

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003**

**SESSION LAW 2003-352
HOUSE BILL 897**

AN ACT TO IMPROVE THE SOLVENCY OF THE COMMERCIAL LEAKING PETROLEUM UNDERGROUND STORAGE TANK CLEANUP FUND AND THE NONCOMMERCIAL LEAKING PETROLEUM UNDERGROUND STORAGE TANK CLEANUP FUND BY TEMPORARILY REQUIRING THAT CLEANUPS PROCEED ONLY AFTER PREAPPROVAL BY THE DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES PURSUANT TO A SCHEDULE BASED ON THE DEGREE OF RISK TO HUMAN HEALTH AND THE ENVIRONMENT AND OTHER FACTORS; TO PROVIDE THAT PAYMENT OR REIMBURSEMENT FROM THE COMMERCIAL FUND AND NONCOMMERCIAL FUND BE LIMITED TO THAT NECESSARY TO ACHIEVE THE MOST COST-EFFECTIVE CLEANUP; TO PROVIDE FOR THE IMPLEMENTATION OF PERFORMANCE-BASED CLEANUPS; TO MINIMIZE FUTURE DISCHARGES AND RELEASES BY AUTHORIZING THE ADOPTION OF RULES TO REQUIRE THE USE OF SECONDARY CONTAINMENT FOR PETROLEUM UNDERGROUND STORAGE TANK SYSTEMS; TO AUTHORIZE THE ENVIRONMENTAL MANAGEMENT COMMISSION TO ADOPT TEMPORARY AND PERMANENT RULES TO REDUCE CERTAIN TESTING REQUIREMENTS APPLICABLE TO THE LEAKING UNDERGROUND STORAGE TANK CLEANUP PROGRAM TO REDUCE COSTS; TO PROVIDE THAT A MIXED PLUME OF CONTAMINATION THAT RESULTS FROM RELEASES OF PETROLEUM FROM BOTH AN UNDERGROUND STORAGE TANK AND AN ABOVEGROUND STORAGE TANK OR OTHER SOURCE MAY BE CLEANED UP UNDER THE RISK-BASED CLEANUP RULES APPLICABLE TO RELEASES FROM PETROLEUM UNDERGROUND STORAGE TANKS; AND TO AUTHORIZE THE ENVIRONMENTAL REVIEW COMMISSION TO STUDY ISSUES RELATED TO THE LEAKING PETROLEUM UNDERGROUND STORAGE TANK CLEANUP PROGRAM IN ORDER TO PROTECT PROPERTY VALUES, ENSURE TIMELY REIMBURSEMENT OF PERSONS WHO ENGAGE IN CLEANUPS, AND PROTECT GROUNDWATER.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143-215.94A is amended by adding a new subsection to read:

- "(2a) 'Cost-effective cleanup' means the cleanup method that meets all of the following criteria:
- a. Addresses imminent threats to human health or the environment.
 - b. Provides for the cleanup or removal of all contaminated soil except in circumstances where it is impractical to remove contaminated soil.
 - c. Is approved by the Commission for remediation of the site.
 - d. Is the least expensive cleanup based on total cost, including costs not eligible for reimbursement from the Commercial Fund or the Noncommercial Fund."

SECTION 2. G.S. 143-215.94B(d) reads as rewritten:

- "(d) The Commercial Fund shall not be used for:
- (1) Costs incurred as a result of a discharge or release from an aboveground tank, aboveground pipe or fitting not connected to an underground storage tank, or vehicle.
 - (2) The removal or replacement of any tank, pipe, fitting or related equipment.
 - (3) Costs incurred as a result of a discharge or release of petroleum from a transmission pipeline.
 - (4) Costs intended to be paid by the Noncommercial Fund.
 - (5) Costs associated with the administration of any underground storage tank program other than the program administered pursuant to this Part.
 - (6) Costs paid or reimbursed by or from any source other than the Commercial Fund, including but not limited to, any payment or reimbursement made under a contract of insurance.
 - (7) Costs incurred as a result of the cleanup of environmental damage to groundwater to a more protective standard than the risk-based standard required by the Department unless the cleanup of environmental damage to groundwater to a more protective standard is necessary to resolve a claim for compensation by a third party for property damage.
 - (8) Costs in excess of those required to achieve the most cost-effective cleanup."

SECTION 3. G.S. 143-215.94B(f) reads as rewritten:

"(f) **(Effective until October 1, 2006)** ~~On the first day of~~ During each fiscal ~~quarter, year,~~ the Department may ~~allocate use up to fifty percent (50%) two million five hundred thousand dollars (\$2,500,000)~~ of the funds in the Commercial Fund ~~that are not otherwise obligated~~ for performance-based cleanups as provided in this subsection. The Department may also use any funds that are available from any other source and that are specifically intended to be used for performance-based cleanups as provided in this section. Each performance-based cleanup shall comply with the requirements of this Part and any other provisions of law that govern the cleanup of environmental damage resulting from the discharge or release of a petroleum product from a commercial underground storage tank. The Department or any owner, operator, or landowner may contract for performance-based cleanups with environmental services firms that the Department has determined to be qualified to satisfactorily complete the work associated with a cleanup. Before the award of the contract, the environmental services firms shall secure a surety or performance bond equal to the price of the firm's services under the contract and shall demonstrate having secured the surety or performance bond to the satisfaction of the Department. The surety shall be liable on the bond obligation when the environmental services firms fail to perform as specified in the contract. A performance-based contract shall provide that cleanup will be completed within the time and for the cost stated in the contract. The Department or any owner, operator, or landowner shall select environmental services firms for performance-based cleanup through a competitive bidding process. The Commission shall adopt rules governing the competitive bidding process, process and any other rules necessary to implement this subsection. The rules shall establish qualifications for environmental services firms and for individuals and firms that provide engineering services as part of a contract to satisfactorily complete work associated with cleanup."

SECTION 4. G.S. 143-215.94D(d) reads as rewritten:

- "(d) The Noncommercial Fund shall not be used for:
- (1) Costs incurred as a result of a discharge or release from an aboveground tank, aboveground pipe or fitting not connected to an underground storage tank, or vehicle.

- (2) The removal or replacement of any tank, pipe, fitting or related equipment.
- (3) Costs incurred as a result of a discharge or release of petroleum from a transmission pipeline.
- (4) Costs intended to be paid for by the Commercial Fund.
- (5) Costs associated with the administration of any underground storage tank program other than the program administered pursuant to this Part.
- (6) Costs paid or reimbursed by or from any source other than the Noncommercial Fund, including, but not limited to, any payment or reimbursement made under a contract of insurance.
- (7) Costs incurred as a result of the cleanup of environmental damage to groundwater to a more protective standard than the risk-based standard required by the Department unless the cleanup of environmental damage to groundwater to a more protective standard is necessary to resolve a claim for compensation by a third party for property damage.
- (8) Costs in excess of those required to achieve the most cost-effective cleanup."

SECTION 5. G.S. 143-215.94D(f) reads as rewritten:

"(f) **(Effective until October 1, 2006)** ~~On the first day of~~ During each fiscal ~~quarter, year~~ the Department may ~~allocate~~ use up to ~~fifty percent (50%) two hundred fifty thousand dollars (\$250,000)~~ of the funds in the Noncommercial Fund ~~that are not otherwise obligated~~ for performance-based cleanups as provided in this subsection. The Department may also use any funds that are available from any other source and that are specifically intended to be used for performance-based cleanups as provided in this section. Each performance-based cleanup shall comply with the requirements of this Part and any other provisions of law that govern the cleanup of environmental damage resulting from the discharge or release of a petroleum product from a noncommercial underground storage tank. The Department or any owner, operator, or landowner may contract for performance-based cleanups with environmental services firms that the Department has determined to be qualified to satisfactorily complete the work associated with a cleanup. Before the award of the contract, the environmental services firms shall secure a surety or performance bond equal to the price of the firm's services under the contract and shall demonstrate having secured the surety or performance bond to the satisfaction of the Department. The surety shall be liable on the bond obligation when the environmental services firms fail to perform as specified in the contract. A performance-based contract shall provide that cleanup will be completed within the time and for the cost stated in the contract. The Department or any owner, operator, or landowner shall select environmental services firms for performance-based cleanup through a competitive bidding process—process and any other rules necessary to implement this subsection."

SECTION 6. G.S. 143-215.94E(f) is repealed.

SECTION 7. G.S. 143-215.94E(g) reads as rewritten:

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

- (1) The owner or operator has willfully violated any substantive law, rule, or regulation applicable to underground storage tanks and intended to prevent or mitigate discharges or releases or to facilitate the early detection of discharges or ~~releases; releases.~~
- (2) The discharge or release is the result of the owner's or operator's willful or wanton ~~misconduct; or misconduct.~~
- (3) The owner or operator has failed to pay any annual tank operating fee due pursuant to G.S. 143-215.94C."

SECTION 8. G.S. 143-215.94T reads as rewritten:

"§ 143-215.94T. Adoption and implementation of regulatory program.

(a) The Commission shall adopt, and the Department shall implement and enforce, rules relating to underground storage tanks as provided by G.S. 143-215.3(a)(15) and G.S. 143B-282(2)h. These rules shall include standards and requirements applicable to both existing and new underground storage tanks and tank systems, may include different standards and requirements based on tank capacity, tank location, tank age, and other relevant factors, and shall include, at a minimum, standards and requirements for:

- (1) Design, construction, and installation, including monitoring systems.
- (2) Notification to the Department, inspection, and registration.
- (3) Recordation of tank location.
- (4) Modification, retrofitting, and upgrading.
- (5) General operating requirements.
- (6) Release detection.
- (7) Release reporting, investigation, and confirmation.
- (8) Corrective action.
- (9) Repair.
- (10) Closure.
- (11) Financial responsibility.
- (12) Tank tightness testing procedures and certification of persons who conduct tank tightness tests.
- (13) Secondary containment for nontank components of petroleum underground storage tank systems.

(b) Rules adopted pursuant to subsection (a) of this section that apply only to commercial underground storage tanks shall not apply to any:

- (1) Farm or residential underground storage tank of 1,100 gallons or less capacity used for storing motor fuel for noncommercial purposes.
- (2) Underground storage tank of 1,100 gallons or less capacity used for storing heating oil for consumptive use on the premises where stored.
- (3) Underground storage tank of more than 1,100 gallon capacity used for storing heating oil for consumptive use on the premises where stored by four or fewer households.

(c) Rules adopted pursuant to subdivision (13) of subsection (a) of this section shall require secondary containment for all nontank components of underground storage tank systems, including all piping and fittings, pump heads, and dispensers. Secondary containment requirements shall include standards for double wall piping and fittings and sump containment for pump heads and dispensers. The rules shall provide for monthly monitoring of double wall interstices and sump containments. The rules shall apply to any underground storage tank system that is installed on or after the date on which the rules become effective and to the replacement of any nontank component of an underground storage tank system on or after that date.

SECTION 9. G.S. 143-215.94V reads as rewritten:

"§ 143-215.94V. Standards for petroleum underground storage tank cleanup.

(a) Legislative findings and intent.

- (1) The General Assembly finds that:
 - a. The goals of the underground storage tank program are to protect human health and the environment. Maintaining the solvency of the Commercial Fund and the Noncommercial Fund is essential to these goals.
 - b. The sites at which discharges or releases from underground storage tanks occur vary greatly in terms of complexity, soil types, hydrogeology, other physical and chemical characteristics, current and potential future uses of groundwater,

and the degree of risk that each site may pose to human health and the environment.

- c. Risk-based corrective action is a process that recognizes this diversity and utilizes an approach where assessment and remediation activities are specifically tailored to the conditions and risks of a specific site.
 - d. Risk-based corrective action gives the State flexibility in requiring different levels of cleanup based on scientific analysis of different site characteristics, and allowing no action or no further action at sites that pose little risk to human health or the environment.
 - e. A risk-based approach to the cleanup of environmental damage can adequately protect human health and the environment while preventing excessive or unproductive cleanup efforts, thereby assuring that limited resources are directed toward those sites that pose the greatest risk to human health and the environment.
- (2) The General Assembly intends:
- a. To direct the Commission to adopt rules that will provide for risk-based assessment and cleanup of discharges and releases from petroleum underground storage tanks. These rules are intended to combine groundwater standards that protect current and potential future uses of groundwater with risk-based analysis to determine the appropriate cleanup levels and actions.
 - b. That these rules apply to all discharges or releases that are reported on or after the date the rules become effective in order to ascertain whether cleanup is necessary, and if so, the appropriate level of cleanup.
 - c. That these rules may be applied to any discharge or release that has been reported at the time the rules become effective at the discretion of the Commission.
 - d. That these rules and decisions of the Commission and the Department in implementing these rules facilitate the completion of more cleanups in a shorter period of time.
 - e. That neither the Commercial Fund nor the Noncommercial Fund be used to clean up sites where the Commission has determined that a discharge or release poses a degree of risk to human health or the environment that is no greater than the acceptable level of risk established by the Commission.
 - f. Repealed by Session Laws 1998-161, s. 11(c).
 - g. That the Commercial Fund and the Noncommercial Fund be used to perform the most cost-effective cleanup that addresses imminent threats to human health and the environment.

(b) The Commission shall adopt rules to establish a risk-based approach for the assessment, prioritization, and cleanup of discharges and releases from petroleum underground storage tanks. The rules shall address, at a minimum, the circumstances where site-specific information should be considered, criteria for determining acceptable cleanup levels, and the acceptable level or range of levels of risk to human health and the environment.

(c) The Commission may require an owner or operator or a landowner eligible for payment or reimbursement under subsections (b), (b1), (c), and (c1) of G.S. 143-215.94E to provide information necessary to determine the degree of risk to human health and the environment that is posed by a discharge or release from a petroleum underground storage tank, and to identify the most cost-effective cleanup that addresses imminent threats to human health and the environment.

(d) If the Commission concludes that a discharge or release poses a degree of risk to human health or the environment that is no greater than the acceptable level of risk established by the Commission, the Commission shall notify an owner, operator, or landowner who provides the information required by subsection (c) of this section that no cleanup, further cleanup, or further action will be required unless the Commission later determines that the discharge or release poses an unacceptable level of risk or a potentially unacceptable level of risk to human health or the environment. If the Commission concludes that a discharge or release poses a degree of risk to human health or the environment that requires further cleanup, the Commission shall notify the owner, operator, or landowner who provides the information required by subsection (c) of this section of the cleanup method approved by the Commission as the most cost-effective cleanup method for the site. This section shall not be construed to prohibit an owner, operator, or landowner from selecting a cleanup method other than the cost-effective cleanup method approved by the Commission so long as the Commission determines that the alternative cleanup method will address imminent threats to human health and the environment.

(e) If the Commission concludes under subsection (d) of this section that no cleanup, no further cleanup, or no further action will be required, the Department shall not pay or reimburse any costs otherwise payable or reimbursable under this Article from either the Commercial or Noncommercial Fund, other than reasonable and necessary to conduct the risk assessment required by this section, unless:

- (1) Cleanup is ordered or damages are awarded in a finally adjudicated judgment in an action against the owner or landowner.
- (2) Cleanup is required or damages are agreed to in a consent judgment approved by the Department prior to its entry by the court.
- (3) Cleanup is required or damages are agreed to in a settlement agreement approved by the Department prior to its execution by the parties.
- (4) The payment or reimbursement is for costs that were incurred prior to or as a result of notification of a determination by the Commission that no cleanup, no further cleanup, or no action is required.
- (5) The payment or reimbursement is for costs that were incurred as a result of a later determination by the Commission that the discharge or release poses a threat or potential threat to human health or the environment as provided in subsection (d) of this section.

(e1) If the Commission concludes under subsection (d) of this section that further cleanup is required and notifies the owner, operator, or landowner of the cleanup method approved by the Commission as the most cost-effective cleanup method for the site, the Department shall not pay or reimburse any costs otherwise payable or reimbursable under this Article from either the Commercial Fund or Noncommercial Fund, other than those costs that are reasonable and necessary to conduct the risk assessment and to implement the cost-effective cleanup method approved by the Commission. If the owner, operator, or landowner selects a cleanup method other than the one identified by the Commission as the most cost-effective cleanup, the Department shall not pay or reimburse for costs in excess of the cost of implementing the approved cost-effective cleanup.

(f) This section shall not be construed to limit the authority of the Commission to require investigation, initial response, and abatement of a discharge or release pending a determination by the Commission under subsection (d) of this section as to whether cleanup, further cleanup, or further action will be required.

(g) Subsections (c) through ~~(e)~~(e1) of this section apply only to assessments and cleanups in progress or begun on or after 2 January 2, 1998.

(h) If a discharge or release of petroleum from an underground storage tank results in contamination in soil or groundwater that becomes commingled with contamination that is the result of a discharge or release of petroleum from a source of

contamination other than an underground storage tank, the cleanup of petroleum may proceed under rules adopted pursuant to this section. The Department shall not pay or reimburse any costs associated with the assessment or remediation of that portion of contamination that results from a release or discharge of petroleum from a source other than an underground storage tank from either the Commercial Fund or the Noncommercial Fund."

SECTION 10. The definitions set out in G.S. 143-212 and G.S. 143-215.94A apply to this section. The rights and obligations of an owner, operator, or a landowner to whom G.S. 143-215.94E(b1) applies who is eligible to have costs paid or reimbursed under G.S. 143-215.94B shall be governed by G.S. 143-215.94E as modified by this section. The Department shall establish the degree of risk to human health and the environment posed by a discharge or release of petroleum from a commercial underground storage tank and shall determine a schedule for further assessment and cleanup based on the degree of risk to human health and the environment posed by the discharge or release. If any of the costs of assessment and cleanup of the discharge or release from a commercial underground storage tank are eligible to be paid from the Commercial Fund, the Department shall also consider the availability of funds in the Commercial Fund and the order in which the discharge or release was reported in determining the schedule. The Department may revise the schedule that applies to the assessment and cleanup of any discharge or release at any time based on its reassessment of any of the foregoing factors. The lack of availability of funds in the Commercial Fund shall not relieve an owner or operator of responsibility to immediately undertake to collect and remove the discharge or release or to conduct any assessment or cleanup ordered by the Department or be a defense against any violations and penalties issued to the owner or operator for failure to conduct required assessment or cleanup. If the owner or operator takes initial steps to collect and remove the discharge or release as required by the Department and completes initial assessment required to determine degree of risk, the owner or operator shall not be subject to any violation or penalty for any failure to proceed with further assessment or cleanup under G.S.143-215.84 or G.S. 143-215.94E before the owner or operator is authorized to proceed with further assessment or cleanup pursuant to the schedule set by the Department. Once the Department has determined a schedule for the assessment and cleanup of a discharge or release from a commercial underground storage tank, an owner, operator, or other person responsible for the assessment and cleanup is not eligible to have the costs of the assessment or cleanup paid or reimbursed from the Commercial Fund until such time as further assessment or cleanup is authorized by the Department pursuant to the schedule. An owner, operator, or other person may undertake further assessment or cleanup before receiving authorization from the Department. An owner, operator, or other person who undertakes further assessment or cleanup before receiving authorization from the Department shall be reimbursed only after the Department has paid or reimbursed the costs for all assessments and cleanups that the Department has authorized.

SECTION 11. In order to reduce costs associated with the assessment and cleanup of discharges and releases of petroleum from petroleum underground storage tanks, the Environmental Management Commission may adopt temporary and permanent rules to modify the testing requirements set out in 15A NCAC 2L.0115 (Risk-Based Assessment and Corrective Action for Petroleum Underground Storage Tanks). Reference to this section shall satisfy the requirement for a statement of finding of need for a temporary rule.

SECTION 12.(a) The Environmental Review Commission may study issues related to the Leaking Petroleum Underground Storage Tank Cleanup Program. The Commission may evaluate any of the following:

- (1) The adequacy of program funding.
- (2) Options for management of available funds, including prioritization of cleanups and preapproval of cleanups.

- (3) Changes in deductible and co-payment requirements.
- (4) Options to increase program funding.
- (5) The availability and use of private insurance to pay or reimburse the costs of the assessment and cleanup of releases and discharges of petroleum from petroleum underground storage tanks and of any liability of owners and operators of those tanks to third parties.
- (6) Issues related to the inclusion of aboveground storage tanks in the program, including registration, fees and other funding issues, cleanup standards, and regulation of these tanks.
- (7) Issues related to the provision of liability protection to a bona fide purchaser of a petroleum-contaminated property who has knowledge of, but did not cause or contribute to, the contamination of the property.

SECTION 12.(b) The Commission may report its findings and recommendations, including any proposed legislation, to the 2004 Regular Session of the 2003 General Assembly, or to the 2005 General Assembly.

SECTION 13. This act is effective when it becomes law. Section 10 of this act expires 1 October 2005.

In the General Assembly read three times and ratified this the 15th day of July, 2003.

s/ Marc Basnight
President Pro Tempore of the Senate

s/ James B. Black
Speaker of the House of Representatives

s/ Michael F. Easley
Governor

Approved 1:49 p.m. this 27th day of July, 2003