

GENERAL ASSEMBLY OF NORTH CAROLINA

SESSION 1993

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SENATE BILL 1651*

Short Title: Underground Storage Tank Amends 94.

(Public)

Sponsors: Senator Tally.

Referred to: Environment and Natural Resources.

June 1, 1994

A BILL TO BE ENTITLED

1 AN ACT TO IMPLEMENT RECOMMENDATIONS OF THE STATE AUDITOR
2 AND THE DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL
3 RESOURCES REGARDING THE REGULATION OF PETROLEUM
4 UNDERGROUND STORAGE TANKS AND THE CLEANUP OF LEAKING
5 PETROLEUM UNDERGROUND STORAGE TANKS, AS RECOMMENDED BY
6 THE ENVIRONMENTAL REVIEW COMMISSION.
7

8 The General Assembly of North Carolina enacts:

9 Section 1. G.S. 143-215.94E(e) reads as rewritten:

10 "(e) When the owner or operator pays the costs described in G.S. 143-215.94B(b)
11 or G.S. 143-215.94D(b1) resulting from a discharge or release of petroleum from an
12 underground storage tank, the owner or operator may seek reimbursement from the
13 appropriate fund for any costs he may elect to have either the Commercial Fund or the
14 Noncommercial Fund pay in accordance with subsections (b) and (c) of this section.
15 The Department shall reimburse the owner or operator for all costs he may elect to have
16 the appropriate fund pay that the Department determines to be reasonable and necessary
17 and for which appropriate documentation is submitted. The Department may contract
18 for any services necessary to evaluate any claim for reimbursement or compensation
19 from either the Commercial Fund or the Noncommercial Fund and may pay the cost of
20 these services from the fund against which the claim is made. The cost of contractual
21 services to evaluate a claim shall be included as costs under G.S. 143-215.94B(b) and
22 G.S. 143-215.94D(b1). The Commission shall adopt rules governing reimbursement of
23 necessary and reasonable costs. An owner or operator whose claim for reimbursement
24 is denied may appeal a decision of the Department as provided in Article 3 of Chapter

1 150B of the General Statutes. If the owner or operator is eligible for reimbursement
2 under this section and the cleanup extends beyond a period of three months, the owner
3 or operator may apply to the Department for interim reimbursements to which he is
4 entitled under this section on a quarterly basis."

5 Sec. 2. G.S. 143-215.94G(a) reads as rewritten:

6 "(a) The Department may use staff, equipment, or materials under its control or
7 provided by other cooperating federal, State, or local agencies and may contract with
8 any agent or contractor it deems appropriate to investigate a release, to develop and
9 implement a cleanup plan, to provide interim alternative sources of drinking water to
10 third parties, and to pay the initial costs for providing permanent alternative sources of
11 drinking water to third parties, and shall pay the costs resulting from commercial
12 underground storage tanks from the Commercial Fund and shall pay the costs resulting
13 from noncommercial underground storage tanks from the Noncommercial Fund,
14 whenever there is a discharge or release of petroleum from any of the following:

- 15 (1) A noncommercial underground storage tank.
- 16 (2) An underground storage tank whose owner or operator cannot be
17 identified or located.
- 18 (3) An underground storage tank whose owner or operator fails to proceed
19 as required by G.S. 143-215.94E(a).
- 20 (4) A commercial underground storage tank taken out of operation prior to
21 1 January 1974 if, when the discharge or release is discovered, neither
22 the owner nor operator owns or leases the land on which the
23 underground storage tank is located."

24 Sec. 3. G.S. 143-215.94K reads as rewritten:

25 "**§ 143-215.94K. Penalties. Enforcement.**

26 The penalties provided in G.S. 143-215.102 provisions of G.S. 143-215.94V through
27 G.S. 143-215.94X shall apply to this Part, ~~provided that no penalty imposed under this~~
28 ~~Part shall exceed five thousand dollars (\$5,000). Part."~~

29 Sec. 4. G.S. 143-215.94L is amended by adding a new subsection to read:

30 "(e) Subject to appropriation by the General Assembly, the Department is
31 authorized to spend up to three million seven hundred seventy-five thousand dollars
32 (\$3,775,000) from the Commercial Fund and six hundred seventy-five thousand dollars
33 (\$675,000) from the Noncommercial Fund to implement the provisions of this Part and
34 Part 2B of this Article."

35 Sec. 5. Part 2B of Article 21A of Chapter 143 is amended by adding four
36 new sections to read:

37 "**§ 143-215.94U. Registration of petroleum underground storage tanks; operation**
38 **of petroleum underground storage tanks; permit required.**

39 (a) The owner or operator of each petroleum underground storage tank for which
40 notification to the Department is required under 40 Code of Federal Regulations §
41 280.22 (1 July 1994 Edition) or 42 U.S.C. § 6991a shall obtain an operating permit from
42 the Department. The Department shall issue an operating permit only if the owner or
43 operator:

- 1 (1) Has notified the Department of the existence of the tank as required by
2 40 Code of Federal Regulations § 280.22 (1 July 1994 Edition or 42
3 U.S.C. § 6991a;
- 4 (2) Has paid all fees required under G.S. 143-215.94C;
- 5 (3) Complies with applicable release detection requirements set out in
6 rules adopted pursuant to this Chapter, notifies the Department of the
7 method or combination of methods of leak detection in use; and
8 certifies to the Department that all applicable release detection
9 requirements are being met; and
- 10 (4) Complies with applicable air quality requirements set out in rules
11 adopted pursuant to this Chapter, notifies the Department of the
12 method or combination of methods of emission controls in use; and
13 certifies to the Department that all applicable emission control
14 requirements are being met.
- 15 (b) No person shall place a petroleum product, or cause a petroleum product to be
16 placed, into an underground storage tank for which the owner or operator does not hold
17 a currently valid operating permit.
- 18 (c) The Department shall provide a decal for each petroleum underground
19 storage tank for which an operating permit is issued under this section. Except for the
20 owner or operator, no person shall be liable under subsection (b) of this section if a
21 currently valid decal has been affixed to the petroleum underground storage tank, unless
22 the person knows or has reason to know that the owner or operator does not hold a
23 currently valid operating permit for the petroleum underground storage tank.
- 24 **"§ 143-215.94V. Enforcement procedures: civil penalties.**
- 25 (a) A civil penalty of not more than ten thousand dollars (\$10,000) may be
26 assessed by the Secretary against any person who:
- 27 (1) Violates any provision of this Part or rule adopted pursuant to this
28 Part.
- 29 (2) Fails to apply for or to secure a permit required by this Part.
- 30 (3) Violates or fails to act in accordance with the terms, conditions, or
31 requirements of any permit issued pursuant to this Part.
- 32 (4) Fails to file, submit, or make available, as the case may be, any
33 documents, data, or reports required by this Part.
- 34 (5) Makes any false statement, representation, or certification in any
35 application, record, report, plan, or other document filed or required to
36 be maintained under this Part or a rule implementing this Part; or who
37 knowingly makes a false statement of a material fact in a rule-making
38 proceeding or contested case under this Part; or who falsifies, tampers
39 with, or knowingly renders inaccurate any recording or monitoring
40 device or method required to be operated or maintained under this Part
41 or rules implementing this Part.
- 42 (6) Violates or fails to act in accordance with the terms, conditions, or
43 requirements of any special order or other appropriate document issued
44 pursuant to G.S. 143-215.2.

1 (7) Refuses access to the Commission or its duly designated representative
2 to any premises for the purpose of conducting a lawful inspection
3 provided for in this Part.

4 (b) If any action or failure to act for which a penalty may be assessed under this
5 section is continuous, the Secretary may assess a penalty not to exceed ten thousand
6 dollars (\$10,000) per day for so long as the violation continues.

7 (c) In determining the amount of the penalty, the Secretary shall consider the
8 factors set out in G.S. 143B-282.1(b). The procedures set out in G.S. 143B-282.1 shall
9 apply to civil penalty assessments that are presented to the Commission for final agency
10 decision.

11 (d) The Secretary shall notify any person assessed a civil penalty of the
12 assessment and the specific reasons therefor by registered or certified mail, or by any
13 means authorized by G.S. 1A-1, Rule 4. Contested case petitions shall be filed within
14 30 days of receipt of the notice of assessment.

15 (e) Requests for remission of civil penalties shall be filed with the Secretary.
16 Remission requests shall not be considered unless made within 30 days of receipt of the
17 notice of assessment. Remission requests must be accompanied by a waiver of the right
18 to a contested case hearing pursuant to Chapter 150B and a stipulation of the facts on
19 which the assessment was based. Consistent with the limitations in G.S. 143B-282.1(c)
20 and (d), remission requests may be resolved by the Secretary and the violator. If the
21 Secretary and the violator are unable to resolve the request, the Secretary shall deliver
22 remission requests and his recommended action to the Committee on Civil Penalty
23 Remissions of the Environmental Management Commission appointed pursuant to G.S.
24 143B-282.1(c).

25 (f) If any civil penalty has not been paid within 30 days after notice of
26 assessment has been served on the violator, the Secretary shall request the Attorney
27 General to institute a civil action in the superior court of any county in which the
28 violator resides or has his or its principal place of business to recover the amount of the
29 assessment, unless the violator contests the assessment as provided in subsection (d) of
30 this section, or requests remission of the assessment in whole or in part as provided in
31 subsection (e) of this section. If any civil penalty has not been paid within 30 days after
32 the final agency decision or court order has been served on the violator, the Secretary
33 shall request the Attorney General to institute a civil action in the superior court of any
34 county in which the violator resides or has his or its principal place of business to
35 recover the amount of the assessment. Such civil actions must be filed within three
36 years of the date the final agency decision or court order was served on the violator.

37 (g) The Secretary may delegate his powers and duties under this section to the
38 Director of the Division of Environmental Management of the Department.

39 **"§ 143-215.94W. Enforcement procedures: criminal penalties.**

40 (a) Any person who negligently commits any of the offenses set out in
41 subdivisions (1) through (6) of G.S. 143-215.94V(a) shall be guilty of a Class 2
42 misdemeanor which may include a fine not to exceed fifteen thousand dollars (\$15,000)
43 per day of violation, provided that such fine shall not exceed a cumulative total of two

1 hundred thousand dollars (\$200,000) for each period of 30 days during which a
2 violation continues.

3 (b) Any person who knowingly and willfully commits any of the offenses set out
4 in subdivisions (1) through (6) of G.S. 143-215.94V(a) shall be guilty of a Class I
5 felony, which may include a fine not to exceed one hundred thousand dollars
6 (\$100,000) per day of violation, provided that this fine shall not exceed a cumulative
7 total of five hundred thousand dollars (\$500,000) for each period of 30 days during
8 which a violation continues. For the purposes of this subsection, the phrase 'knowingly
9 and willfully' shall mean intentionally and consciously as the courts of this State,
10 according to the principles of common law interpret the phrase in the light of reason and
11 experience.

12 (c) (1) Any person who knowingly commits any of the offenses set
13 out in subdivisions (1) through (6) of G.S. 143-215.94V(a) and who
14 knows at that time that he thereby places another person in imminent
15 danger of death or serious bodily injury shall be guilty of a Class C
16 felony, which may include a fine not to exceed two hundred fifty
17 thousand dollars (\$250,000) per day of violation, provided that this
18 fine shall not exceed a cumulative total of one million dollars
19 (\$1,000,000) for each period of 30 days during which a violation
20 continues.

21 (2) For the purposes of this subsection, a person's state of mind is knowing
22 with respect to:

- 23 a. His conduct, if he is aware of the nature of his conduct;
24 b. An existing circumstance, if he is aware or believes that the
25 circumstance exists; or
26 c. A result of his conduct, if he is aware or believes that his
27 conduct is substantially certain to cause danger of death or
28 serious bodily injury.

29 (3) Under this subsection, in determining whether a defendant who is a
30 natural person knew that his conduct placed another person in
31 imminent danger of death or serious bodily injury:

- 32 a. The person is responsible only for actual awareness or actual
33 belief that he possessed; and
34 b. Knowledge possessed by a person other than the defendant but
35 not by the defendant himself may not be attributed to the
36 defendant.

37 (4) It is an affirmative defense to a prosecution under this subsection that
38 the conduct charged was conduct consented to by the person
39 endangered and that the danger and conduct charged were reasonably
40 foreseeable hazards of an occupation, a business, or a profession; or of
41 medical treatment or medical or scientific experimentation conducted
42 by professionally approved methods and such other person had been
43 made aware of the risks involved prior to giving consent. The

1 defendant may establish an affirmative defense under this subdivision
2 by a preponderance of the evidence.

3 (d) No proceeding shall be brought or continued under this section for or on
4 account of a violation by any person who has previously been convicted of a federal
5 violation based upon the same set of facts.

6 (e) In proving the defendant's possession of actual knowledge, circumstantial
7 evidence may be used, including evidence that the defendant took affirmative steps to
8 shield himself from relevant information. Consistent with the principles of common
9 law, the subjective mental state of defendants may be inferred from their conduct.

10 (f) For the purposes of the felony provisions of this section, a person's state of
11 mind shall not be found 'knowingly and willfully' or 'knowingly' if the conduct that is
12 the subject of the prosecution is the result of any of the following occurrences or
13 circumstances:

14 (1) A natural disaster or other act of God which could not have been
15 prevented or avoided by the exercise of due care or foresight.

16 (2) An act of third parties other than agents, employees, contractors, or
17 subcontractors of the defendant.

18 (3) An act done in reliance on the written advice or emergency on-site
19 direction of an employee of the Department. In emergencies, oral
20 advice may be relied upon if written confirmation is delivered to the
21 employee as soon as practicable after receiving and relying on the
22 advice.

23 (4) An act causing no significant harm to the environment or risk to the
24 public health, safety, or welfare and done in compliance with other
25 conflicting environmental requirements or other constraints imposed in
26 writing by environmental agencies or officials after written notice is
27 delivered to all relevant agencies that the conflict exists and will cause
28 a violation of the identified standard.

29 (5) Violations causing no significant harm to the environment or risk to
30 the public health, safety, or welfare for which no enforcement action or
31 civil penalty could have been imposed under any written civil
32 enforcement guidelines in use by the Department at the time. This
33 subdivision shall not be construed to require the Department to
34 develop or use written civil enforcement guidelines.

35 (6) Occasional, inadvertent, short-term violations causing no significant
36 harm to the environment or risk to the public health, safety, or welfare.
37 If the violation occurs within 30 days of a prior violation or lasts for
38 more than 24 hours, it is not an occasional, short-term violation.

39 (g) All general defenses, affirmative defenses, and bars to prosecution that may
40 apply with respect to other criminal offenses under State criminal offenses may apply to
41 prosecutions brought under this section or other criminal statutes that refer to this
42 section and shall be determined by the courts of this State according to the principles of
43 common law as they may be applied in the light of reason and experience. Concepts of

1 justification and excuse applicable under this section may be developed in the light of
2 reason and experience.

3 **"§ 143-215.94X. Enforcement procedures; injunctive relief.**

4 Whenever the Department has reasonable cause to believe that any person has
5 violated or is threatening to violate any of the provisions of this Part, any of the terms of
6 any permit issued pursuant to this Part, or a rule implementing this Part, the Department
7 may, either before or after the institution of any other action or proceeding authorized
8 by this Part, request the Attorney General to institute a civil action in the name of the
9 State upon the relation of the Department for injunctive relief to restrain the violation or
10 threatened violation and for such other and further relief in the premises as the court
11 shall deem proper. The Attorney General may institute such action in the superior court
12 of the county in which the violation occurred or may occur or, in his discretion, in the
13 superior court of the county in which the person responsible for the violation or
14 threatened violation resides or has his or its principal place of business. Upon a
15 determination by the court that the alleged violation of the provisions of this Part or the
16 regulations of the Commission has occurred or is threatened, the court shall grant the
17 relief necessary to prevent or abate the violation or threatened violation. Neither the
18 institution of the action nor any of the proceedings thereon shall relieve any party to
19 such proceedings from any penalty prescribed for violation of this Part."

20 Sec. 6. There is appropriated from the Commercial Leaking Petroleum
21 Underground Storage Tank Cleanup Fund to the Department of Environment, Health,
22 and Natural Resources the sum of three million seven hundred seventy-five thousand
23 dollars (\$3,775,000) for the 1994-95 fiscal year to implement the provisions of Part 2A
24 and Part 2B of Article 21A of Chapter 143 of the General Statutes. There is
25 appropriated from the Noncommercial Leaking Petroleum Underground Storage Tank
26 Cleanup Fund to the Department of Environment, Health, and Natural Resources the
27 sum of six hundred seventy-five thousand dollars (\$675,000) for the 1994-95 fiscal year
28 to implement the provisions of Part 2A and Part 2B of Article 21A of Chapter 143 of
29 the General Statutes.

30 Sec. 7. Sections 1, 2, and 7 are effective upon ratification and apply to any
31 pending claim for reimbursement and to any release regardless of when the release is
32 discovered or reported. Sections 3 and 5 become effective 1 January 1995 and apply to
33 offenses occurring or continuing on or after that date. Sections 4 and 6 become
34 effective 1 July 1994.