

**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2005**

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**HOUSE BILL 1385**

Short Title: Underground Storage Tank Amendments.

(Public)

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Sponsors: Representatives Gibson; and Harrison.

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Referred to: Environment and Natural Resources.

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April 21, 2005

A BILL TO BE ENTITLED

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

7 The General Assembly of North Carolina enacts:

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

9 **"§ 143-215.94E. Rights and obligations of the owner or operator.**

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

16 (a1) If a spill or overflow associated with a petroleum underground storage tank  
17 results in a release of petroleum to the environment of 25 gallons or more or causes a  
18 sheen on nearby surface water, the owner or operator of the petroleum underground  
19 storage tank shall immediately clean up the spill or overflow, report the spill or overflow to  
20 the Department within 24 hours of the spill or overflow, and begin to restore the area  
21 affected in accordance with the requirements of this Article. The owner or operator of a  
22 petroleum underground storage tank shall immediately clean up a spill or overflow of less  
23 than 25 gallons of petroleum that does not cause a sheen on nearby surface water. If a  
24 spill or overflow of less than 25 gallons of petroleum cannot be cleaned up within 24  
25 hours of the spill or overflow or causes a sheen on nearby surface water, the owner or  
26 operator of the petroleum underground storage tank shall immediately notify the  
27 Department.  
28

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.