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May 15, 2014



Dexter Matthews  
Director  
NC Division of Waste Management  
1601 Mail Service Center  
Raleigh, NC 27699-1601

Re: Marvin E. Taylor Jr. - Petition for Rule-making, 15A NCAC 2L .0400, Amendment to Risk-based Assessment and Corrective Action for Underground Petroleum Storage Tanks

Dear Mr. Matthews:

On behalf of the undersigned, Marvin E. Taylor Jr. ("Petitioner"), we are, by this letter filing this Petition for Rule-making (the "Petition") pursuant to NCGS § 150B-20 and 15A NCAC 2I .0501, which allow any person to petition the Director of the appropriate Division of the North Carolina Department of Environment and Natural Resources to adopt, amend or repeal an existing rule by submitting a rule-making petition. Specifically, the Petitioner is seeking to amend provisions of Section .0400 ("Section .0400") of 15A NCAC 2L to extend the risk-based assessment and corrective action regime set forth in Section .0400 to discharges and releases of petroleum, including without limitation discharges and releases from aboveground storage tanks. Pursuant to 15A NCAC 2I .0501(a), we are addressing this Petition to you as the Director of the North Carolina Division of Waste Management ("DWM") since DWM is the Division responsible for implementing Section .0400 as required by applicable law and regulations, including without limitation Subchapter 2L of Title 15A of the North Carolina Administrative Code. As required by 15A NCAC 2I .0501(a), a copy of the Petition in electronic form is being sent to the Recording Clerk of the Environmental Management Commission (the "Commission").

In the following sections, we provide the information that corresponds to the requirements for a rule-making petition as set forth in subparagraphs to 15A NCAC 2I .0501(b). For ease of reference, we have set forth the information required by each subparagraph followed by the requisite information.

(1) Provide the text of the proposed rule(s) conforming to the Codifier of Rules' requirements for publication of proposed rules in the North Carolina Register.

The current risk-based assessment and corrective action regime ("risk-based remediation regime") for petroleum underground storage tanks ("UST" or "USTs" is set forth in Section .0400.

Petitioner requests that Rules .0400, .0403, .0404(1), .0405(1), (5), (6) and (10) and .0410 of Section .0400 be amended to extend the

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risk-based remediation regime set forth in Section .0400 to discharges and releases of petroleum from any source, including without limitation discharges and releases from aboveground storage tanks ("AST" or "ASTs") as set forth in Appendix A.

(2) Provide the statutory authority for the agency to promulgate the rule(s).

The statutory authority for the Commission to promulgate an amendment to the rules is NCGS § 143B-282(a)(2)g.

See Appendix B for a discussion of the construction of the statutory authority.

(3) Provide a statement of the reasons for adoption of the proposed rule(s).

Current Section .0400 provides a risk-based remediation regime applicable to the remediation of contaminants from leaking USTs. The rule by its terms is not available for contamination from ASTs.

Adoption of Section .0400 demonstrates that in certain circumstances contaminant levels that exceed the requirements of Sections .0100 and .0200, 15A NCAC 2L.0100, .0200 (collectively "Section.0.100), are an acceptable level of risk for health, safety and the environment. Further, Section .0400 states that a purpose in establishing procedures for risk-based assessment and corrective action is "to accomplish [its] goals in a cost-efficient manner to assure the best use of the limited resources available to address groundwater pollution within the State." [Emphasis added.]

Presumably, at the time of the adoption of Section .0400, the focus was on the limited resources of the Leaking Underground Storage Tank ("LUST") funds and perhaps as well the limited resources of UST owners.

No doubt the existence of the LUST funds provides a motive to adopt a less costly remediation regime. It does not, however, provide a rationale for exclusion of ASTs from the use of such regime.

The disparate treatment of remediation of contamination from USTs on the one hand and from ASTs on the other imposes an unnecessary and unfair burden on the limited resources of AST owners.

The proposed amendment of Section .0400 should be adopted to extend to owners of ASTs the benefits of the risk-based remediation regime of Section .0400 as presently in effect for USTs. Such extension should

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eliminate any constitutional questions (noted below) raised by the current disparate treatment of ASTs and USTs without depriving USTs of the benefits of current Section .0400.

In appropriate circumstances, the extended rule will reduce the cost of remediation of certain spills from ASTs, thus utilizing resources more efficiently and in some instances it may allow properties to be developed that might otherwise be idle because of the excessive costs of remediation.

It may also facilitate the sale of such properties more efficiently than a transaction that may otherwise have to be conditioned on a successful application under the North Carolina Brownfields Program. NCGS § 130A-310.30 et. seq.

on its face, the denial to owners of ASTs of the risk-based remediation regime available to owners of USTs constitutes disparate treatment which may violate the substantive due process and equal protection clauses of the US Constitution (Amendment XIV) and the law of the land and equal protection clauses of the NC Constitution (Article I, section 19). Extending the risk-based remediation regime to ASTs will eliminate the disparate treatment as an issue.

To withstand a constitutional challenge to disparate treatment involving economic interests, such treatment must be in response to a legitimate governmental interest and must have a rational basis. *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 488 US 336 (1989); *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs*, 153 N.C. App. 527, 532 (2002).

Health, safety and the environment are recognized governmental interests. *Whitney Stores, Inc. v. Clark*, 277 N.C. 322(1970). The efficient use of resources may also be considered legitimate governmental interests. *SS Kresge v. Davis*, 277 N.C. 654, 661-62 (1970).

It has been suggested that the imposition of certain regulatory requirements imposed on USTs justifies the exclusion of ASTs from the provisions of Section .0400.

But the requirements that UST owners obtain permits for each UST, maintain monitoring wells and apply other methods for detecting leaks from USTs and associated piping and meet certain requirements for the design and construction of USTs all relate to the fact that neither USTs nor spills from them are readily visible because of their location un-

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derground. Any corrosion or other deterioration in the integrity of USTs also is not readily detectable. NCGS § 143-215.94T; 15A NCAC 2N.

In contrast, ASTs are visible, leaks from them are visible and any corrosion or deterioration in the integrity of ASTs is easily detectable. The design and construction of ASTs is regulated by building and fire codes, their location is regulated by zoning codes and spills, when they occur, are subject to the same reporting requirements as USTs. 15A NCAC 2L.0100 et. seq.

In any event, none of the regulations or financial requirements imposed on USTs justifies the disparate availability of the risk-based remediation regime of Section .0400. when a spill has occurred. The impact of the contaminants is the same whether the source of the contaminants is located above, or below, ground.

For clarity, the requested amendment of Section .0400 (i) does not involve access to the LUST funds and (ii) does not extend eligibility for reimbursement from the LUST funds to AST owners.

(4) Provide a statement of the effect on existing rules or orders.

Other than the rules to be amended, Petitioner is not aware of any effect on existing rules or orders.

The requested amendments may have some practical effect in that the availability of Section .0400 for ASTs may shift some actions from Section .0100 and the Brownfields Program to Section .0400. In other words, they may effect a reallocation of the monitoring of corrective action.

(5) Provide copies of any documents and data supporting the proposed rule(s).

The purpose of the proposed amendment of Section .0400 relates to the fairness and constitutionality of the rule's application to ASTs and USTs. Petitioner has cited cases to support Petitioner's construction of the statutory authority and the constitutionality of Section .0400.

(6) Provide a statement of the effect of the proposed rule(s) on existing practices in the area involved, including cost factors for persons affected by the proposed rule(s).

The proposed amendments would apply to (i) AST sites with known groundwater contamination where the level of certain contaminants exceeds the current standard under Section .0100 but does not exceed the standards under, and meets the other requirements of Section .0400 and

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(ii) AST sites where in the future groundwater contamination meeting the requirements of Section .0400 might occur or be discovered. The effects on these sites would be as follows:

The highest concentrations of contamination always exist at what is known as the source area, such as where a spill occurred or an AST leaked. As contamination migrates out from the source area in the groundwater, the concentration decreases as the contaminants are dispersed in the groundwater or as they start to break down because of the effect of natural conditions.

The area where groundwater is considered contaminated is the area where the concentrations exceed the Section .0100 standards. Based on the principle described in the preceding paragraph, if the Section .0400 standards are extended to ASTs, the area of contamination will be smaller.

A party responsible for groundwater contamination at a site must first determine the vertical and horizontal extent of contamination, that is how far out the contamination extends and how deep it goes. If the Section .0400 standards are extended to ASTs, the area of contamination will not be as large and it will take fewer wells and groundwater and soil samples to determine the boundaries of the contamination. This will obviously decrease the cost of the overall investigation.

(7) Provide a statement explaining the computation of the cost factors.

At a site meeting the requirements of Section .0400 costs to be incurred will include the costs to assess and determine the vertical and horizontal extent of the contamination and to establish compliance with the other requirements of Section .0400. This will consist of costs to install and sample groundwater monitoring wells and to take soil samples and evaluate the results of such sampling. Follow-on costs will include all costs to identify and evaluate viable technologies to remediate the contamination and then perform the cleanup with the selected technology. These costs will consist of consulting, engineering, construction and operation and maintenance costs.

If it is demonstrated that the site complies with the risk-based remediation regime of Section .0400, the site may avoid more expensive remediation required to meet the Section .0100 standards.

Figure 1 compares the cost factors of determining compliance with the cost factors of remediation of a hypothetical spill resulting in contaminated area of 6,400 square feet of ground surface area with contamination extending to a depth of 6 feet below the ground surface or approximately 1,425 cubic yards of contaminated soil. Part One shows a comparison of the extent of contamination and the work necessary to define that extent. Part Two shows the estimated cost to clean up

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to the Section .0100 standards by removing and replacing the contaminated soil.

(8) Provide a description, including the names and addresses, if known, of those most likely to be affected by the proposed rule(s).

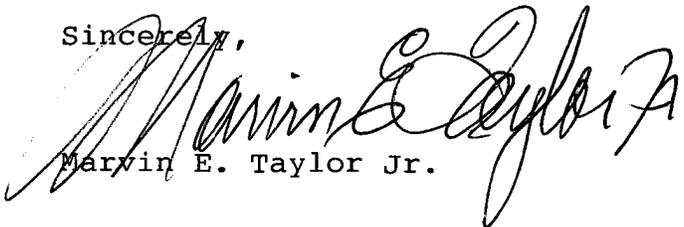
Generically, those most likely to be affected by the proposed amendments would be AST owners who can comply with the risk-based remediation regime of Section .0400. With the exception of the Petitioner and his co-tenant, the names and addresses, of AST owners are not known to Petitioner. The name and address of the Petitioner is set forth in Paragraph 9 below. The co-tenant's name and address is Jack B. Taylor, 4400 Ocean Front Avenue, Virginia Beach, VA 23451.

(9) Provide the name(s) and address(es) of the petitioner(s).

Marvin E. Taylor Jr.  
119 SW Maynard Road, Suite 205  
Cary, NC 27511.

We appreciate your consideration of this Petition. If you have any questions or need additional information, please contact me.

Sincerely,



Marvin E. Taylor Jr.

Enclosures

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Appendix A

APPENDIX A

The following Rules are proposed to be amended as set forth in the following pages:

15A NCAC 2L .0400  
15A NCAC 2L .0403  
15A NCAC 2L .0404  
15A NCAC 2L .0405  
15A NCAC 2L .0410.

1 15A NCAC 2L .0400 is proposed for amendment as follows:

2

3 **15A NCAC 2L .0400 RISK-BASED ASSESSMENT AND CORRECTIVE ACTION**

4 **FOR PETROLEUM ~~UNDERGROUND STORAGE TANKS~~ DISCHARGES AND RELEASES**

5

6 *History Note: Authority G.S. 143-215.2; 143-215.3(a)(1); 143-*

7 *215.94A; 143-215.94E; 143-215.94T; 143-215.94V;*

8 *143B-282; 1995 (Reg. Sess. 1996) c. 648, s. 1;*

9 *Recodified from 15A NCAC 2L .0115(a);*

10 *Amended Eff. March 1, 2015; December 1, 2005.*

1 15A NCAC 2L .0403 is proposed for amendment as follows:

2

3 **15A NCAC 2L .0403           RULE APPLICATION**

4 This Section applies to any discharge or release ~~from a "commercial~~  
 5 ~~underground storage tank" or a "noncommercial underground~~  
 6 ~~storage tank" as those terms are defined in G.S. 143-215.94A of~~  
 7 petroleum from any source which is reported before the effective  
 8 date of this Section as provided in 15A NCAC 2L .0416 of this  
 9 Section. The requirements of this Section shall apply to the own-  
 10 er and operator of the ~~underground~~ storage tank or other source  
 11 from which the discharge or release occurred, a landowner seeking  
 12 reimbursement from the Commercial Leaking Underground Storage  
 13 Tank Fund or the Noncommercial Leaking Underground Storage Tank  
 14 Fund under G.S. 143-215.94E, and any other person responsible for  
 15 the assessment or cleanup of a discharge or release of petroleum  
 16 ~~from an underground~~ a storage tank or other source, including any  
 17 person who has conducted or controlled an activity which results  
 18 in the discharge or release of petroleum or petroleum products as  
 19 defined in G.S. 143-215.94A(10) to the groundwaters of the State,  
 20 or in proximity thereto; these persons shall be collectively re-  
 21 ferred to for purposes of this Section as the "responsible party".  
 22 This Section shall be applied in a manner consistent with the  
 23 rules found in 15A NCAC 2N in order to assure that the State's  
 24 requirements regarding assessment and cleanup from underground  
 25 storage tanks are no less stringent than Federal requirements.

26

27 *History Note:*            *Authority G.S. 143-215 2; 143-215.3(a)(1); 143-*  
 28                                *215.94A; 143-215.94E; 143-215.94T; 143-215.94V;*  
 29                                *143B-282; 1995 (Reg. Sess. 1996) c. 648, s. 1;*  
 30                                *Recodified from 15A NCAC 2L .0115(b);*  
 31                                *Amended Eff. March 1, 2015; December 1, 2005.*

1 15A NCAC 2L .0404 is proposed for amendment as follows:

2

3 **15A NCAC 2L .0404 REQUIRED INITIAL ABATEMENT ACTIONS BY RE-**  
 4 **SPONSIBLE PARTY**

5 A responsible party shall:

- 6 (1) take immediate action to prevent any further dis-  
 7 charge or release of petroleum, ~~from the underground~~  
 8 ~~storage tank~~, identify and mitigate any fire, explo-  
 9 sion or vapor hazard, remove any free product; and  
 10 comply with the requirements of Rules .0601 through  
 11 .0604 and .0701 through .0703 and .0705 of Subchap-  
 12 ter 2N;
- 13 (2) incorporate the requirements of 15A NCAC 2N .0704 in-  
 14 to the submittal required under Item (3) of this Para-  
 15 graph or the limited site assessment report required  
 16 under 15A NCAC 2L .0405 of this Section, whichever is  
 17 applicable. Such submittals shall constitute compli-  
 18 ance with the reporting requirements of 15A NCAC 2N  
 19 .0704(b);
- 20 (3) submit within 90 days of the discovery of the dis-  
 21 charge or release a soil contamination report contain-  
 22 ing information sufficient to show that remaining un-  
 23 saturated soil in the side walls and at the base of  
 24 the excavation does not contain contaminant levels  
 25 which exceed either the "soil-to-groundwater" or the  
 26 residential maximum soil contaminant concentrations  
 27 established by the Department pursuant to 15A NCAC 2L  
 28 .0411 of this Section, whichever is lower. If such  
 29 showing is made, the discharge or release shall be  
 30 classified as low risk by the Department.

31

32 *History Note:* Authority G.S. 143-215.2; 143-215.3(a)(1); 143-  
 33 215.94A; 143-215.94E; 143-215.94T; 143-215.94V;  
 34 143B-282; 1995 (Reg. Sess. 1996) c.648, s.1;  
 35 Recodified from 15A NCAC 2L .0115(c)(1)-(3);  
 36 Amended Eff. March 1, 2015; December 1, 2005.

1 15A NCAC 2L .0405 is proposed for amendment as follows:

2

3 **15A NCAC 2L .0405 REQUIREMENTS FOR LIMITED SITE ASSESSMENT**

4 If the required showing cannot be made under 15A NCAC 2L .0404 of  
5 this Section, submit within 120 days of the discovery of the dis-  
6 charge or release, or within such other greater time limit approv-  
7 ed by the Department, a report containing information needed by the  
8 Department to classify the level of risk to human health and the  
9 environment posed by a discharge or release under 15A NCAC 2L  
10 .0406 of this Section. Such report should include, at a minimum:

- 11 (1) a location map, based on a USGS topographic map, show-  
12 ing the radius of 1500 feet from the source area of  
13 a confirmed release or discharge and depicting all  
14 water supply wells and, surface waters and designat-  
15 ed wellhead protection areas as defined in 42 USC  
16 300h-7(e) within the 1500 foot radius. For purposes  
17 of this Section, source area means point release or  
18 discharge from the ~~underground storage tank system;~~  
19 source of the petroleum;
- 20 (2) a determination of whether the source area of the  
21 discharge or release is within a designated wellhead  
22 protection area as defined in 42 USC 300h-7(e);
- 23 (3) if the discharge or release is in the Coastal Plain  
24 physiographic region as designated on the map entitl-  
25 ed "Geology of North Carolina" published by the De-  
26 partment in 1985, determination of whether the source  
27 area of the discharge or release is located in an  
28 area in which there is recharge to an unconfined or  
29 semi-confined deeper aquifer which is being used or  
30 may be used as a source of drinking water;
- 31 (4) a determination of whether vapors from the discharge  
32 or release pose a threat of explosion due to the ac-  
33 cumulation of vapors in a confined space or pose any  
34 other serious threat to public health, public safety  
35 or the environment;

- 1           (5)       scaled site map(s) showing the location of the follow-  
2                   ing which are on or adjacent to the property where  
3                   the source is located: site boundaries, roads, build-  
4                   ings, basements, floor and storm drains, subsurface  
5                   utilities, septic tanks and leach fields, underground  
6                   storage tank systems, above ground storage tank sys-  
7                   tems, monitoring wells, borings and the sampling  
8                   points;
- 9           (6)       the results from a limited site assessment which shall  
10                   include:
- 11                    (a)       the analytical results from soil samples  
12                               collected during the construction of a  
13                               monitoring well installed in the source  
14                               area of each confirmed discharge or  
15                               release ~~from a noncommercial or commercial~~  
16                               ~~underground storage tank system~~ of petro-  
17                               leum and either the analytical results  
18                               of a groundwater sample collected from  
19                               the well, or, if free product is present  
20                               in the well, the amount of free product  
21                               in the well. The soil samples shall be  
22                               collected every five feet in the unsat-  
23                               urated zone unless a water table is en-  
24                               countered at or greater than a depth of  
25                               25 feet from land surface in which case  
26                               soil samples shall be collected every 10  
27                               feet in the unsaturated zone. The soil  
28                               samples shall be collected from suspected  
29                               worst-case locations exhibiting visible  
30                               contamination or elevated levels of vol-  
31                               atile organic compounds in the borehole;
- 32                    (b)       if any constituent in the groundwater  
33                               sample from the source area monitoring  
34                               well installed in accordance with Sub-  
35                               item (a) of this Item, for a site meeting  
36                               the high risk classification in 15A NCAC

1 2L .0406(1), exceeds the standards or in-  
 2 terim standards established in 15A NCAC  
 3 2L .0202 by a factor of 10 and is a dis-  
 4 charge or release from a commercial un-  
 5 derground storage tank, the analytical  
 6 results from a groundwater sample col-  
 7 lected from each of three additional mon-  
 8 itoring wells or, if free product is pre-  
 9 sent in any of the wells, the amount of  
 10 free product in such well. The three ad-  
 11 ditional monitoring wells shall be in-  
 12 stalled as follows: as best as can be de-  
 13 termined, one upgradient of the source of  
 14 contamination, and two downgradient of  
 15 the source of contamination. The monitor-  
 16 ing wells installed upgradient and down-  
 17 gradient of the source of contamination  
 18 must be located such that groundwater  
 19 flow direction can be determined;

20 (c) potentiometric data from all required  
 21 wells;

- 22 (7) the availability of public water supplies and the id-  
 23 entification of properties served by the public water  
 24 supplies within 1500 feet of the source area of a con-  
 25 firmed discharge or release;
- 26 (8) the land use, including zoning if applicable, within  
 27 1500 feet of the source area of a confirmed discharge  
 28 or release;
- 29 (9) a discussion of site specific conditions or possible  
 30 actions which could result in lowering the risk class-  
 31 ification assigned to the release. Such discussion  
 32 shall be based on information known or required to be  
 33 obtained under this Paragraph; and
- 34 (10) names and current addresses of all owners and operators  
 35 of the ~~underground storage tank systems~~ sources

1 for which a discharge or release is confirmed, the  
2 owner(s) of the land upon which such ~~systems~~ sources  
3 are located, and all potentially affected real pro-  
4 perty owners. When considering a request from a re-  
5 sponsible party for additional time to submit the re-  
6 port, the Division shall consider the extent to which  
7 the request for additional time is due to factors out-  
8 side of the control of the responsible party, the pre-  
9 vious history of the person submitting the report in  
10 complying with deadlines established under the Com-  
11 mission's rules, the technical complications associat-  
12 ed with assessing the extent of contamination at the  
13 site or identifying potential receptors, and the nec-  
14 essity for immediate action to eliminate an imminent  
15 threat to public health or the environment.

16  
17 *History Note:* Authority G.S. 143-215.2; 143-215.3(a)(1); 143-  
18 215.94A; 143-215.94E; 143-215.94T; 143-215.94V;  
19 143B-282; 1995 (Reg. Sess. 1996) c.648, s.1;  
20 Recodified from 15A NCAC 2L .0115(c)(4);  
21 Amended Eff. March 1, 2015; December 1, 2005.

1 15A NCAC 2L .0410 is proposed for amendment as follows:

2  
3 **15A NCAC 2L .0410 DEPARTMENTAL LISTING OF DISCHARGES OR RE-**  
4 **LEASES**

5 To the extent feasible, the Department shall maintain in each of  
6 the Department's regional offices a list of all petroleum ~~under-~~  
7 ~~ground storage tank~~ discharges or releases discovered and report-  
8 ed to the Department within the region on or after the effective  
9 date of this Section and all petroleum ~~underground storage tank~~  
10 discharges or releases for which notification was issued under  
11 15A NCAC 2L .0407(d) of this Section by the Department on or af-  
12 ter the effective date of this Section.

13  
14 *History Note: Authority G.S. 143-215.2; 143-215.3(a)(1); 143-*  
15 *215.94A; 143.215.94E; 143-215.94T; 143-215.94V;*  
16 *143B-282; 1995 (Reg. Sess. 1996) c. 648, s.1;*  
17 *Recodified from 15A NCAC 2L .0115(1);*  
18 *Amended Eff. March 1, 2015; December 1, 2005.*

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 Appendix B

APPENDIX B

It may be argued that NCGS § 143B-282(a)(2)g does not authorize the Commission to adopt a risk-based remediation regime that applies to contamination from ASTs and that NCGS § 143-215.94V is limited to USTs, thereby excluding any authority for ASTs.

Section 143B-282(a) creates the Commission and provides it "with the power and duty to promulgate rules to be followed in the protection, preservation, and enhancement of the water and air resources of the State." [Emphasis added.]

NCGS § 143B-282(a)(2)g provides that the "[Commission] shall adopt rules:

. . . .

g. For the protection of the land and waters over which this State has jurisdiction from pollution by oil, oil products and oil by-products pursuant to Article 21A of Chapter 143."

By adopting Section 143-215.94V(a)(2), the General Assembly expressed its intent to direct the Commission to adopt a risk-based assessment and cleanup regime but limits the direction to USTs.

Webster's Third New International Dictionary defines:

"power" to mean "legal authority";

"duty" to mean "obligatory tasks, conduct, service or functions enjoined by order or usage"; and

"direct" to mean "to prescribe especially by formal or mandatory instruction".

Thus, the Commission was granted the legal authority and the obligation to adopt rules regarding oil pollution by Section 143B-282(a)(2)g. In adopting Section 143-215.94V, the General Assembly instructed the Commission to exercise the authority already granted to it to adopt a risk-based remediation regime, in effect denying the discretion to act or not to act in this regard. Such direction does not, even by implication, deprive the Commission of its broad authority which includes the authority to adopt a risk-based remediation regime for contamination from ASTs.

In this context, the absence of a directive to adopt a regime for ASTs when one has been affirmatively provided for USTs does not require the conclusion that a statutory directive is necessary to provide authority to extend a risk-based remediation regime to ASTs.

If Section 143-215.94V is interpreted as limiting the Commission's broad authority to adoption of a risk-based remediation regime for

## Appendix B (con't)

contamination from USTs only, it falls prey to the constitutional challenges outlined in Paragraph 3 of this Petition.

It is well established that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score. *Clark v. Martinez*, 543 US 371, 380-81 (2005); *Moore Ice Cream Co. v. Rose*, 289 US 373, 379 (1933).

Notwithstanding the construction dictated by constitutional considerations, the Commission adopted a regulation that excludes a class that should have been included in the regulation and thus the regulation as adopted also falls prey to the constitutional challenges noted in Paragraph 3.

To correct this, rather than exposing the regulation to constitutional challenge, the Commission should exercise its authority to extend Section .0400 to include contamination from ASTs, thus preserving the benefits of Section .0400 for USTs, rather than exposing it to a declaration by the courts that it is unconstitutional.

Any contention that the authority granted by Section 143B-282 was limited to protecting, preserving or enhancing and that risk-based remediation is not preserving, protecting or enhancing ignores the fact that the efficient use of resources to focus those resources on the more serious cases constitutes protecting, preserving and enhancing. NCGS § 143-215.94V(a)(1)e states:

"A risk-based approach to the cleanup of environmental damage can adequately protect human health and the environment while preventing excessive or unproductive cleanup efforts, thereby assuring that limited resources are directed toward those sites that pose the greatest risk to human health and the environment."

\* \* \* \* \*

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 Figure 1

FIGURE 1

COST COMPUTATION

PART A

Assume that an initial site assessment indicates that the contaminated area appears to cover a horizontal area of approximately 6,400 square feet and a vertical area of approximately 6 feet.

To refine this information, assume a total of four monitoring wells are drilled and samples taken from each well and that as many as 20 soil samples are taken. The costs are:

Initial Site Assessment

One well	\$ 1,500
One sample	750
Four soil samples	1,400
Engineering costs/report	1,500
Total	<u>\$ 5,150</u>

Phase II Site Assessment

Three wells @ \$1,500 each	\$ 4,500
Three samples @ \$750 each	2,250
Twenty soil samples @ 350 each	7,000
Engineering costs	5,000
Reports	1,500
Total	<u>\$ 20,250</u>

Total Assessment Costs \$ 25,400

In the example, assume the site assessments show levels of contaminants that meet the risk-based remediation requirements of Section .0400, including the location of drinking water wells, water supplies, proximity to surface waters and absence of subsurface spaces, are met; and that no further action is required.

PART B

Absent the availability of the risk-based remediation regime of Section .0400, excavation and disposal of the contaminated soil may be the best remediation. In the example, this would involve the removal of approximately 1,425 cubic yards or 2,280 tons of material.\* The costs are:

Excavation and hauling \$35/ton	\$ 75,000
Backhoe rental 2 days	800
Replacement materials \$12/cu.yd.	17,100
Engineering costs/report(s)	15,000
Total Remediation Costs	<u>\$ 107,900</u>

Alternative computation @ \$50/ton total costs \$ 113,500

## PART B (con't)

If extended well monitoring is required after removal and replacement, an additional cost of \$25,000-\$50,000 could be incurred.

\*Cubic yard of reasonably dry soil equals 1.6 tons in weight.