwater wells that may be impacted by the pollution or contamination.
- f. Such other information and data as the Department of Health requires in order to evaluate the request.

The environmental assessment does not need to be submitted with the application. However, it is the responsibility of the applicant to provide adequate data to the department, if it is not already on file, and the application cannot be processed until it is received.

### **Conditions**

As conditions to the issuance of a responsibility exemption letter, the Department of Health will require, as necessary in its discretion to protect the environment and public health, the following:

- a. Agreement to comply with and complete any remediation plan approved and ordered by the department, including monitoring of natural attenuation of pollution or contamination.

- b. Agreement to provide access for all monitoring and remedial activities reasonably related to the identified pollution or contamination if the remediation or monitoring is being conducted by a responsible party or governmental body other than the landowner or operator.
- c. Agreement to any other reasonable institutional controls that are necessary to protect public health and welfare from pollution or contamination on the property or to satisfy environmental standards enforced by the department.
- d. Agreement to comply with all institutional controls, letters of no further remediation, letters of no further action, or letters of regulatory assurance established or instituted under Section 23-20.2-03.1 by the Department of Health to protect the environment or public health.

### **Types of Institutional Controls**

When environmental remediation required by the Department of Health is completed to the extent practicable, there may necessarily be residual contamination. In such cases, the department will, in order to protect the environment and public health, require an effective and enforceable means of ensuring the conduct of any maintenance, monitoring or operation of remediation systems; of restricting certain uses of land, including placing restrictions on drilling for or pumping groundwater; and of providing certain limitations on the development or improvement of properties as long as any residual contamination remains. These restrictions, or institutional controls, contain or prevent the migration of regulated substances or other pollution or contamination or protect receptors from exposure or threat of exposure to regulated substances or other pollution or contamination. The institutional controls may be incorporated in a municipal or county ordinance or in an environmental covenant. Examples of institutional controls that have been or may be appropriate for properties, depending on the site-specific conditions, include restrictions on new wells; restrictions on excavations; limiting appropriate development to industrial or agricultural, rather than residential; etc.

#### **a. Ordinance**

- i) When the area subject to institutional controls involves two or more property owners and an area larger than either one city block or 10 acres (4.05 hectares), the Department of Health and the political subdivision having zoning authority over the property may agree to institutional controls relating to the identified area impacted by the pollution or contamination.
- ii) The political subdivision shall provide for notice, public hearing and other procedures in the same manner as zoning regulations are established, provided that the public hearing must be held jointly with the Department of Health.

#### **b. Environmental Covenant**

In addition or in the alternative to an ordinance, the Department of Health may establish institutional controls by agreement to an environmental covenant with the owner of the property, provided that the following steps are completed before the department's approval of the covenant:

- i) All contiguous landowners to the property to which the covenant will attach have been notified by certified mail or by service by publication as provided in the North Dakota Rules of Civil Procedure.

- ii) The covenant states that it is an environmental covenant that runs with the land.
- iii) The covenant contains a legally sufficient description of the real property subject to the covenant.
- iv) The covenant describes the activity or use limitations required to protect the environment and public health and provides for access for any monitoring or remediation.
- v) The covenant identifies every person or entity that is granted any right of access or other rights under the covenant.
- vi) The covenant is signed by the owner and every person granted rights of access or other rights before a notary public.
- vii) The covenant describes the name and location of any administrative record for the environmental response or remediation identified for the property, including any environmental assessment, remediation plan, or monitoring plan.
- viii) The covenant must be filed with the county recorder of the county in which the property is located. A copy of the recorded covenant showing the county document number must be returned to the Department of Health.

#### **Environmental Financial Assurance**

Before agreeing to any institutional controls or responsibility exemptions, the Department of Health may require insurance or other financial assurance to cover the projected cost of any additional environmental monitoring or remediation that may become necessary on the property after the site-specific responsibility exemptions and institutional controls are established.

The department will require insurance coverage or other financial assurance to cover the cost of additional environmental monitoring or remediation that may become necessary after the site-specific responsibility exemptions and institutional controls are established where projected cost of the department-approved monitoring or remediation plan exceeds \$500,000 (five hundred thousand dollars).

#### **Letters of No Further Remediation or No Further Action**

Letters of no further remediation or no further action are responsibility exemptions that ensure that an owner or operator of a contaminated property who qualified for such an exemption will have no further liability for remediation, monitoring or further action, provided that the owner or operator complies with the conditions of the exemption letter and Section 23-20.3-03.1.

The "no further remediation" determination applies when active remediation is completed, but monitoring or other responsibilities (e.g., record keeping, notice requirements, etc.) continue to apply.

"No further action" is broader, releasing the owner or operator from all further responsibilities to act relating to the contamination, provided all conditions of the institutional controls are met.

The Department of Health will issue a responsibility exemption letter to an owner or operator who meets Section 23-20.3-03.1's requirements, when the remediation and/or monitoring plan and any necessary institutional controls approved by the department are completed.

Letters of no further remediation or no further action may be amended by the written agreement of the Department of Health and the owners(s) and/or operator(s) participating.

Letters of no further remediation or no further action are voidable only against a person who violates an institutional control or a condition of a letter of no further remediation or no further action; who is responsible for a new or additional release of a regulated substance or pollutant on the property or site; or whose actions or negligence cause the violation, release or migration.

### **Letters of Regulatory Assurance to Lenders**

Chapter 32-40.1 North Dakota Century Code protects lenders and certain individuals acting in a representative capacity, such as guardians and trustees, from liability for environmental damage. In addition, under Section 23-20.3-03.1, lenders who participate in a financial assurance agreement may not be held liable for any environmental remediation on the property except as provided in Section 32-40.1-02(3).

The Department of Health may issue a letter of regulatory assurance to a lender which states that the lender is not responsible for environmental remediation on the property or site and which addresses other issues relating to responsibility, notice, violation of agreements regarding financial assurances by an owner or operator, default or other matters affecting potential liability, investment, or redevelopment.

A letter of regulatory assurance given or granted to a lender also applies to a lender's transferees or assigns, provided the party had no prior involvement with or responsibility for the site of the environmental release, and uses and manages the property after the transfer or assignment in compliance with institutional controls or other conditions established under Section 23-20.3-03.1 and the requirements of chapters 23-20.3 and 61-28.

### **Additional information/Suggestions**

Following the procedures outlined in this guidance document and providing the Department of Health with all the data and information needed to evaluate the site or property will expedite the department's review and determination of the remediation and/or monitoring required as a condition of the issuance of the responsibility exemption.

To the extent possible, it is desirable to give the staff adequate notice and lead time for its review, well in advance of deadlines such as mortgage closings, etc. A full review and issuance of a letter of regulatory exemption may take from two weeks to two months, depending on the type of contaminant, complexity of the site hydrogeology, historical factors and staff workload. If all necessary data is not submitted with the request, the review may take even longer. Projects that are extremely rushed tend to incur inordinate costs.

All costs to perform the environmental site assessment, any fees for filing documents with the county, and any private legal fees are the full responsibility of the applicant. In addition, the Department of Health or local political subdivision may request reimbursement of costs and expenses of administration of the request. Hiring a consultant who is familiar with the responsibility exemption program and who can provide all of the pertinent information the first time saves money and time for the applicant. The applicant should feel free to contact department staff directly regarding the site or property and stay in contact with the staff during the course of the project.

**Sequence of Review and Issuance**

<b>Action Item</b>	<b>Who Is Responsible</b>
1. Environmental site assessment	Applicant (if data is not available)
2. Submit request form	Applicant
3. Review for completeness	Department of Health
4. Review site assessment and available data	Department of Health
5. Determination of applicable institutional controls	Department of Health (may be proposed by applicant and submitted with the request)
6. Draft environmental covenant or ordinance	Department of Health (may be proposed by applicant and submitted with the request)
7. Provide notice and opportunity for public hearing (if an ordinance)	Local political subdivision at request of the applicant
8. Public ordinance hearing (if necessary)	Local political subdivision and Department of Health
9. Write the letter of regulatory exemption	Department of Health
10. Endorse the letter of regulatory exemption	Applicant
11. Notification of contiguous landowners (not necessary under the ordinance option or for letter of regulatory assurance to a lender)	Applicant
12. File environmental covenants and/or responsibility exemption documents with county recorder's office, if needed	Applicant
13. Return original signed copy of agreements to the department along with copies of recorded covenants showing county document numbers, and proof of landowner notification to the department.	Applicant
Responsibility exemption is then in effect	