

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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HOUSE BILL 1385
Committee Substitute Favorable 5/26/05
Senate Agriculture/Environment/Natural Resources Committee Substitute
Adopted 8/11/05

Short Title: Underground Storage Tank Amendments.

(Public)

Sponsors:

Referred to:

April 21, 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.(a) G.S. 143-215.94E reads as rewritten:

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

...

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

(e1) The Department may contract for any services necessary to evaluate any
claim for reimbursement or compensation from either the Commercial Fund or the
Noncommercial Fund, may contract for any expert witness or consultant services
necessary to defend any decision to pay or deny any claim for reimbursement, and may
pay the cost of these services from the fund against which the claim is made; provided
that in any fiscal year the Department shall not expend from either fund more than one
percent (1%) of the unobligated balance of the fund on 30 June of the previous fiscal
year. The cost of contractual services to evaluate a claim or for expert witness or

1 consultant services to defend a decision with respect to a claim shall be included as
2 costs under G.S. 143-215.94B(b), 143-215.94B(b1), and 143-215.94D(b1).

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

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

23 (e4) (1) If the owner or operator takes initial steps to collect and remove the
24 discharge or release as required by the Department and completes the
25 initial assessment required to determine degree of risk, the owner or
26 operator shall not be subject to any violation or penalty for any failure
27 to proceed with further assessment or cleanup under G.S. 143-215.84
28 or this section before the owner or operator is authorized to proceed
29 with further assessment or cleanup as provided in subsection (e5) of
30 this section. The lack of availability of funds in the Commercial Fund
31 or the Noncommercial Fund shall not relieve an owner or operator of
32 responsibility to immediately undertake to collect and remove the
33 discharge or release or to conduct any assessment or cleanup ordered
34 by the Department or be a defense against any violations and penalties
35 issued to the owner or operator for failure to conduct required
36 assessment or cleanup.

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

1 underground storage tank are eligible to be paid or reimbursed from
2 the Commercial Fund, the Department shall also consider the
3 availability of funds in the Commercial Fund and the order in which
4 the discharge or release was reported in determining the schedule.

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

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

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

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

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

28 1. The nature and scope of a task is reasonable and
29 necessary to be performed under G.S. 143-215.94B(b),
30 143-215.94B(b1), or 143-215.94D(b1) in order to
31 achieve the purposes of this Part.

32 2. The amount estimated for the cost of a task does not
33 exceed the amount or rate that is reasonable for that task.

34 (1)(2) The Department may require an owner, operator, or landowner to
35 obtain approval from the Department preapproval before proceeding
36 with any task that will result in a cost that is eligible to be paid or
37 reimbursed under G.S. 143-215.94B(b), 143-215.94B(b1), or
38 143-215.94D(b1)-task. The Department shall specify those tasks for
39 which preapproval is required. The Department shall deny any request
40 for payment or reimbursement of the cost of any task for which
41 preapproval is required if the owner, operator, or landowner failed to
42 obtain preapproval of the task. Preapproval of a task by the
43 Department does not guarantee payment or reimbursement in the
44 amount estimated for the cost of the task at the time preapproval is

1 requested. The Department shall pay or reimburse the cost of a task
2 only if ~~the~~all of the following apply:

3 a. The cost is eligible to be paid under G.S. 143-215.94B(b),
4 143-215.94B(b1), or ~~143-215.94D(b1)-143-215.94D(b1).~~

5 b. Payment is in accordance with G.S. 143-215.94B(d) or
6 G.S. 143-215.94D(d).

7 c. ~~and if the~~The Department determines that the cost is reasonable
8 and necessary.

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

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

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

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

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

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

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

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

1 payment or reimbursement of costs for tasks that are ~~preapproved~~
2 authorized under this subdivision shall be paid or reimbursed on the
3 same basis as tasks that are ~~preapproved-authorized~~ under subdivision
4 ~~(2)~~ subdivisions (5) and (6) of this subsection.

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

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

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

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

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

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

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

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

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

3 ~~**SECTION 1.(b)** — Notwithstanding G.S. 143-215.94E(k), as enacted by~~
4 ~~subsection (a) of this section, an owner, operator, or landowner shall request payment or~~
5 ~~reimbursement of the cost of any task completed prior to 1 January 2006 that is eligible~~
6 ~~to be paid or reimbursed from the Commercial Fund or the Noncommercial Fund no~~
7 ~~later than 1 January 2007. The Department shall deny any request for payment or~~
8 ~~reimbursement of the cost of any task to which this subsection applies that is made after~~
9 ~~1 January 2007.~~

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

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