

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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HOUSE DRH30221-RT-5A (3/1)

Short Title: Underground Storage Tank Amendments.

(Public)

Sponsors: Representative Gibson.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO MAKE CLARIFYING AND CONFORMING AMENDMENTS TO
G.S. 143-215.94E, WHICH GOVERNS THE RIGHTS AND OBLIGATIONS OF
OWNERS AND OPERATORS OF UNDERGROUND STORAGE TANKS, AND
TO REMOVE THE SUNSET APPLICABLE TO, AMEND, AND CODIFY
SECTION 10 OF S.L. 2003-352, AS AMENDED BY SUBSECTION (E) OF
SECTION 30.10 OF S.L. 2004-124.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-215.94E reads as rewritten:

"§ 143-215.94E. Rights and obligations of the owner or operator.

(a) Upon a determination that a discharge or release of petroleum from an underground storage tank has occurred, the owner or operator of the underground storage tank shall notify the Department pursuant to G.S. 143-215.85. The owner or operator of the underground storage tank shall immediately undertake to collect and remove the discharge or release and to restore the area affected in accordance with the requirements of this Article.

(a1) If a spill or overflow associated with a petroleum underground storage tank results in a release of petroleum to the environment of 25 gallons or more or causes a sheen on nearby surface water, the owner or operator of the petroleum underground storage tank shall immediately clean up the spill or overflow, report the spill or overflow to the Department within 24 hours of the spill or overflow, and begin to restore the area affected in accordance with the requirements of this Article. The owner or operator of a petroleum underground storage tank shall immediately clean up a spill or overflow of less than 25 gallons of petroleum that does not cause a sheen on nearby surface water. If a spill or overflow of less than 25 gallons of petroleum cannot be cleaned up within 24 hours of the spill or overflow or causes a sheen on nearby surface water, the owner or

1 operator of the petroleum underground storage tank shall immediately notify the
2 Department.

3 (b) In the case of a discharge or release from a commercial underground storage
4 tank where the owner or operator has been identified and has proceeded with cleanup,
5 the owner or operator may elect to have the Commercial Fund pay or reimburse the
6 owner or operator for any costs described in subsection (b) or (b1) of G.S. 143-215.94B
7 that exceed the amounts for which the owner or operator is responsible under that
8 subsection. The sum of payments by the owner or operator and the payments from the
9 Commercial Fund shall not exceed one million dollars (\$1,000,000) per discharge or
10 release except as provided in G.S. 143-215.94B(b2).

11 (b1) In the case of a discharge or release from a commercial underground storage
12 tank where the owner and operator cannot be identified or located, or where the owner
13 and operator fail to proceed as required by subsection (a) of this section, if the current
14 landowner of the land in which the commercial underground storage tank is located
15 notifies the Department in accordance with G.S. 143-215.85 and undertakes to collect
16 and remove the discharge or release and to restore the area affected in accordance with
17 the requirements of this Article and applicable federal and State laws, regulations, and
18 rules, the current landowner may elect to have the Commercial Fund pay or reimburse
19 the current landowner for any costs described in subdivisions (1), (2), (2a), (3), and (4)
20 of G.S. 143-215.94B(b) or G.S. 143-215.94B(b1) that exceed the amounts for which the
21 owner or operator is responsible under that subsection. The current landowner is not
22 eligible for payment or reimbursement until the current landowner has paid the costs
23 described in subdivisions (1), (2), (2a), (3), and (4) of G.S. 143-215.94B(b) or
24 G.S. 143-215.94B(b1) for which the owner or operator is responsible. Eligibility for
25 reimbursement under this subsection may be transferred from a current landowner who
26 has paid the costs described in subdivisions (1), (2), (2a), (3), and (4) of
27 G.S. 143-215.94B(b) or G.S. 143-215.94B(b1) to a subsequent landowner. The sum of
28 payments from the Commercial Fund and from all other sources shall not exceed one
29 million dollars (\$1,000,000) per discharge or release except as provided in
30 G.S. 143-215.94B(b2). This subsection shall not be construed to require a current
31 landowner to cleanup a discharge or release of petroleum from an underground storage
32 tank for which the current landowner is not otherwise responsible. This subsection does
33 not alter any right, duty, obligation, or liability of a current landowner, former
34 landowner, subsequent landowner, owner, or operator under other provisions of law.
35 This subsection shall not be construed to limit the authority of the Department to engage
36 in a cleanup under this Article or any other provision of law. In the event that an owner
37 or operator is subsequently identified or located, the Secretary shall seek reimbursement
38 as provided in G.S. 143-215.94G(d). The current landowner shall submit documentation
39 of all expenditures as required by G.S. 143-215.94G(b).

40 (c) In the case of a discharge or release from a noncommercial underground
41 storage tank or a commercial underground storage tank eligible for the Noncommercial
42 Fund in accordance with G.S. 143-215.94D(b), the owner or operator may elect to have
43 the Noncommercial Fund pay or reimburse the owner or operator for the costs described

1 in G.S. 143-215.94D(b1) up to a maximum of one million dollars (\$1,000,000) per
2 discharge or release.

3 (c1) In the case of a discharge or release from a noncommercial underground
4 storage tank where the owner and operator cannot be identified or located, or where the
5 owner and operator fail to proceed as required by subsection (a) of this section, if the
6 current landowner of the land in which the noncommercial underground storage tank is
7 located notifies the Department in accordance with G.S. 143-215.85 and undertakes to
8 collect and remove the discharge or release and to restore the area affected in
9 accordance with the requirements of this Article and applicable federal and State laws,
10 regulations, and rules, the current landowner may elect to have the Noncommercial
11 Fund pay or reimburse the current landowner for ninety percent (90%) of any costs
12 described in subdivisions (1) and (2) of G.S. 143-215.94D(b1) that exceed five thousand
13 dollars (\$5,000). Eligibility for reimbursement under this subsection may be transferred
14 to a subsequent landowner from a current landowner who has paid the costs for which
15 the landowner is responsible under this subsection. The sum of payments from the
16 Noncommercial Fund and from all other sources shall not exceed one million dollars
17 (\$1,000,000) per discharge or release. This subsection shall not be construed to require a
18 current landowner to clean up a discharge or release of petroleum from an underground
19 storage tank for which the current landowner is not otherwise responsible. This
20 subsection does not alter any right, duty, obligation, or liability of a current landowner,
21 former landowner, subsequent landowner, owner, or operator under other provisions of
22 law. This subsection shall not be construed to limit the authority of the Department to
23 engage in a cleanup under this Article or any other provision of law. The current
24 landowner shall submit documentation of all expenditures as required by
25 G.S. 143-215.94G(b).

26 (d) In any case where the costs described in G.S. 143-215.94B(b),
27 143-215.94B(b1), or 143-215.94D(b1) exceed one million dollars (\$1,000,000), or one
28 million five hundred thousand dollars (\$1,500,000) if G.S. 143-215.94B(b2) applies, the
29 provisions of Article 21A of this Chapter or any other applicable statute or common law
30 principle regarding liability shall apply for the amount in excess of one million dollars
31 (\$1,000,000) or, if G.S. 143-215.94B(b2) applies, one million five hundred thousand
32 dollars (\$1,500,000). Nothing contained in this Part shall limit or modify any liability
33 that any party may have pursuant to Article 21A of this Chapter, any other applicable
34 statute, or at common law.

35 (e) When an owner, operator, or landowner pays the costs described in
36 G.S. 143-215.94B(b), 143-215.94B(b1), or 143-215.94D(b1) resulting from a discharge
37 or release of petroleum from an underground storage tank, the owner, operator, or
38 landowner may seek reimbursement from the appropriate fund for any costs that the
39 owner, operator, or landowner may elect to have either the Commercial Fund or the
40 Noncommercial Fund pay in accordance with ~~subsections (b), (b1), (c), and (c1)~~ of this
41 section.

42 (e1) The Department may contract for any services necessary to evaluate any
43 claim for reimbursement or compensation from either the Commercial Fund or the
44 Noncommercial Fund, may contract for any expert witness or consultant services

1 necessary to defend any decision to pay or deny any claim for reimbursement, and may
2 pay the cost of these services from the fund against which the claim is made; provided
3 that in any fiscal year the Department shall not expend from either fund more than one
4 percent (1%) of the unobligated balance of the fund on 30 June of the previous fiscal
5 year. The cost of contractual services to evaluate a claim or for expert witness or
6 consultant services to defend a decision with respect to a claim shall be included as
7 costs under G.S. 143-215.94B(b), 143-215.94B(b1), and 143-215.94D(b1).

8 (e2) An owner or operator whose claim for reimbursement is denied may appeal a
9 decision of the Department as provided in Article 3 of Chapter 150B of the General
10 Statutes. If the owner or operator is eligible for reimbursement under this section and
11 the cleanup extends beyond a period of three months, the owner or operator may apply
12 to the Department for interim reimbursements to which he is entitled under this section
13 on a quarterly basis. If the Department fails to notify an owner or operator of its
14 decision on a claim for reimbursement under this ~~subsection~~ section within 90 days after
15 the date the claim is received by the Department, the owner or operator may elect to
16 consider the claim to have been denied, and may appeal the denial as provided in Article
17 3 of Chapter 150B of the General Statutes.

18 (e1)(e3) The Department shall not pay any third party or reimburse any owner or
19 operator who has paid any third party pursuant to any settlement agreement or consent
20 judgment relating to a claim by or on behalf of a third party for compensation for bodily
21 injury or property damage unless the Department has approved the settlement
22 agreement or consent judgment prior to entry into the settlement agreement or consent
23 judgment by the parties or entry of a consent judgment by the court. The approval or
24 disapproval by the Department of a proposed settlement agreement or consent judgment
25 shall be subject to challenge only in a contested case filed under Chapter 150B of the
26 General Statutes. The Secretary shall make the final agency decision in a contested case
27 proceeding under this subsection.

28 (e4) (1) The Department shall establish the degree of risk to human health and
29 the environment posed by a discharge or release of petroleum from a
30 commercial underground storage tank and shall determine a schedule
31 for further assessment and cleanup that is based on the degree of risk
32 to human health and the environment posed by the discharge or release
33 and that gives priority to the assessment and cleanup of discharges and
34 releases that pose the greatest risk. If any of the costs of assessment
35 and cleanup of the discharge or release from a commercial
36 underground storage tank are eligible to be paid from the Commercial
37 Fund, the Department shall also consider the availability of funds in
38 the Commercial Fund and the order in which the discharge or release
39 was reported in determining the schedule.

40 (2) The Department shall establish the degree of risk to human health and
41 the environment posed by a discharge or release of petroleum from a
42 noncommercial underground storage tank and shall determine a
43 schedule for further assessment and cleanup that is based on the degree
44 of risk to human health and the environment posed by the discharge or

1 release and that gives priority to the assessment and cleanup of
2 discharges and releases that pose the greatest risk. If any of the costs of
3 assessment or cleanup of the discharge or release from a
4 noncommercial underground storage tank are eligible to be paid from
5 the Noncommercial Fund, the Department shall also consider the
6 availability of funds in the Noncommercial Fund and the order in
7 which the discharge or release was reported in determining the
8 schedule.

9 (3) The Department may revise the schedules that apply to the assessment
10 and cleanup of any discharge or release at any time based on its
11 reassessment of any of the foregoing factors. The lack of availability
12 of funds in the Commercial Fund or the Noncommercial Fund shall not
13 relieve an owner or operator of responsibility to immediately
14 undertake to collect and remove the discharge or release or to conduct
15 any assessment or cleanup ordered by the Department or be a defense
16 against any violations and penalties issued to the owner or operator for
17 failure to conduct required assessment or cleanup. If the owner or
18 operator takes initial steps to collect and remove the discharge or
19 release as required by the Department and completes the initial
20 assessment required to determine degree of risk, the owner or operator
21 shall not be subject to any violation or penalty for any failure to
22 proceed with further assessment or cleanup under G.S. 143-215.84 or
23 G.S. 143-215.94E before the owner or operator is authorized to
24 proceed with further assessment or cleanup as provided in subsection
25 (e5) of this section.

26 (e2)(e5) (1) As used in this subsection:

- 27 a. 'Approval' means a determination by the Department that the
28 cost of a task is eligible to be paid under G.S. 143-215.94B(b),
29 143-215.94B(b1), or 143-215.94D(b1).
30 b. 'Authorization' means a determination by the Department that a
31 person may proceed with one or more tasks.
32 c. 'Preapproval' means a determination by the Department that the
33 nature and scope of a task is reasonable and necessary to be
34 performed under G.S. 143-215.94B(b), 143-215.94B(b1), or
35 143-215.94D(b1) in order to achieve the purposes of this Part.

36 (4)(2) The Department may require an owner, operator, or landowner to
37 obtain ~~approval from the Department~~ preapproval and approval before
38 proceeding with any task that will result in a cost that is eligible to be
39 paid or reimbursed under G.S. 143-215.94B(b), 143-215.94B(b1), or
40 143-215.94D(b1). The Department shall specify those tasks for which
41 preapproval and approval is required. The Department shall deny any
42 request for payment or reimbursement of the cost of any task for which
43 preapproval or approval is required if the owner, operator, or
44 landowner failed to obtain preapproval or approval of the task. The

1 Department shall pay or reimburse the cost of a task only if the cost is
2 eligible to be paid under G.S. 143-215.94B(b), 143-215.94B(b1), or
3 143-215.94D(b1) and if the Department determines that the cost is
4 reasonable and necessary.

5 (3) The Commission may adopt rules governing reimbursement of
6 reasonable and necessary costs and, consistent with any rules adopted
7 by the Commission, the Department shall develop, implement, and
8 periodically revise a schedule of costs that the Department determines
9 to be reasonable and necessary costs for specific tasks. Statements that
10 specify tasks for which preapproval or approval is required and
11 schedules of reasonable and necessary costs for specific tasks are
12 statements within the meaning of G.S. 150B-2(8a)g. This subsection
13 shall not be construed to invalidate any rule of the Commission related
14 to preapproval or approval of tasks that will result in a cost that is
15 eligible to be paid or reimbursed under G.S. 143-215.94B(b),
16 143-215.94B(b1), or 143-215.94D(b1), provided, however, that the
17 Department may specify additional tasks for which preapproval or
18 approval is required.

19 (4) In all cases, the Department shall require an owner, operator, or
20 landowner to submit documentation sufficient to establish that a cost is
21 eligible to be paid or reimbursed under this Part before the Department
22 pays or reimburses the cost.

23 ~~(2)~~(5) If a task is one for which preapproval or approval is required, the
24 Department shall authorize the task only if the task is preapproved or
25 approved as required. The Department shall authorize a task the cost of
26 which is to be paid from the Commercial Fund only when the task is
27 scheduled to be performed on the basis of a priority determination
28 pursuant to subsection (e4) of this section.

29 (6) Except as provided in subdivisions ~~(3) and (4)~~(9) and (10) of this
30 subsection, the Department shall not ~~preapprove~~ authorize any task the
31 cost of which is to be paid or reimbursed from the Commercial Fund
32 unless the Department determines, based on the scope of the work to
33 be performed and the schedule of reasonable and necessary costs, that
34 sufficient funds will be available in the Commercial Fund to pay a
35 claim for payment or reimbursement of the cost of that task within 90
36 days after the Department determines that the owner, operator, or
37 landowner has submitted a claim with documentation sufficient to
38 establish that the owner, operator, or landowner is eligible to have the
39 claim paid under this Part.

40 (7) Except as provided in subdivisions ~~(3) and (4)~~(9) and (10) of this
41 subsection, the Department shall not ~~preapprove~~ authorize any task the
42 cost of which is to be paid or reimbursed from the Noncommercial
43 Fund unless the Department determines, based on the scope of the
44 work to be performed and the schedule of reasonable and necessary

1 costs, that sufficient funds will be available in the Noncommercial
2 Fund to pay a claim for payment or reimbursement of the cost of that
3 task within 90 days after the Department determines that the owner,
4 operator, or landowner has submitted a claim with documentation
5 sufficient to establish that the owner, operator, or landowner is eligible
6 to have the claim paid under this Part.

7 (8) This subsection shall not be construed to establish a cause of action
8 against the Commission or the Department for any failure to pay or
9 reimburse any cost within any specific period of time. This subsection
10 shall not be construed to establish a defense to any action to enforce
11 the requirements of either G.S. 143-215.84 or subsection (a) of this
12 section. ~~This subsection shall not be construed to invalidate any rule of
13 the Commission related to preapproval of tasks that will result in a cost
14 that is eligible to be paid or reimbursed under G.S. 143-215.94B(b),
15 143-215.94B(b1), or 143-215.94D(b1), provided, however, that the
16 Department may specify additional tasks for which preapproval is
17 required as provided in this subsection.~~

18 ~~(3)~~(9) The Department may ~~preapprove~~ authorize a task the cost of which is
19 to be paid or reimbursed from the Commercial Fund or the
20 Noncommercial Fund when sufficient funds will not be available to
21 pay a claim for payment or reimbursement of the cost of that task
22 within the 90-day period described in ~~subdivision (2)~~ subdivisions (6)
23 and (7) of this subsection if the owner, operator, or landowner
24 specifically requests that the task be ~~preapproved~~ authorized and
25 agrees that the claim for payment or reimbursement of the cost will not
26 be paid until after the Department has paid all claims for payment or
27 reimbursement of costs for tasks that the Department has ~~preapproved~~
28 authorized pursuant to ~~subdivision (2)~~ of this subsection.

29 ~~(4)~~(10) The Department may ~~preapprove~~ authorize a task the cost of which
30 is to be paid or reimbursed from the Commercial Fund or the
31 Noncommercial Fund when sufficient funds will not be available to
32 pay a claim for payment or reimbursement of the cost of that task
33 within the 90-day period described in ~~subdivision (2)~~ subdivisions (6)
34 and (7) of this subsection if the discharge or release creates an
35 emergency situation. An emergency situation exists when a discharge
36 or release of petroleum results in an imminent threat to human health
37 or the environment. A claim for payment or reimbursement of costs for
38 tasks that are ~~preapproved~~ authorized under this subdivision shall be
39 paid or reimbursed on the same basis as tasks that are ~~preapproved~~
40 authorized under ~~subdivision (2)~~ subdivisions (6) and (7) of this
41 subsection.

42 (11) An owner, operator, or landowner is not eligible to have the cost of
43 any task for which authorization is required paid or reimbursed from
44 the Commercial Fund or the Noncommercial Fund until such time as

1 the task is authorized. An owner, operator, or landowner may elect to
2 undertake further assessment or cleanup before receiving
3 authorization. An owner, operator, or other person who undertakes
4 further assessment or cleanup before receiving authorization may be
5 reimbursed only after the Department has paid or reimbursed all other
6 owners, operators, and landowners for the costs for all tasks that have
7 been authorized and, to the extent that preapproval or approval of
8 those tasks is required, only if the tasks are preapproved or approved.

9 (f) Repealed by Session Laws 2003-352, s. 6, effective July 27, 2003.

10 (f1) Any person seeking payment or reimbursement from either the Commercial
11 Fund or the Noncommercial Fund shall certify to the Department that the costs to be
12 paid or reimbursed by the Commercial Fund or the Noncommercial Fund are not
13 eligible to be paid or reimbursed by or from any other source, including any contract of
14 insurance. If any cost paid or reimbursed by the Commercial Fund or the
15 Noncommercial Fund is eligible to be paid or reimbursed by or from another source,
16 that cost shall not be paid from, or if paid shall be repaid to, the Commercial Fund or the
17 Noncommercial Fund. As used in this Part, the phrase "any other source including any
18 contract of insurance" does not include self-insurance.

19 (g) No owner or operator shall be reimbursed pursuant to this section, and the
20 Department shall seek reimbursement of the appropriate fund or of the Department for
21 any monies disbursed from the appropriate fund or expended by the Department if any
22 of the following apply:

23 (1) The owner or operator has willfully violated any substantive law, rule,
24 or regulation applicable to underground storage tanks and intended to
25 prevent or mitigate discharges or releases or to facilitate the early
26 detection of discharges or releases.

27 (2) The discharge or release is the result of the owner's or operator's
28 willful or wanton misconduct.

29 (3) The owner or operator has failed to pay any annual tank operating fee
30 due pursuant to G.S. 143-215.94C.

31 (h) Subdivision (1) of subsection (g) of this section shall not be construed to limit
32 the right of an owner or operator to contest notices of violation or orders issued by the
33 Department. Subdivision (1) of subsection (g) of this section shall not apply to a
34 payment or reimbursement pursuant to this section if, at the time of the discharge or
35 release, the owner or operator holds a valid operating permit as required by
36 G.S. 143-215.94U.

37 ~~(i) An owner or operator who notifies the Department of an intention to close or~~
38 ~~upgrade a commercial underground storage tank as provided in~~
39 ~~G.S. 143-215.94B(b)(2a) shall commence the closure or upgrade prior to 1 July 1994~~
40 ~~and shall complete the closure or upgrade prior to 1 January 1995. An owner who~~
41 ~~notifies the Department of an intention to close or upgrade a commercial underground~~
42 ~~storage tank and who fails to commence and complete the closure as specified in this~~
43 ~~subsection is subject to a civil penalty as provided in G.S. 143-215.94W. The provisions~~
44 ~~of G.S. 143-215.94B(b)(2a) do not apply if an owner or operator who notifies the~~

1 ~~Department of an intention to close or upgrade a commercial underground storage tank~~
2 ~~fails to commence or complete the closure or upgrade within the dates specified in this~~
3 ~~subsection.~~

4 ~~The clear proceeds of civil penalties provided for in this subsection shall be remitted~~
5 ~~to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2."~~

6 **SECTION 2.** Notwithstanding Section 13 of S.L. 2003-352, Section 10 of
7 S.L. 2003-352, as amended by subsection (e) of Section 30.10 of S.L. 2004-124 and as
8 codified and amended by Section 1 of this act, shall continue in effect.

9 **SECTION 3.** This act is effective when it becomes law.