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REFERENCE TITLE: **underground storage tanks; revisions**

State of Arizona
Senate
Forty-sixth Legislature
Second Regular Session
2004

SB 1337

Introduced by
Senators Allen: Bennett, Brown

AN ACT

AMENDING SECTIONS 49-1054 AND 49-1093, ARIZONA REVISED STATUTES; RELATING TO UNDERGROUND STORAGE TANK REGULATION.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1

1 Be it enacted by the Legislature of the State of Arizona:

2 Section 1. Section 49-1054, Arizona Revised Statutes, is amended to
3 read:

4 49-1054. Extent of coverage; insurance

5 A. The department shall provide coverage from the assurance account
6 for ninety per cent of the reasonable and necessary costs of eligible
7 activities pursuant to section 49-1052, subsection A. **COVERAGE FROM THE**
8 **ASSURANCE ACCOUNT SHALL CONSTITUTE THE PRIMARY FINANCIAL ASSURANCE MECHANISM**
9 **UP TO THE MAXIMUM LIMITS PRESCRIBED IN THIS SECTION FOR ALL OWNERS AND**
10 **OPERATORS FOR ACTIVITIES THAT ARE ELIGIBLE AS PRESCRIBED BY SECTION 49-1052,**
11 **SUBSECTION A.** Ninety per cent of the reasonable and necessary costs shall be
12 the extent of coverage, except that owners and operators are eligible for
13 coverage from the assurance account for only fifty per cent of the reasonable
14 and necessary costs of corrective actions pertaining to soil and groundwater
15 remediation for releases reported after June 30, 2000 from underground
16 storage tanks that are not permanently closed, not temporarily closed or not
17 upgraded in accordance with the rules adopted pursuant to section 49-1014.
18 The owner or operator shall **SUBMIT CERTIFICATION THAT ACKNOWLEDGES THE**
19 **OWNER'S OR OPERATOR'S RESPONSIBILITY TO** pay the remaining costs of the
20 eligible activities pursuant to section 49-1052, subsection A. The maximum
21 amount that is subject to coverage is five hundred thousand dollars. An
22 owner or operator is eligible for additional coverage from the assurance
23 account up to a maximum of one million dollars if the owner or operator meets
24 both of the following conditions:

25 1. The owner or operator ~~has submitted certification to the department~~
26 ~~that the owner or operator has submitted a claim against any applicable~~
27 ~~insurance coverage and~~ has certified to the department the amount of any
28 benefits or reimbursement that the owner or operator has received ~~or will~~
29 ~~receive~~ from any insurance coverage that might apply to the costs of the
30 corrective action. The owner or operator is eligible for payment from the
31 department to the extent that the corrective action costs have not been
32 reimbursed by insurance and within the coverage limits prescribed by this
33 paragraph. ~~The department may compel the production of documents to~~
34 ~~determine the existence, amount and type of coverage available.~~ An owner or
35 operator shall report to the department any subsequent payment or
36 reimbursement for claims made for corrective actions costs. The owner or
37 operator shall remit to the department within thirty days any amounts that
38 were previously paid to the owner or operator from the underground storage
39 tank revolving fund assurance account and that have also been recovered from
40 insurance.

41 2. The owner or operator has utilized to the maximum extent possible
42 any alternative financial assurance mechanisms required for coverage pursuant
43 to section 49-1052, subsection F, paragraph 5. ~~The department may compel the~~
44 ~~production of documents to determine the existence, amount and type of~~
45 ~~alternative coverage available.~~ An owner or operator shall report to the

1 department any payment of corrective actions costs through these alternative
2 mechanisms. The owner or operator shall remit to the department within
3 thirty days any amounts that were recovered by the owner or operator from the
4 underground storage tank revolving fund assurance account and that have also
5 been recovered from any alternative mechanisms.

6 B. The department shall not disburse more than the maximum amounts
7 prescribed by subsection A of this section from the assurance account for
8 corrective action costs associated with an occurrence regardless of the
9 number of persons who are eligible for coverage.

10 C. The department shall pay eligible costs that are reasonable and
11 were actually incurred. Reasonableness of corrective actions shall be
12 determined based on the law and the facts available to the owner, operator or
13 person described in section 49-1052, subsection I at the time the technical
14 decision was made. Corrective action costs that are preapproved by the
15 department or corrective actions that are performed at the written request or
16 written instruction of the department are deemed reasonable, necessary and
17 reimbursable. At least every three years, the department shall establish
18 schedules of corrective action costs which the department considers
19 reasonable. For those years that the department does not establish a cost
20 schedule, all costs shall be adjusted annually in accordance with the
21 percentage change in the bureau of labor statistics annual number for the
22 final producer price index for finished goods less food and energy not
23 seasonally adjusted. These cost schedules shall be task-based costs relating
24 to the phases of corrective action. The department may establish additional
25 cost schedules for incremental costs that are necessary to supplement the
26 task-based costs to reflect limited site specific conditions. No other cost
27 schedules shall be established and all eligible work shall be reviewed and
28 paid based on the task-based costs and incremental costs when necessary. The
29 department shall not require costs associated with a given task to include
30 details on time and materials if the total costs claimed for that task do not
31 exceed the amount for that task in the schedule of corrective action costs as
32 established pursuant to this section. The department shall pay the costs
33 that are associated with a given task and that do not exceed the amount for
34 that task in the applicable cost schedule. Payments to an owner or operator
35 shall be based on the schedule of corrective action costs in effect on the
36 date a contract for corrective action work was entered into by the owner or
37 operator, or if that date cannot be determined, the date work associated with
38 the corrective action was performed. The cost schedules apply to all
39 corrective action costs submitted for payment from the assurance account,
40 including any costs incurred by the department in taking corrective actions
41 after May 27, 1998 and to the recovery of those corrective action costs by
42 the department pursuant to sections 49-1017, 49-1017.01 and 49-1022. The
43 department shall pay for work item costs as if the work was specified within
44 a preapproved work plan if the work is within the work objectives of a
45 preapproved work plan, and if either of the following ~~apply~~ APPLIES:

1 1. The cost is for a work item that is substituted for a work item
2 that was set forth in the preapproved work plan, if the cost does not exceed
3 both of the following:

4 (a) The cost schedule for the work item submitted in substitution.

5 (b) The cost of the work item originally preapproved.

6 2. The cost is for reasonable and necessary work that is not specified
7 within the preapproved work plan as a work item, and is not a substituted
8 work item, if the cost does not result in both of the following:

9 (a) Payments under the preapproved work plan to exceed the total
10 preapproved amount.

11 (b) Payments to exceed the cost schedule for that work item.

12 If payment for the costs pursuant to paragraph 2 of this subsection would
13 cause an exceedance of the total preapproved amount in the work plan, that
14 excess amount for the work that is equal to or less than the applicable cost
15 schedules shall be prioritized for payment as prescribed by section 49-1052,
16 subsection G.

17 D. The department shall allow upgrade and replacement costs incurred
18 at the time of corrective action for compliance with 40 Code of Federal
19 Regulations section 280.21 regarding corrosion protection and spill and
20 overfill prevention to be applied on a dollar for dollar basis not to exceed
21 ten per cent of the reasonable and necessary costs of corrective actions as
22 calculated pursuant to subsection A of this section.

23 E. An owner or operator shall not receive payment from the department
24 until after the owner or operator has ~~submitted certification to the~~
25 ~~department that the owner or operator has submitted a claim against any~~
26 ~~applicable insurance coverage and has~~ certified to the department the amount
27 of any benefits or reimbursement that the owner or operator has received ~~or~~
28 ~~will receive~~ from any insurance coverage that ~~might apply~~ HAS BEEN APPLIED to
29 the costs of the corrective action FOR THE OCCURRENCE. The owner or operator
30 is eligible for payment from the department to the extent that the corrective
31 action costs have not been ~~and will not be~~ reimbursed by insurance OR ANY
32 ALTERNATE FINANCIAL ASSURANCE MECHANISM and within the coverage limits
33 prescribed by this section. An owner or operator shall report to the
34 department whether it has insurance coverage available and shall comply with
35 all applicable financial responsibility requirements. The department may
36 compel the production of documents to determine the existence, amount and
37 type of coverage available. An owner or operator shall report to the
38 department any subsequent payment or reimbursement FROM INSURANCE OR ANY
39 ALTERNATE FINANCIAL ASSURANCE MECHANISM for ~~claims made for~~ corrective
40 actions costs. The owner or operator shall remit to the department within
41 thirty days any amounts that were previously paid to the owner or operator
42 from the underground storage tank revolving fund assurance account and that
43 have also been recovered from insurance OR ANY ALTERNATE FINANCIAL ASSURANCE
44 MECHANISM.

1 F. Appeals fees and costs payable pursuant to section 49-1091.01 shall
2 be paid in the next regular round of payment without being subject to ranking
3 and in the order received by the department.

4 Sec. 2. Section 49-1093, Arizona Revised Statutes, is amended to read:
5 49-1093. Underground storage tank technical appeals panel

6 A. The underground storage tank technical appeals panel is established
7 consisting of ~~five~~ TEN regular members and ~~two~~ THREE alternate members who
8 are appointed by and who serve at the pleasure of the governor for staggered
9 two year terms. Each member shall have a baccalaureate degree and
10 professional experience in hydrology, hydrogeology, geology or engineering.
11 Experience with underground storage tank corrective actions is highly
12 preferred. A member shall not be an employee of the United States
13 environmental protection agency or this state, but may be a faculty member at
14 a state university.

15 B. Members and alternates are eligible for compensation pursuant to
16 section 38-611, subsection D for each day they attend a hearing or conduct
17 formal deliberations.

18 C. Members are subject to title 38, chapter 3, article 8, relating to
19 conflict of interest. A panel member shall not participate in an
20 administrative hearing if the member has an appeal pending pursuant to this
21 section that is substantially similar to the matter on appeal. A former
22 panel member shall not appear before the panel as an employee or consultant
23 for a party to an appeal for a period of one year. A panel member shall not
24 participate in an administrative hearing if either of the following ~~apply~~
25 **APPLIES**:

26 1. The member is or was during the preceding year an employee of a
27 party at the hearing.

28 2. The member is or was employed during the preceding year by a firm
29 appearing on behalf of a party at the hearing.

30 D. The appellant, the department or the administrative law judge
31 selected by the office of administrative hearings may request that the panel
32 participate in a hearing arising from a final decision or determination
33 issued pursuant to section 49-1091. If five panel members including
34 alternates are not available, the hearing may proceed if at least three
35 members including alternates are available.

36 E. Hearings shall be conducted in accordance with this article and the
37 procedures in title 41, chapter 6, article 10, relating to convening and
38 conducting hearings and time frames for issuing decisions. The notice of
39 hearing issued pursuant to section 41-1092.05 shall be served on the panel
40 members.

41 F. The scope of the hearing shall be limited to those matters and
42 rationale specifically addressed in the final determination or decision
43 issued by the department pursuant to section 49-1091.

44 G. Unless otherwise agreed by the parties, before the hearing, the
45 parties shall exchange a list of witnesses and any copies of documents to be

1 introduced at the hearing and attempt in good faith to stipulate to those
2 witnesses who will be called to testify, the documents that may be introduced
3 at the hearing and any facts and law at issue in the matter. Before the
4 hearing, the administrative law judge as necessary shall issue an order
5 listing the witnesses to be called, ~~AND~~ AND the documents that may be introduced
6 and clarifying or limiting any procedural, legal or factual issues in the
7 matter, scheduling any deadlines and hearing dates, and requesting any
8 prehearing briefing.

9 H. The panel shall hear testimony, review evidence, examine witnesses
10 if necessary and prepare written findings of fact regarding the matters
11 specifically identified by the department pursuant to subsection F of this
12 section. The administrative law judge and the panel members shall deliberate
13 at the conclusion of the hearing. Following these deliberations, the panel
14 members shall weigh the evidence presented and issue written findings of fact
15 based solely on the testimony presented at the hearing and the exhibits
16 received into evidence. The administrative law judge shall adopt the panel's
17 technical findings of fact in the recommended decision to the director unless
18 the administrative law judge determines that the technical findings of fact
19 are technically invalid. The administrative law judge shall prepare a
20 written explanation in the recommended decision to the director regarding the
21 reasons for the administrative law judge's finding and shall include a copy
22 of the panel's technical findings of fact with the recommended decision.

23 I. The director may affirm, reject or modify the recommended decision
24 of the administrative law judge. The director may only reject or modify the
25 technical findings of fact in the recommended decision if the director
26 determines they are technically invalid. The director may only reject or
27 modify the conclusions of law in the recommended decision if the director
28 determines they are incorrect as a matter of law. The director's decision
29 shall be issued in accordance with the time frames prescribed in section
30 41-1092.08, subsection B. The recommended decision becomes the final
31 administrative decision if the director's decision is not issued within
32 thirty days after receipt of the recommended decision.

33 J. Any party may intervene in an appeal at the discretion of the
34 administrative law judge.

35 Sec. 3. Retroactivity

36 Section 49-1054, Arizona Revised Statutes, as amended by this act,
37 applies retroactively to from and after December 31, 2002.