

**LETTER OPINION
2003-L-38**

September 15, 2003

Mr. L. David Glatt
Chief, Environmental Health Section
North Dakota Department of Health
1200 Missouri Ave
Bismarck, ND 58504-5264

Dear Mr. Glatt:

Thank you for your letter asking several questions concerning the application of N.D.C.C. § 23-33-08 and the release of information by the State Department of Health regarding its ground water quality monitoring program.

In 1991, the Legislature enacted a program to protect ground water resources against contamination. 1991 N.D. Sess. Laws ch. 286; N.D.C.C. § 23-33-01. The Legislature gave the Department authority to obtain access to privately owned land for installing wells to monitor ground water for pesticide pollution, but chose to protect landowners and operators by restricting the Department from disclosing results of the monitoring. N.D.C.C. § 23-33-08. Section 23-33-08 provides that “[t]he names and addresses of landowners and operators who participate in a ground water monitoring program may not be linked, in any public disclosure, to the findings of the program” unless the Department by rule finds a compelling public interest justifying the disclosure. N.D.C.C. § 23-33-08. If there is no determination of a compelling public interest, disclosing the information is a class C felony. N.D.C.C. § 12.1-13-01 (making disclosure of confidential information a class C felony); N.D.C.C. § 23-33-08.

The key issue is determining what was intended when the Legislature forbade the names and addresses of landowners from being linked in a public disclosure to the findings of the program. When determining legislative intent, words used in a statute are to be given their plain, ordinary, and commonly understood meaning. Douville v. Pembina County Water Resource District, 612 N.W.2d 270, 274 (N.D. 2000). The commonly understood definition of “link” includes “[s]omething resembling a chain link in its physical arrangement or its connecting function.” The American Heritage Dictionary 734 (2d coll. ed. 1991). Particularly relevant in this instance, “link” means “[t]o connect

or become connected with or as if with links.” Id. The definition of “link” also implies not only that the names and addresses may not be disclosed, but also that any disclosure may not provide a link or connection to the confidential names and addresses. Therefore, unless the Department has determined by rule¹ that a compelling public interest justifies it, ground water monitoring program information may not be disclosed if disclosure will provide a means to identify the landowners or operators participating in the program.

You specifically ask whether the Department may disclose to the public information concerning the wells and the results of water testing by disclosing the public land survey location or by publishing a map showing the location of the wells. Depending on the detail of the map or the specificity of the survey location, both of those forms of information may be the practical and functional equivalent of disclosing the names and address of the persons owning or operating the land upon which the well is located. In other words, the more detailed the information, the more likely that information will be a link to determining the names and addresses of participants.

Ground water monitoring information may be disclosed if it is done in a manner that does not link the participants to the findings. An example of how this could be done is found in rules implementing the Health Insurance Portability and Accountability Act of 1996. Section 164.502, 45 C.F.R., allows protected health information to be released to the public only if it has been de-identified unless disclosure is otherwise permitted by law or the individual to whom the information relates has provided a release. The federal law generally prohibits disclosing information by geographic subdivisions smaller than a state, including disclosure by street address, city, county, precinct, complete zip code, or their equivalents. 45 C.F.R. § 164.514(b)(2)(i)(B). Information may be disclosed by the geographic unit formed by combining the initial three digits of a zip code if the geographic unit formed by combining all zip codes with the same three initial digits contains more than 20,000 people. Id. If the combination of all such geographic units contains 20,000 or less, the location cannot be identified. Id. If the Department follows this example when disclosing the results of the program, then it is my opinion that the Department will not link the results of the program to the names and addresses of participating landowners or operators. This is an example only, and the Department has reasonable discretion to determine a means to comply with N.D.C.C. § 23-33-08. Lee v. N.D. Workers Comp. Bureau, 587 N.W.2d 423, 425 (N.D. 1998) (courts will defer to an agency’s reasonable interpretation of statute but will not defer to an interpretation that contradicts clear and unambiguous statutory language).

¹ The Department has not promulgated a rule under which a compelling public interest can be determined.

You also asked whether the restriction against disclosing information linking the names and addresses of landowners or operators to findings of the ground water monitoring program applies when the ground water tested is from a well that was not installed pursuant to N.D.C.C. § 23-33-08. In addition to the authority to monitor ground water under N.D.C.C. § 23-33-08, the Department may also conduct ground water quality monitoring activities in cooperation with the State Engineer and other state agencies. N.D.C.C. § 23-33-06. An examination of the language used in N.D.C.C. § 23-33-08 reveals that the protection given to the participants' names and addresses is not dependent upon whether access to ground water was provided under N.D.C.C. § 23-33-08. Therefore, it is my further opinion that the prohibition against making a public disclosure linking the findings of the program to the names and addresses of landowners or operators applies to monitoring and testing under both N.D.C.C. § 23-33-06 and N.D.C.C. § 23-33-08.

Finally, you asked whether the restriction against disclosing information applies when a monitoring well is installed on a public road right of way or easement adjacent to private land. Highway easements exist not only along constructed roads, but also along section lines without regard to whether a road has been constructed on the section line. N.D.C.C. § 24-07-03. Subject to approval by the board of county commissioners or the board of township supervisors, monitoring wells may be placed on a section line easement provided they do not obstruct the development and use of the section line as a public right of way. N.D.A.G. 2002-F-01. A landowner whose land abuts a section line or other road or highway easement retains ownership of the real property within the section line easement, subject to the public's right to travel. Small v. Burleigh County, 225 N.W.2d 295, 297 (N.D. 1974); Hjelle v. J.C. Snyder & Sons, 133 N.W.2d 625, 629 (N.D. 1965). Thus, it is my further opinion that because a landowner whose land abuts a road, highway, or section line easement on which is located a monitoring well retains ownership of the land underlying the highway easement, the landowner falls under the protection of N.D.C.C. § 23-33-08.²

Land underlying a road or highway may also be owned in fee simple by the government. N.D.A.G. 2003-F-02. In such an instance, the name and address of the landowner would be the government entity owning the fee simple interest in the real estate on which the highway has been constructed. The protection for landowners and operators against disclosure provided by N.D.C.C. § 23-33-08, does not state a different rule if the landowner or operator is a public entity as opposed to a private entity. Therefore, it is my further opinion that N.D.C.C. § 23-33-08 prohibits the Department from disclosing ground water monitoring program information if disclosure will provide a means to

² Because the landowner retains ownership of the land underlying a highway easement, access to monitor ground water from wells located on highway easements must be obtained from the landowner or operator under N.D.C.C. § 23-33-08.

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identify government landowners or operators participating in the program unless it is determined that a compelling public interest justifies the disclosure.

Sincerely,

Wayne Stenehjem
Attorney General

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