

**GENERAL ASSEMBLY OF NORTH CAROLINA**  
**SESSION 2005**

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**2**

**HOUSE BILL 1385**  
**Committee Substitute Favorable 5/26/05**

Short Title: Underground Storage Tank Amendments.

(Public)

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Sponsors:

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Referred to:

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April 21, 2005

A BILL TO BE ENTITLED

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

8 The General Assembly of North Carolina enacts:

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

10 **"§ 143-215.94E. Rights and obligations of the owner or operator.**

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

17 (a1) If a spill or overflow associated with a petroleum underground storage tank  
18 results in a release of petroleum to the environment of 25 gallons or more or causes a  
19 sheen on nearby surface water, the owner or operator of the petroleum underground  
20 storage tank shall immediately clean up the spill or overflow, report the spill or overflow to  
21 the Department within 24 hours of the spill or overflow, and begin to restore the area  
22 affected in accordance with the requirements of this Article. The owner or operator of a  
23 petroleum underground storage tank shall immediately clean up a spill or overflow of less  
24 than 25 gallons of petroleum that does not cause a sheen on nearby surface water. If a  
25 spill or overflow of less than 25 gallons of petroleum cannot be cleaned up within 24  
26 hours of the spill or overflow or causes a sheen on nearby surface water, the owner or  
27 operator of the petroleum underground storage tank shall immediately notify the  
28 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) If the owner or operator takes initial steps to collect and remove the  
27 discharge or release as required by the Department and completes the  
28 initial assessment required to determine degree of risk, the owner or  
29 operator shall not be subject to any violation or penalty for any failure  
30 to proceed with further assessment or cleanup under G.S. 143-215.84  
31 or this section before the owner or operator is authorized to proceed  
32 with further assessment or cleanup as provided in subsection (e5) of  
33 this section. The lack of availability of funds in the Commercial Fund  
34 or the Noncommercial Fund shall not relieve an owner or operator of  
35 responsibility to immediately undertake to collect and remove the  
36 discharge or release or to conduct any assessment or cleanup ordered  
37 by the Department or be a defense against any violations and penalties  
38 issued to the owner or operator for failure to conduct required  
39 assessment or cleanup.

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 commercial underground storage tank and shall determine a schedule  
43 for further assessment and cleanup that is based on the degree of risk  
44 to human health and the environment posed by the discharge or release

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

8                   (3)   The Department shall establish the degree of risk to human health and  
9                   the environment posed by a discharge or release of petroleum from a  
10                  noncommercial underground storage tank and shall determine a  
11                  schedule for further assessment and cleanup that is based on the degree  
12                  of risk to human health and the environment posed by the discharge or  
13                  release and that gives priority to the assessment and cleanup of  
14                  discharges and releases that pose the greatest risk. If any of the costs of  
15                  assessment or cleanup of the discharge or release from a  
16                  noncommercial underground storage tank are eligible to be paid or  
17                  reimbursed from the Noncommercial Fund, the Department shall also  
18                  consider the availability of funds in the Noncommercial Fund and the  
19                  order in which the discharge or release was reported in determining the  
20                  schedule.

21                  (4)   The Department may revise the schedules that apply to the assessment  
22                  and cleanup of any discharge or release at any time based on its  
23                  reassessment of any of the foregoing factors.

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

25                  a.    'Authorization' means a determination by the Department that a  
26                  person may proceed with one or more tasks associated with the  
27                  assessment or cleanup of a discharge or release from a  
28                  petroleum underground storage tank. To 'authorize' means to  
29                  make such a determination.

30                  b.    'Preapproval' means a determination by the Department that:

31                        1.   The nature and scope of a task is reasonable and  
32                        necessary to be performed under G.S. 143-215.94B(b),  
33                        143-215.94B(b1), or 143-215.94D(b1) in order to  
34                        achieve the purposes of this Part.

35                        2.   The amount or rate to be paid or reimbursed for a task  
36                        does not exceed the amount or rate that is reasonable for  
37                        that task.

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

1 preapproval is required if the owner, operator, or landowner failed to  
2 obtain preapproval of the task. The Department shall pay or reimburse  
3 the cost of a task only if the cost is eligible to be paid under  
4 G.S. 143-215.94B(b), 143-215.94B(b1), or 143-215.94D(b1) and if the  
5 ~~Department determines that the cost is reasonable and necessary task~~  
6 has been preapproved.

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

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

25 (5) The Department shall authorize a task the cost of which is to be paid or  
26 reimbursed from the Commercial Fund or the Noncommercial Fund  
27 only when the task is scheduled to be performed on the basis of a  
28 priority determination pursuant to subsection (e4) of this section. The  
29 Department shall not pay or reimburse the cost of any task for which  
30 authorization is required under this subsection until the Department  
31 has preapproved and authorized the task.

32 ~~(2)(6)~~ (6) Except as provided in subdivisions ~~(3) and (4)~~(8) and (9) of this  
33 subsection, the Department shall not ~~preapprove~~ authorize any task the  
34 cost of which is to be paid or reimbursed from the Commercial Fund  
35 or the Noncommercial Fund unless the Department determines, based  
36 on the scope of the work to be performed and the schedule of  
37 reasonable and necessary costs, that sufficient funds will be available  
38 in the Commercial Fund or the Noncommercial Fund, whichever  
39 applies, to pay a claim for payment or reimbursement of or reimburse  
40 the cost of that task within 90 days after the Department determines  
41 that the owner, operator, or landowner has submitted a claim with  
42 documentation sufficient to establish that the ~~owner, operator, or~~  
43 ~~landowner claim~~ is eligible to have the claim be paid under this Part.  
44 ~~Except as provided in subdivisions (3) and (4) of this subsection, the~~

1 Department shall not preapprove any task the cost of which is to be  
2 paid or reimbursed from the Noncommercial Fund unless the  
3 Department determines, based on the scope of the work to be  
4 performed and the schedule of reasonable and necessary costs, that  
5 sufficient funds will be available in the Noncommercial Fund to pay a  
6 claim for payment or reimbursement of the cost of that task within 90  
7 days after the Department determines that the owner, operator, or  
8 landowner has submitted a claim with documentation sufficient to  
9 establish that the owner, operator, or landowner is eligible to have the  
10 claim paid under this Part.

11 (7) This subsection shall not be construed to establish a cause of action  
12 against the Commission or the Department for any failure to pay or  
13 reimburse any cost within any specific period of time. This subsection  
14 shall not be construed to establish a defense to any action to enforce  
15 the requirements of either G.S. 143-215.84 or subsection (a) of this  
16 section. ~~This subsection shall not be construed to invalidate any rule of  
17 the Commission related to preapproval of tasks that will result in a cost  
18 that is eligible to be paid or reimbursed under G.S. 143-215.94B(b),  
19 143-215.94B(b1), or 143-215.94D(b1), provided, however, that the  
20 Department may specify additional tasks for which preapproval is  
21 required as provided in this subsection.~~

22 (3)(8) The Department may preapprove and authorize a task the cost of  
23 which is to be paid or reimbursed from the Commercial Fund or the  
24 Noncommercial Fund ~~when sufficient funds will not be available to  
25 pay a claim for payment or reimbursement of the cost of that task  
26 within the 90-day period described in subdivision (2) that has not been  
27 authorized pursuant to subdivisions (5) and (6) of this subsection if the  
28 owner, operator, or landowner specifically requests that the task be  
29 preapproved~~ authorized and agrees that the claim for payment or  
30 reimbursement of the cost will not be paid until after the Department  
31 has paid all claims for payment or reimbursement of costs for tasks  
32 that the Department has ~~preapproved~~ authorized pursuant to  
33 ~~subdivision (2)~~ subdivisions (5) and (6) of this subsection.

34 (4)(9) The Department may preapprove and authorize a task the cost of  
35 which is to be paid or reimbursed from the Commercial Fund or the  
36 Noncommercial Fund ~~when sufficient funds will not be available to  
37 pay a claim for payment or reimbursement of the cost of that task  
38 within the 90-day period described in subdivision (2) that has not been  
39 authorized pursuant to subdivisions (5) and (6) of this subsection if the  
40 discharge or release creates an emergency situation. An emergency  
41 situation exists when a discharge or release of petroleum results in an  
42 imminent threat to human health or the environment. A claim for  
43 payment or reimbursement of costs for tasks that are ~~preapproved~~  
44 authorized under this subdivision shall be paid or reimbursed on the~~

1 same basis as tasks that are ~~preapproved~~ authorized under subdivision  
2 ~~(2)~~ subdivisions (5) and (6) of this subsection.

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

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

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

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

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

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

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

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

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

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

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