House Engrossed Senate Bill

FILED

JANICE K. BREWER
SECRETARY OF STATE

State of Arizona
Senate
Forty-eighth Legislature
First Regular Session
2007

CHAPTER 103

SENATE BILL 1310

AN ACT

AMENDING SECTIONS 49-1019 AND 49-1052, ARIZONA REVISED STATUTES; RELATING TO UNDERGROUND STORAGE TANKS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

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

Section 1. Section 49-1019, Arizona Revised Statutes, is amended to read:

49-1019. Release of regulated substance; causes of action; limitation; liability

A. Any one of the following persons may bring an action in superior court against a person who caused or contributed to the release of a regulated substance from an underground storage tank to require that person to reimburse one of the following persons for the reasonable costs of corrective actions taken in response to the release:

1. An owner or operator of an underground storage tank or any other person who takes a corrective action pursuant to section 49-1005.

2. An owner or operator of an underground storage tank or any other person from whom costs are recovered by this state pursuant to section 49-1017 or 49-1017.01.

B. The person seeking reimbursement has the burden of demonstrating that the corrective action costs incurred were reasonable.

C. This article does not affect or modify the obligations or liability of a person, by reason of subrogation or otherwise, under any other provision of common law, federal law or the laws of this state, for damages, injury or loss resulting from a release of a regulated substance or for the costs of a corrective action, except that a person who receives compensation for the costs of a corrective action pursuant to this article is precluded from recovering compensation for the same corrective action costs pursuant to any other federal law or the laws of this state. A person who receives compensation for corrective action costs pursuant to federal law or the laws of this state is precluded from receiving compensation for the same corrective action costs as provided in this article.

D. Liability under this section shall be equitably allocated on a case-by-case basis in accordance with section 49-1017, subsection D. Any party authorized to bring an action pursuant to subsection A of this section and any party against whom an action is brought may have liability allocated through mediation in accordance with section 49-1017, subsection D or through the informal appeal process in accordance with section 49-1091.

E. The department may take corrective action for a release and recover direct costs pursuant to section 49-1017 in proportion to the allocation made pursuant to subsection D of this section if an owner or an operator does not perform all necessary corrective actions and there is no other person to perform corrective actions pursuant to section 49-1052, subsection I. An owner or an operator is eligible for ~~one hundred~~ NINETY per cent coverage from the assurance account for reasonable and necessary eligible costs above those for which ~~they are~~ THE OWNER OR OPERATOR IS liable if ~~they elect~~ THE OWNER OR OPERATOR ELECTS to perform corrective action which exceeds ~~their~~ THE allocated share of liability.

Sec. 2. Section 49-1052, Arizona Revised Statutes, is amended to read:

49-1052. Coverage of corrective action costs

A. The department shall provide from the assurance account coverage in the amounts authorized by subsection I of this section and sections 49-1017, 49-1022 and 49-1054 of the costs incurred after September 15, 1989 of the following:

1. Sampling, analysis and reporting THAT ARE initiated pursuant to section 49-1004 AND that ~~confirms~~ CONFIRM the presence of a release that requires corrective action pursuant to section 49-1005.

2. Sampling, analysis and reporting THAT ARE initiated pursuant to section 49-1008 AND that ~~confirms~~ CONFIRM the presence of a release that requires corrective action pursuant to section 49-1005.

3. Permanent closure pursuant to section 49-1008 before July 1, 1999, if the owner or operator satisfies both of the following requirements:

(a) A release associated with the tank being closed was reported to the department.

(b) The closure of the tank met all applicable closure requirements of section 49-1008 and rules adopted pursuant to that section.

4. Permanent closure of a tank pursuant to section 49-1008 on or after July 1, 1999, if the owner or operator satisfies all of the following requirements:

(a) The closure of the tank meets all applicable closure requirements of section 49-1008 and the rules adopted pursuant to that section.

(b) A release to native soils was confirmed and reported to the department before closure activities were initiated.

(c) The source of the release is the tank that is being closed.

(d) The tank that is being closed met the temporary closure requirements or the new or upgraded tank requirements in rules adopted pursuant to section 49-1014 at the time of the release.

(e) The tank cannot be repaired under the rules adopted pursuant to section 49-1014.

5. Corrective actions initiated pursuant to section 49-1005.

6. Permanent closure pursuant to section 49-1008, for persons described in subsection I of this section, if all of the following are met:

(a) The underground storage tank being closed is the source of a release to native soil that requires corrective action.

(b) Permanent closure of the underground storage tank met all of the applicable closure requirements of section 49-1008 and the rules adopted pursuant to that section.

(c) A release to native soil associated with the underground storage tank being closed was reported to the department.

(d) The person described in subsection I of this section meets the requirements of section 49-1016, subsection C.

7. Costs incurred for professional fees directly related to the preparation of an assurance account application. The department shall credit these fees toward the applicant's copayment obligation.

B. The department may provide the coverage required by this section either by paying the owner, the operator or a designated representative of the owner or operator or any combination of these persons or a political subdivision covered by subsection H of this section or by making direct payments for eligible actions on behalf of the owner, operator or political subdivision. If the department determines that an application for direct payment or reimbursement is incomplete, the department within forty-five days of the application shall notify the owner or operator of the missing information as specifically as possible and shall permit the owner or operator to provide the additional information within thirty days. On the request of an applicant, the department shall grant an additional sixty days to submit the missing information. The grant of additional time tolls the period for making an interim determination on matters relating to direct payment or reimbursement pursuant to section 49-1091.

C. An owner, an operator, a designated representative of an owner or operator or a political subdivision covered by subsection H of this section may apply to the department for coverage of the eligible costs pursuant to this article and rules adopted pursuant to this article. Any employee of the owner or operator may submit an application to the department on behalf of the owner or operator.

D. The department shall not pay for eligible costs unless the department determines that the eligible activities have met, or when completed will meet, the applicable requirements of section 49-1004 or 49-1005. The department may require by rule that persons who perform payable eligible activities meet specified standards of qualification and be approved by the department.

E. The department shall not provide any coverage described in this article to an owner or operator of underground storage tanks described in section 49-1031, subsection C. The department shall not provide any coverage described in this article with respect to the substances described in section 49-1031, subsection C, unless the tax imposed by article 2 of this chapter applies to such substances.

F. The department shall not provide any coverage described in this article to an owner or operator or any person or entity employed or retained by an owner or operator, if any of the following applies:

1. The owner or operator is delinquent in the payment of any fee, penalty or interest thereon imposed under this chapter and fails to cure that delinquency within thirty days after receiving notice from the department. If the owner or operator cures the delinquency more than thirty days after receiving notice from the department, the owner or operator may submit a new application for coverage. The new application shall be prioritized for review and payment in the ordinary course of ranking. If the owner or

operator cures the delinquency within thirty days after receiving notice from the department, the owner or operator retains the owner's or operator's place in the priority system. The department shall provide notice of the delinquency within thirty days after receiving an application for payment from the assurance account or within sixty days after a work plan is submitted for preapproval. If the department does not provide notice pursuant to this paragraph, the department shall not withhold payment based on that delinquency nor shall the department use that delinquency as a basis for the department to delay preapproval of corrective actions and related costs. An owner or operator remains eligible for coverage for other underground storage tank sites if no fees, penalties or interest is delinquent for those sites.

2. The owner or operator is delinquent in filing any excise tax return required by section 49-1032, subsection B and fails to cure that delinquency within thirty days after receiving notice of the delinquency from the department. If the owner or operator cures the delinquency more than thirty days after receiving notice from the department, the owner or operator may submit a new application for coverage. The new application shall be prioritized for review and payment in the ordinary course of ranking. If the owner or operator cures the delinquency within thirty days, after receiving notice from the department, the owner or operator retains the owner's or operator's place in the priority system. The department shall provide notice of the delinquency within thirty days after receiving an application for payment from the assurance account or within sixty days after a work plan is submitted for preapproval. If the department does not provide notice pursuant to this paragraph, the department shall not withhold payment based on that delinquency. The department shall not use a delinquency pursuant to this paragraph as a basis for the department to delay preapproval or corrective actions and related costs.

3. The underground storage tanks included in the application for coverage are located at a site that is the subject of an enforcement proceeding under section 49-1013. The owner or operator remains eligible for coverage for other sites where underground storage tanks are located if the owner or operator is not the subject of an enforcement proceeding regarding those sites. Payment from the assurance account will be withheld during the time that a final compliance order is in effect only for those costs directly associated with those activities that are the subject of the compliance order. Any payment costs that are incurred prior to a compliance order becoming final and that are not directly associated with the subject of that compliance order shall be eligible for payment pursuant to this section. Processing of payment from the assurance account shall not be delayed until a compliance order becomes final. An owner or operator shall not be considered to be the subject of an enforcement proceeding for purposes of eligibility for assurance account payments if any of the following applies:

(a) The department has filed an action in superior court unless the court determines in its discretion on the merits of the action that withholding payment is an appropriate sanction. Processing of payment shall be postponed until the court determines the owner's or operator's eligibility.

(b) The department takes corrective actions pursuant to section 49-1017, subsection A, paragraphs 1 and 2, without the consent of the owner or operator.

(c) An owner or operator formally consents in writing to an administrative order. If the department determines that the owner or operator is in violation of the consent order, the owner or operator shall not be considered to be subject to an enforcement proceeding and processing of payment from the assurance account shall not be delayed until a final administrative decision is rendered finding that the owner or operator is in violation of the consent order. Payment from the assurance account shall be withheld only for those costs determined in the final administrative decision to be incurred for those activities that are the direct subject of the determined violation of the consent order. Any other payment costs that are incurred prior to a final administrative decision finding a violation of the consent order or payment costs that are not the direct subject of the consent order violation shall be eligible for payment pursuant to this section. For compliance orders and violated consent orders that become final on or before November 1, 2000, on satisfaction of a final compliance order or a final administrative decision on a violated consent order, an owner or operator regains eligibility of coverage for costs incurred for activities that are the subject of the final compliance order or final violated consent order. For compliance orders and violated consent orders that become final after November 1, 2000, an owner or operator regains coverage for costs incurred for activities that are the subject of the final compliance order or final violated consent order, except that the director may withhold coverage of up to twenty-five per cent of the eligible costs incurred for activities that are performed to cure the violation and that gave rise to the final compliance order or final violated consent order if the owner or operator has not demonstrated good faith attempts to meet the requirements of the final compliance order or to correct the violation of the consent order. Any decision by the director to withhold coverage under this subdivision is an appealable agency action.

4. An individual, an owner or operator or any entity seeking coverage is convicted of fraud relating to performance of eligible activities or to any claim made for payment from the assurance account. This paragraph applies only to the individual, the owner or operator or the entity that is actually convicted of fraud relating to a corrective action or to a claim made for payment.

5. The owner or operator has failed to comply with the financial responsibility requirements of 40 Code of Federal Regulations part 280, subpart H with respect to the underground storage tanks included in the application for coverage and all of the following conditions are met:

(a) On or after July 1, 1996, the person seeking coverage is an owner or operator of the tank.

(b) As of July 1, 1996, there are no preexisting conditions precluding the ability to obtain financial responsibility which would have covered the release.

(c) The release is reported on or after July 1, 1996.

(d) The owner or operator fails to provide information to refute both of the following conditions:

(i) The tank was not pumped before July 1, 1996 for the purposes of removing free product.

(ii) Regulated substances were placed in or dispensed from the tank on or after July 1, 1996.

The owner or operator remains eligible for coverage for other sites where the owner or operator has complied with the financial responsibility requirements of this paragraph. The conditions described in subdivision (d) of this paragraph shall not apply to releases reported after January 1, 2000.

G. The department shall establish criteria for determining priorities among the applications for coverage under this article. The criteria shall include:

1. The need for financial assistance. The financial need evaluation shall include the owner's or operator's corrective action liabilities at all of the owner's or operator's underground storage tank sites in the state.

2. The risk to human health and the environment.

3. Whether the coverage is provided as a direct payment to a person performing an eligible activity.

4. The extent to which a delay in providing coverage will affect an eligible activity in progress.

5. The date on which an application for coverage is made.

6. The date on which an eligible activity for which coverage is sought is to be or was taken.

7. Whether the payment has been previously deferred because of insufficient monies in the assurance account and, if deferred, the length of such deferral.

H. The department may provide the coverage described in this article for eligible activity costs incurred by a political subdivision with respect to a release from an underground storage tank if the underground storage tank or the property where the underground storage tank is located comes into the possession or control of the political subdivision under either title 12, chapter 8, article 2 or 3.

I. The department may provide the coverage described in this article for eligible activity costs with respect to a release from an underground storage tank incurred by a person who currently owns the property or a person with principal control of the property on which the underground storage tank is or was located or the underground storage tank and who undertakes to meet the requirements of section 49-1005, but who is not an owner or operator. For claims paid on or after ~~the effective date of this amendment to this section~~ AUGUST 25, 2004, a person who undertakes to meet the requirements and who is not an owner or an operator is eligible for ninety per cent coverage, except that if the ten per cent per application that is not covered exceeds the assessed valuation of the real property, the person is eligible for one hundred per cent coverage in an application. If that person is not eligible for one hundred per cent coverage and does not pay the ten per cent remaining and notwithstanding the limitations prescribed in section 49-1017, the department shall take corrective action with respect to that release. A person who takes corrective action pursuant to this subsection shall submit certification to the department that the person has paid the remaining costs or has agreed to pay those remaining costs as demonstrated in an existing agreement.

J. Subject to section 38-503 and other applicable statutes and rules, the department may contract with a private consultant for the purpose of assisting the department in reviewing work plans, site characterization reports, corrective action plans, monitoring reports and other information to determine whether corrective actions meet the criteria and requirements of this chapter and the rules adopted by the director. If the department contracts with a consultant pursuant to this section, an owner or operator may request that the department expedite the review or inspection process by requesting that the department use the services of the consultant and by agreeing to pay to the department the costs of the consultant's services. The department shall not use a private consultant if the fee charged for that service would be more than the fee the department would charge to provide that service. The department shall pay the consultant for the services rendered by the consultant from fees paid by the applicant to the department pursuant to this section.

K. Claims for coverage that are not paid within one hundred eighty days after receipt by the department of a complete and correct claim accrue interest at the rate of eight per cent per year. Interest shall not accrue on any claim that is unpaid as a result of insufficient monies in the area account for that claim.

L. Requests by the department for additional information from claimants shall be reasonably related to the determination of the validity of the claim as prescribed by this article.

M. Except for claims for appeals costs authorized pursuant to section 49-1091.01, claims for coverage, or a work plan for preapproval, at a site shall be submitted to the department no more than one year after the claimant

receives a closure letter sent by the department by certified mail with notice that the claimant has one year to submit a claim for that release. If the claim is submitted in a timely manner, the claimant may correct or supplement the claim within a reasonable time as specified by the department without loss of coverage. If a work plan is submitted in a timely manner, the claimant, at any time thereafter, may correct, supplement or resubmit the work plan. Failure to submit a timely claim or work plan shall result in denial of the claim. Any monies encumbered or set aside regarding the claim shall be returned to the assurance account, except for those monies encumbered or set aside for the purpose of well abandonment or site restoration. The time limit prescribed by this subsection does not apply to closed releases that are subsequently reopened for the performance of additional corrective actions or at which corrective actions are proceeding pursuant to a work plan for preapproval submitted before the release was closed.

N. The department shall provide coverage for the costs of corrective actions relating to soil remediation that are consistent with remediation standards developed pursuant to chapter 1, article 4 of this title. Payment may be made for the most cost-effective corrective actions to remediate soil either to the predetermined residential soil clean up levels or site specific residential soil clean up levels for unrestricted use of the property as determined by a risk based health assessment performed pursuant to rules adopted pursuant to article 1 of this chapter. The department shall provide coverage for the costs of corrective actions relating to groundwater remediation and for approved corrective action plans that are submitted on or after ~~the effective date of this amendment to this section~~ AUGUST 25, 2004 and for work plans that are associated with an approved corrective action plan that is submitted to the department on or after ~~the effective date of this amendment to this section~~ AUGUST 25, 2004, and payment shall be made only for the most cost-effective risk based corrective action in accordance with rules adopted under article 1 of this chapter. On adoption of rules and after a request to the department, the department shall issue a no further action letter on completion of source removal and source control and approval of a groundwater monitored natural attenuation corrective action plan. The department shall provide coverage for corrective actions related to the control and removal of a source of contamination but shall not provide coverage for permanent closure of an underground storage tank. A source of contamination includes any one or more of the following:

1. Free product.

2. A regulated substance present in soil that causes or threatens to cause an exceedance of the aquifer water quality standards.

3. A regulated substance present in groundwater at levels that would prevent timely reduction of contaminant concentrations in comparison with the performance of active remediation.

4. Any other presence of a regulated substance causing an ongoing source of contamination, as determined by the department.

O. If a person intends to seek payment from the assurance account, the corrective action selected in a corrective action plan shall be the most cost-effective alternative that meets the requirements of section 49-1005. Monies from state appropriations shall not be used for administrative costs. If the most inexpensive corrective action alternative is not selected, the person shall demonstrate to the department the criteria supporting the corrective action selected in the corrective action plan. Nothing in this subsection shall affect the department's review of corrective action costs pursuant to article 3 of this chapter.

P. The coverage provided by this section is available only to the extent of the monies available in the assurance account. If there are insufficient monies available in the assurance account to pay all eligible costs which the department has determined should be paid, the department shall defer such payment until sufficient monies are available to pay such eligible costs. The department shall not provide any coverage and the assurance account is not liable for compensating third parties for bodily injury or property damage caused by releases from underground storage tanks.

Q. ~~From and after December 31, 2005,~~ The department shall not accept an application to the assurance account FOR COVERAGE FROM AN APPLICANT FOR COSTS ASSOCIATED WITH A SINGLE FACILITY MORE FREQUENTLY THAN ONCE EACH CALENDAR MONTH AND THE DEPARTMENT SHALL NOT ACCEPT AN APPLICATION FOR COSTS ASSOCIATED WITH A SINGLE FACILITY for an amount of less than five thousand dollars unless any of the following applies:

1. The reimbursement or preapproval application is the final application associated with the release.

2. The application for direct payment is the final application associated with the preapproved work plan.

3. The application is the last application submitted by that applicant on or before June 30, 2010.

APPROVED BY THE GOVERNOR APRIL 18, 2007.

FILED IN THE OFFICE OF THE SECRETARY OF STATE APRIL 18, 2007.

Passed the House April 3, 20 07,

by the following vote: 55 Ayes,

0 Nays, 5 Not Voting

Speaker of the House

Cheryl Laube
Assistant Chief Clerk of the House

Passed the Senate February 8, 20 07,

by the following vote: 27 Ayes,

1 Nays, 2 Not Voting

Timothy S Bee
President of the Senate

Chairman Billington
Secretary of the Senate

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF GOVERNOR
This Bill was received by the Governor this

_____ day of _____, 20____,

at _____ o'clock _____ M.

_____
Secretary to the Governor

Approved this _____ day of

_____, 20_____,

at _____ o'clock _____ M.

_____
Governor of Arizona

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF SECRETARY OF STATE

This Bill was received by the Secretary of State

this _____ day of _____, 20____,

at _____ o'clock _____ M.

_____
Secretary of State

S.B. 1310

SENATE CONCURS IN HOUSE
AMENDMENTS AND FINAL PASSAGE

Passed the Senate April 12, 20 07

by the following vote: 28 Ayes,

0 Nays, 2 Not Voting

Timothy S. Bee
President of the Senate

Chamian Billington
Secretary of the Senate

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF GOVERNOR

This Bill received by the Governor this

12th day of April, 20 07

at 11:41 o'clock a. M.

Jennifer Aparicio
Secretary to the Governor

Approved this 18 day of

April

at 2 o'clock P. M.

Governor of Arizona

EXECUTIVE DEPARTMENT OF ARIZONA
OFFICE OF SECRETARY OF STATE

This Bill received by the Secretary of State

this 18 day of April, 20 07

S.B. 1310

at 3:33 o'clock p. M.

Janice K. Brewer
Secretary of State