

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005**

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SENATE BILL 927

Short Title: Underground Storage Tank Amendments.

(Public)

Sponsors: Senator Clodfelter.

Referred to: Agriculture/Environment/Natural Resources.

March 24, 2005

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

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

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

38 (c) In the case of a discharge or release from a noncommercial underground
39 storage tank or a commercial underground storage tank eligible for the Noncommercial
40 Fund in accordance with G.S. 143-215.94D(b), the owner or operator may elect to have
41 the Noncommercial Fund pay or reimburse the owner or operator for the costs described
42 in G.S. 143-215.94D(b1) up to a maximum of one million dollars (\$1,000,000) per
43 discharge or release.

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

24 (d) In any case where the costs described in G.S. 143-215.94B(b),
25 143-215.94B(b1), or 143-215.94D(b1) exceed one million dollars (\$1,000,000), or one
26 million five hundred thousand dollars (\$1,500,000) if G.S. 143-215.94B(b2) applies, the
27 provisions of Article 21A of this Chapter or any other applicable statute or common law
28 principle regarding liability shall apply for the amount in excess of one million dollars
29 (\$1,000,000) or, if G.S. 143-215.94B(b2) applies, one million five hundred thousand
30 dollars (\$1,500,000). Nothing contained in this Part shall limit or modify any liability
31 that any party may have pursuant to Article 21A of this Chapter, any other applicable
32 statute, or at common law.

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

40 (e1) The Department may contract for any services necessary to evaluate any
41 claim for reimbursement or compensation from either the Commercial Fund or the
42 Noncommercial Fund, may contract for any expert witness or consultant services
43 necessary to defend any decision to pay or deny any claim for reimbursement, and may
44 pay the cost of these services from the fund against which the claim is made; provided

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

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

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

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

38 (2) The Department shall establish the degree of risk to human health and
39 the environment posed by a discharge or release of petroleum from a
40 noncommercial underground storage tank and shall determine a
41 schedule for further assessment and cleanup that is based on the degree
42 of risk to human health and the environment posed by the discharge or
43 release and that gives priority to the assessment and cleanup of
44 discharges and releases that pose the greatest risk. If any of the costs of

1 assessment or cleanup of the discharge or release from a
 2 noncommercial underground storage tank are eligible to be paid from
 3 the Noncommercial Fund, the Department shall also consider the
 4 availability of funds in the Noncommercial Fund and the order in
 5 which the discharge or release was reported in determining the
 6 schedule.

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

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

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

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

1 143-215.94D(b1) and if the Department determines that the cost is
2 reasonable and necessary.

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

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

21 ~~(2)~~(5) If a task is one for which preapproval or approval is required, the
22 Department shall authorize the task only if the task is preapproved or
23 approved as required. The Department shall authorize a task the cost of
24 which is to be paid from the Commercial Fund only when the task is
25 scheduled to be performed on the basis of a priority determination
26 pursuant to subsection (e4) of this section.

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

38 (7) Except as provided in subdivisions ~~(3)~~ and ~~(4)~~(9) and (10) of this
39 subsection, the Department shall not ~~preapprove~~ authorize any task the
40 cost of which is to be paid or reimbursed from the Noncommercial
41 Fund unless the Department determines, based on the scope of the
42 work to be performed and the schedule of reasonable and necessary
43 costs, that sufficient funds will be available in the Noncommercial
44 Fund to pay a claim for payment or reimbursement of the cost of that

1 task within 90 days after the Department determines that the owner,
2 operator, or landowner has submitted a claim with documentation
3 sufficient to establish that the owner, operator, or landowner is eligible
4 to have the claim paid under this Part.

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

16 (3)(9) The Department may ~~preapprove~~ authorize a task the cost of which is
17 to be paid or reimbursed from the Commercial Fund or the
18 Noncommercial Fund when sufficient funds will not be available to
19 pay a claim for payment or reimbursement of the cost of that task
20 within the 90-day period described in ~~subdivision (2)~~ subdivisions (6)
21 and (7) of this subsection if the owner, operator, or landowner
22 specifically requests that the task be ~~preapproved~~ authorized and
23 agrees that the claim for payment or reimbursement of the cost will not
24 be paid until after the Department has paid all claims for payment or
25 reimbursement of costs for tasks that the Department has ~~preapproved~~
26 authorized pursuant to ~~subdivision (2)~~ of this subsection.

27 (4)(10) The Department may ~~preapprove~~ authorize a task the cost of which
28 is to be paid or reimbursed from the Commercial Fund or the
29 Noncommercial Fund when sufficient funds will not be available to
30 pay a claim for payment or reimbursement of the cost of that task
31 within the 90-day period described in ~~subdivision (2)~~ subdivisions (6)
32 and (7) of this subsection if the discharge or release creates an
33 emergency situation. An emergency situation exists when a discharge
34 or release of petroleum results in an imminent threat to human health
35 or the environment. A claim for payment or reimbursement of costs for
36 tasks that are ~~preapproved~~ authorized under this subdivision shall be
37 paid or reimbursed on the same basis as tasks that are ~~preapproved~~
38 authorized under ~~subdivision (2)~~ subdivisions (6) and (7) of this
39 subsection.

40 (11) An owner, operator, or landowner is not eligible to have the cost of
41 any task for which authorization is required paid or reimbursed from
42 the Commercial Fund or the Noncommercial Fund until such time as
43 the task is authorized. An owner, operator, or landowner may elect to
44 undertake further assessment or cleanup before receiving

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

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

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

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

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

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

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

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

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

1 ~~fails to commence or complete the closure or upgrade within the dates specified in this~~
2 ~~subsection.~~

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

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

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