

**REGULATORY IMPACT ANALYSIS FOR READOPTION AND AMENDMENTS TO  
15A NCAC 02P COMMERCIAL LEAKING PETROLEUM UNDERGROUND STORAGE  
TANK CLEANUP FUND**

**December 9, 2021**

**General Information**

Agency/Commission: Environmental Management Commission (EMC)

Department: Department of Environmental Quality (DEQ)  
Division of Waste Management  
Underground Storage Tank Section

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Title of Rule Set: Commercial Leaking Petroleum Underground Storage Tank  
Cleanup Fund

Citation: 15A NCAC 02P

Authority: §143-215.94B & E provide authority for the EMC to adopt and the  
DEQ to implement and enforce rules relating the administration of  
the Commercial Leaking Petroleum Underground Storage Tank  
Cleanup Fund. State rules governing the administration are found  
in Title 15A, Subchapter 02P.

Impact Summary: State government: Yes, in benefits only  
Local government: Yes, in benefits only  
Private Sector: Yes, in benefits only  
Substantial impact: No  
Federal Requirement or Impact: No

**Proposed Rule-Making Schedule:**

<b>Action / Responsibility</b>	<b>Date</b>
GWWMC - Approval of Rule Text and RIA to go to EMC	January 12, 2022
EMC - Approval of Rule Text and RIA for public comment	March 10, 2022
Public Comment Period	April 18, 2022 – June 17, 2022
Earliest Date for Public Hearing	May 3, 2022
EMC - Approve Hearing Officer's Report and RIA, Adopt Rules	July 14, 2022
RRC Meeting - Approval of Rule Text	August 18, 2022
Proposed Effective Date	September 1, 2022
Readoption Deadline	January 31, 2023

**Necessity and Purpose of Rule Change**

It is the responsibility of the Department of Environmental Quality (Department) Division of Waste Management (Division) Underground Storage Tank Section (Section) to implement and enforce rules relating to the administration of the commercial leaking petroleum underground storage tank (UST) cleanup fund under the statutory authority of G.S. 143-215.94B & E. State rules governing UST fund administration are found in Title 15A, Subchapter 02P of the North Carolina Administrative Code. The existing rules establish criteria and procedures for the reimbursement of costs incurred by owners, operators, and landowners from the Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund.

Rule .0101 was determined to be necessary without substantive public interest effective March 6, 2018, pursuant to G.S. 150B-21.3A; but this rule is proposed for amendment to make minor updates and clarifications.

Rule .0102 is proposed for repeal because it is unnecessary, since copies of the rules can be found on the website of the Office of Administrative Hearings (OAH) or the Department's website. Note that no fiscal note is required for rules proposed for repeal per G.S. 150B-21.4(d).

Rule .0103 and Sections .0200, .0300, and .0400 are proposed for readoption in accordance with G.S. 150B-21.3A and are required to be readopted by the Environmental Management Commission (EMC) by the deadline established by the Rules Review Commission (RRC) of January 31, 2023.

**Baseline**

The baseline for the proposed rule changes are the existing rules in 15A NCAC 02P; existing statutory requirements in Article 21A of Chapter 143 of the General Statutes (G.S. 143-215.75 to 143-215.104AA); 40 CFR 280; and existing permits issued by the Division for permitted UST facilities.

[Session Law 2015-241, Section 14.16A](#), effective September 18, 2015, is also a part of the baseline because it revised G.S. 143-215.94B and D and directly implemented the change to phase out the Noncommercial Leaking Petroleum Underground Storage Tank Cleanup Fund. The Department has been operating in compliance with the changes made by the Session Law since it became effective.

## **Summary of Rule Changes**

The majority of the proposed amendments include technical changes such as corrections; updates to information such as Department name, addresses, websites, and references; clarification of vague or unclear language; typographical edits; citation updates; and removal of redundant or unnecessary language. Amendments are also proposed to remove references to the leaking petroleum noncommercial UST cleanup fund, which was phased out, to be consistent with the changes made to G.S. 143-215.94B and D under S.L. 2015-241, Section 14.16A as described in the baseline above.

### **Section .0100**

The proposed amendments to Rules .0101 and .0103 make technical updates and provide clarification. Rule .0102 is proposed for repeal since it is no longer necessary.

### **Section .0200**

The proposed amendments to Rules .0201 and .0202 make technical updates, provide clarification, and remove references to noncommercial USTs. Proposed amendments to Rule .0202 add some definitions for clarification and remove some definitions that are no longer necessary. Note that the definition for “dual-usage tank,” and the reference to this term in the definition for “underground storage tank” are proposed to be removed because this definition is obsolete and not entirely accurate. It primarily referred to systems that store fuel for both heating and emergency generators. This definition is obsolete, because the term “commercial underground storage tank” is defined in G.S. 143-215.94A(2). If a tank meets the minimum criteria in this definition, then it may be eligible. If it does not meet the criteria in this definition, it is not eligible, and S.L. 2015-241 phased out eligibility for noncommercial tanks.

### **Section .0300**

The amendments to Rule .0301 are proposed to replace the requirements in rule with a reference to the applicable general statute. The rule language is redundant since the fee requirements are in statute.

The proposed amendments to Rule .0302 add three additional documents required to be submitted to the Department with the notification that they are acquiring ownership of an existing commercial UST. While they appear to be new rule text, they are documents that are required to be generated regardless of this proposed rule text, and the proposed amendment is only requiring that these documents also be submitted to the Department in order for the notification to be considered complete.

Proposed Item (5) requires the submittal of any existing Notice of Residual Petroleum that has been recorded for any known release on that property. This Notice is required to be completed and recorded by G.S 143B-279.9 and 279.11; and would have been required to be completed by the prior owner if a prior release had occurred. Item (6) requires submittal of a simple statement written by the new owner as to whether they intend to accept liability for any previous release, but this proposed amendment does not require that they do or not accept that liability. Item (7) requires submittal of the ownership transfer document, which would have been generated as a part of the transfer of ownership, regardless of the proposed amendment.

The Department has been requiring the submittal of the documents for the transfer of ownership and the Notice of Residual Petroleum under existing rules in order to determine compliance with existing regulations for a transfer of ownership of a UST, so adding these documents to the rule is putting into rule what is being done in practice under existing rules. Had the Department not already

been requiring these documents, adding the requirement to submit the existing documentation would require minimal effort on the part of the new owner.

Adding the documents to the rule provides clarification of what will be necessary to determine compliance with existing rules for Department staff and the new owner. Also, the statement of acceptance of liability is a new requirement, but, as mentioned above, is just a simple statement acknowledging who accepts liability, because accepting liability determines who is eligible to apply for reimbursement, and liability can be transferred. Under existing rule, one party or the other has always had to accept the liability, but documentation of this information was not necessarily required to be submitted at the time of application.

#### Section .0400

The proposed amendments to Rules .0402, .0403, and .0406 only make technical corrections, provide clarification, and/or clarify or remove references to noncommercial USTs. The proposed amendment to Rule .0402(b)(1) clarifies that, because the noncommercial fund was phased out, no costs associated with noncommercial tanks are eligible for reimbursement, regardless of the date.

#### Rule .0401

The existing language in Subparagraphs (a)(2) and (a)(3) is proposed to be deleted because it was applicable only to noncommercial underground storage tanks, and this fund has been phased out as mentioned previously. The existing language in Subparagraph (a)(4) is also proposed to be deleted to be consistent with G.S. 143-215.94B, which provides the eligibility criteria and timeframes, and therefore such criteria should not also be in rule. The criteria in the statutes were also updated by S.L. 2015-241, and the Department has been enforcing the updates since the session law was effective.

The language proposed to be added to Subparagraphs (a)(2), (3), and (4) are intended for clarification of existing rule and statute requirements. The language added to Subparagraph (3) is intended to clarify that the eligible party is defined in Paragraphs (b) through (d), and even though there may be more than one eligible party, only one eligible party can be reimbursed at a time.

The language added to Subparagraph (a)(4) is intended to clarify situations where a release at a site has been cleaned up and the site has received a No Further Action letter including a Notice of Residual Petroleum (i.e., contamination is still present, but at levels below risk-based closure standards), and subsequently has another release that co-mingles with the residuals from the previous release such that the closure standards are exceeded. It allows a responsible party to apply for eligibility and receive credit for funding already reimbursed to satisfy the deductible for the release, since co-mingled releases are considered to constitute one release per G.S. 143-215.94B.

The proposed language is intended to prevent a situation where a new owner is forced to negotiate over eligibility with a previous owner who has no involvement with the current release and does not intend to participate in cleaning it up. This proposed language is being added to clarify and put into rule what is already being done in practice by the Department when making eligibility and reimbursement decisions under existing rule; and to be consistent with the statute requirements.

The amendment to the end of Paragraph (b) is proposed to make the rule consistent with the language in G.S. 143-215.94B(b), which states in part:

“(b) The Commercial Fund shall be used for the payment of the following costs up to an aggregate maximum of one million dollars (\$1,000,000) per occurrence resulting from a discharge or release of a petroleum product from a commercial underground storage tank:

(11) Where the owner of the commercial underground storage tank is the owner only as a result of owning the land on which the commercial underground storage tank is located, the owner did not know or have reason to know that the underground storage tank was located on the property, **and the land was not transferred to the owner to avoid liability for the commercial underground storage tank.**”

Rules .0404(b) and .0405(b)

The proposed amendments to Rules .0404(b) and .0405(b) to state that proof of completion of work must be submitted in addition to proof of payment are intended to clarify the rule requirement to be consistent with and allow the Department to determine compliance with both G.S. 143-215.94E(j) and (k) (to prove that the task has been completed) and G.S. 143-215.94G(b) (to prove that expenditures have been paid). The Department has never issued a reimbursement for incomplete or unpaid work in compliance with the statute requirements.

Rule .0407

The amendment to add Paragraph (c) is proposed to allow the regulated community a choice of appealing a decision informally without being forced to potentially file a petition prematurely in order to preserve their appeal right concerning the expiration of the 60-day time limit established by G.S. 150B-23. The Administrative Procedures Act (APA, G.S. 150B) itself, along with case law interpreting the APA, determines whether a decision is an “agency decision,” eligible to be appealed under the APA. The proposed amendment will not prevent a person from formally appealing when they have that right, but rather allows them to attempt to appeal internally first to avoid having to file a full contested case when someone still hopes to work a situation out through additional discussion with the Department, or by providing additional information, etc. The proposed amendment does not modify the APA requirements or deadlines; but creates a process that gives the regulated community an additional decision point, which will also be appealable under the APA.

Upon receipt of a decision, a person may file a petition with the Office of Administrative Hearings (OAH) or appeal it informally with the Department. If they elect to appeal it informally, another decision is issued by the Department after the proposed informal appeal process, and that decision also may be contested via a petition filed with OAH. The proposed informal process does not cause the person to lose their appeal rights at OAH; but gains additional time to discuss the matter with the Department, which could eliminate the need to ever challenge a decision in OAH, thereby saving time and unnecessary cost for the regulated community and also saving time for state employees. The time and money saved would be difficult to quantify since the Department cannot predict how often requests for reimbursement will be rejected, how often the person requesting would appeal the decision, or how often an appeal could have been prevented through informal discussion.

### **Fiscal Analysis**

The entities that have the potential to be affected by the proposed amendments are existing and future regulated UST facilities permitted by the Division, which may be owned by private entities or state and local governments. However, because the amendments are proposed to make the rules consistent with existing general statutes and current Division practices, or are technical or clarifying changes only, the amendments are not expected to impose any costs to existing or future regulated USTs.

The proposed amendments do not cause any impacts to state or local governments that do not own or operate USTs. The proposed amendments do not cause any impacts to private households since they do not own or operate commercial USTs. The proposed amendments are not expected to impact public health or the environment because they do not change the frequency of inspection

of permitted USTs or affect the Division's ability to take enforcement action for non-compliance.

**Any impacts from the phase-out of the Noncommercial Leaking Petroleum Underground Storage Tank Cleanup Fund are impacts caused by the Session Law changes to the General Statutes in 2015; and are not caused by the proposed amendments.**

### *Benefits*

The proposed amendments provide clarity to future applicants in preparing applications for eligibility to the Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund, and reimbursement from it; and provide clarification to the applicant on the Division's procedures for this process, which may reduce the applicant's time spent in preparing the application. The proposed amendments also provide a benefit to state government employees in the Division by providing clarity in the eligibility requirements and enforcement of the requirements.

Also, the proposed amendment to Rule .0407, which adds an informal appeal process for the determination for reimbursement, reduces the burden on both the regulated community and state government, by providing an informal process that may prevent the unnecessary filing of a formal petition for a contested case with OAH. Note that no fiscal note is required to be prepared for amendments that impose a less stringent burden on regulated persons as a part of the readoption process, per G.S. 150B-21.3A(d)(2).

### **Summary**

Based on the above analysis, the proposed amendments are not expected to have an annual aggregate impact to the affected parties of greater than or equal to \$1 million; and are not expected to impact state or local governments, private households, or public health or the environment, with the exception of providing a benefit through clarification to applicants and to state employees, and benefit of adding an informal appeal process.

**Montie, Jessica**

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**From:** Hollis, Carrie  
**Sent:** December 9, 2021 5:59 PM  
**To:** Montie, Jessica; Jackson, Vance; Hardison, Nancy D; Everett, Jennifer; Randolph, Wayne; Ryals, Scott; Everett, Jennifer  
**Cc:** Snyder, Ashley B; McGhee, Dana; Grozav, Anca  
**Subject:** Approval - Commercial Petroleum Underground Storage Tank Cleanup Fund, 15A NCAC 02P  
**Attachments:** DEQ\_2021-12-09.pdf

OSBM has reviewed the Division of Waste Management's proposed changes to rules 15A NCAC 02P .0101-.0103; .0201-.0202; .0301-.0302; and .0401-.0407 in accordance with G.S. 150B-21.4 and with E.O. 70 from 10/21/2010 as amended by E.O. 48 from 4/9/2014. The regulatory impact analysis has been approved for publication. Please ensure that the state and local government impacts are included in the Notice of Text and that the NC League of Municipalities and Association of County Commissioners are notified.

The .pdf file of the rule impact analysis (attached) will be posted on our website at the following URL (please allow for some time):

[https://files.nc.gov/ncosbm/documents/files/DEQ\\_2021-12-09.pdf](https://files.nc.gov/ncosbm/documents/files/DEQ_2021-12-09.pdf)

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