

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 96-F-19

Date issued: October 4, 1996

Requested by: Jon R. Rice, MD, State Health Officer
Glenn Pomeroy, Insurance Commissioner

- QUESTION PRESENTED -

Whether the "Environmental Protection Act" to be codified as N.D.C.C. § 23-29-16 requires an actual insurance policy be issued to cover a one hundred-year period following closure of an industrial or municipal waste landfill disposal facility or whether financial assurances or other economic mechanisms can be used to satisfy the provisions of the section.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the provisions of N.D.C.C. § 23-29-16 requiring maintenance of the insurance policy for one hundred years after the closure of an industrial or municipal waste landfill disposal facility can be met through financial assurance or other economic mechanisms and does not require an actual insurance policy be issued for the one hundred-year period.

- ANALYSIS -

The "Environmental Protection Act" was enacted pursuant to an initiated measure approved by the voters on June 11, 1996, and will be codified as N.D.C.C. § 23-29-16. N.D.C.C. § 23-29-16(2) provides, in part, that "[t]he insurance policy required by this section shall be maintained for 100 years after the closure of the [industrial or municipal waste landfill disposal] facility."

The Legislature has granted the State Department of Health the responsibility for administration and enforcement of N.D.C.C. ch. 23-29. N.D.C.C. § 23-29-04. Specifically, subsection 13 of section 23-29-04 authorizes the State Department of Health to:

Adopt rules to establish financial assurance requirements to be met by any person proposing construction or operation of a solid waste management facility sufficient

to provide for closure and postclosure activities. Financial assurance requirements must include any or all of the following: insurance, trust funds, surety bonds, letters of credit, personal bonds, certificates of deposit, and financial tests or corporate guarantees.

(Emphasis added.) N.D.C.C. § 23-29-04(8) authorizes the State Department of Health to "[a]dopt and enforce rules governing solid waste management, in order to conserve the air, water, and land resources of the state; protect the public health; prevent environmental pollution and public nuisances; and enable the department to administer this chapter, the adopted solid waste management plan, and delegated federal programs." In addition, the State Department of Health has powers which are necessarily implied from its statutory grants of authority. First Bank of Buffalo v. Conrad, 350 N.W.2d 580, 584-85 (N.D. 1984).

The State Department of Health and the Insurance Department construe the insurance maintenance provision of N.D.C.C. § 23-29-16(2) as consistent with the use of financial assurance or other economic mechanisms to ensure that an insurance policy will be maintained for one hundred years after the facility closes rather than mandating a one hundred-year "term" insurance policy be on file.

The construction of a statute by the administrative agency administering the statute is entitled to deference if the interpretation does not contradict the clear and unambiguous language of the statute. Western Gas Resources, Inc. v. Heitkamp, 489 N.W.2d 869 (N.D. 1992). As the North Dakota Supreme Court stated in Cass County Electric Cooperative v. Northern States Power Co.:

We normally defer to a reasonable interpretation of a statute by the agency responsible for enforcing it, "especially when that interpretation does not contradict the statutory language." Turnbow v. Job Service North Dakota, 479 N.W.2d 827, 830 (N.D. 1992). . . . As Western Gas Resources, Inc. v. Heitkamp, 489 N.W.2d 869, 872 (N.D. 1992), explained, deference to an agency's interpretation of a statute "is an important consideration when an agency interprets and implements a law that is complex and technical."

Cass County Electric Coop. v. Northern States Power, 518 N.W. 2d 216, 220 (N.D. 1994). The general rule is that a law enacted as an initiated measure is subject to the same rules of construction and the same test of constitutionality as one enacted by the Legislature. State v. Houge, 271 N.W. 677, 680 (N.D. 1937).

The Environmental Protection Act to be codified as N.D.C.C. § 23-29-16(2) requires any private person who operates an industrial or municipal waste landfill disposal facility in North Dakota to have a "valid policy of liability insurance in effect in order to respond in damages for liability arising out of the ownership, maintenance or use of that facility." The Act directs that the policy cover "all damage caused to the environment, corrective and/or remedial action in connection therewith, and any other damage caused to public or private property resulting from the ownership, maintenance or use of the facility." Id. Minimum policy limits are "computed by multiplying \$50 per ton times the number of tons of solid waste accepted at the facility from and after January 1, 1995." Id.

The statute further requires the insurance policy "be maintained for 100 years after the closure of the facility." (Emphasis added.) Maintain is defined, in part, as "[t]o preserve or keep in a given existing condition." The American Heritage Dictionary, 757 (1991 2d coll. ed). See Sykeston Tp. v. Wells County, 356 N.W.2d 136, 143 (N.D. 1984) ("maintain" means "to keep in a state of repair"). See also 1993 N.D. Op. Att'y Gen. L-319 (construing the term "general maintenance" in a similar fashion).

Under N.D.C.C. § 26.1-30-01, an insurance policy is a written insurance contract specifying: "1. The parties between whom the contract is made. 2. The rate of premium. 3. The property or life insured. 4. The interest of the insured in the property insured if the insured is not the absolute owner of the property. 5. The risks insured against. 6. The period during which the insurance is to continue." A policy satisfying these criteria could come in several forms. For example, N.D.C.C. ch. 26.1-46 provides for the establishment of risk retention groups to provide for assuming or spreading any or all of the liability exposure of its group members. Forming such a group would provide one alternative to purchasing a commercial insurance policy to cover the one hundred-year period after a facility is closed.

In summary, N.D.C.C. § 23-29-04 places responsibility with the State Department of Health for the administration and enforcement of the chapter. Pursuant to the authority in section 23-29-04, the Department necessarily has discretion in interpreting and implementing N.D.C.C. § 23-29-16. In addition to the general authority, specific authority is given to adopt and enforce rules governing solid waste management and to enable the department to administer chapter 23-29. N.D.C.C. § 23-29-04(8). Specific authority is also granted the Department to adopt rules to establish financial assurance requirements. N.D.C.C. § 23-29-04(13). Pursuant to this authority, the State Department of Health may allow landfill

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disposal facility owners or operators to maintain the insurance policy in a manner other than through purchase of a one hundred-year "term" insurance policy. For instance, the requirements of N.D.C.C. § 23-29-16(2) for the insurance maintenance provision could be met by some combination of self-insurance and an excess insurance policy; a risk retention group plan; or a combination of financial assurance methods identified in N.D.C.C. § 23-29-04(13).

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: David E. Clinton, Assistant Attorney General
Beth Angus Baumstark, Assistant Attorney General

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