

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2001**

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SENATE BILL 1227*

Short Title: Clarify LUST Land-Use Restrict./Deed Record. (Public)

Sponsors: Senator Plyler.

Referred to: Agriculture/Environment/Natural Resources.

June 6, 2002

A BILL TO BE ENTITLED

AN ACT TO CLARIFY CERTAIN STATUTES RELATED TO LAND-USE RESTRICTIONS AND RECORDATION OF THOSE RESTRICTIONS IN CONNECTION WITH THE CLEANUP OF RELEASES FROM PETROLEUM UNDERGROUND STORAGE TANKS, AS RECOMMENDED BY THE ENVIRONMENTAL REVIEW COMMISSION.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 143B-279.9 reads as rewritten:

"§ 143B-279.9. Land-use restrictions may be imposed to reduce danger to public health at contaminated sites.

(a) In order to reduce or eliminate the danger to public health or the environment posed by the presence of contamination at a site, an owner, operator, or other responsible party may impose restrictions on the current or future use of the real property comprising any part of the site where the contamination is located if the restrictions meet the requirements of this section. ~~The~~ Except as provided in subsection (b) of this section, restrictions must be agreed to by the owner of the real property, included in a remedial action plan for the site that has been approved by the Secretary, and implemented as a part of the remedial action program for the site. The Secretary may approve restrictions included in a remedial action plan in accordance with standards that the Secretary determines to be applicable to the site. Except as provided in subsection (b) of this section, if the remedial action is risk-based or will not require that the site meet unrestricted use standards, the remedial action plan must include an agreement by the owner, operator, or other responsible party to record approved land-use restrictions that meet the requirements of this section as provided in G.S. 143B-279.10 or G.S. 143B-279.11, whichever applies. Restrictions may apply to activities on, over, or under the land, including, but not limited to, use of groundwater, building, filling, grading, excavating, and mining. Any approved restriction shall be enforced by any owner of the land, operator of the facility, or other party responsible for the contaminated site. Any land-use restriction may also be enforced by the Department

1 through the remedies provided by any provision of law that is implemented or enforced
2 by the Department or by means of a civil action. The Department may enforce any
3 land-use restriction without first having exhausted any available administrative
4 remedies. A land-use restriction may also be enforced by any unit of local government
5 having jurisdiction over any part of the site. A land-use restriction shall not be declared
6 unenforceable due to lack of privity of estate or contract, due to lack of benefit to
7 particular land, or due to lack of any property interest in particular land. Any person
8 who owns or leases a property subject to a land-use restriction under this Part shall
9 abide by the land-use restriction.

10 (b) The definitions set out in G.S. 143-215.94A apply to this subsection. A
11 ~~risk-based~~ remedial action plan for the cleanup of environmental damage resulting from
12 a discharge or release of petroleum from an underground storage tank pursuant to Part
13 2A of Article 21A of Chapter 143 of the General Statutes ~~that will not require that the~~
14 ~~site meet unrestricted use standards~~ must include an agreement by the owner, operator,
15 or other party responsible for the discharge or release of petroleum to record a notice of
16 approved land-use restrictions that meet the requirements of this section as provided in
17 G.S. 143B-279.11. All of the provisions of this section shall apply except as specifically
18 modified by this subsection. Any restriction on the current or future use of real property
19 shall be enforceable only with respect to: (i) real property on which the source of
20 contamination is located and (ii) any real property on which contamination is located at
21 the time the remedial action plan is approved and that was owned or controlled by any
22 owner or operator of the underground storage tank or other responsible party at the time
23 the discharge or release of petroleum is discovered or reported or at any time thereafter.
24 No restriction on the current or future use of real property shall apply to any portion of
25 any parcel or tract of land on which contamination is not located. This subsection shall
26 not be construed to require any person to record any notice of restriction on the current
27 or future use of real property other than the real property described in this subsection.
28 For purposes of this subsection and G.S. 143B-279.11, the current or future use of real
29 property may be restricted only as set out in any one or more of the following
30 subdivisions:

- 31 (1) Where soil contamination will remain in excess of unrestricted use
32 standards, the property may be used for a primary or secondary
33 residence, school, daycare center, nursing home, playground, park,
34 recreation area, or other similar use only with the approval of the
35 Department.
- 36 (2) Where soil contamination will remain in excess of unrestricted use
37 standards and the property is used for a primary or secondary residence
38 that was constructed before the release of petroleum that resulted in the
39 contamination is discovered or reported, the Secretary may approve
40 alternative restrictions that are sufficient to reduce the risk of exposure
41 to contaminated soils to an acceptable level while allowing the real
42 property to continue to be used for a residence.

- 1 (3) Where groundwater contamination will remain in excess of
2 unrestricted use standards, installation or operation of any well usable
3 as a source of water shall be prohibited.
- 4 (4) Any restriction on the current or future use of the real property that is
5 agreed upon by both the owner of the real property and the
6 Department.
- 7 (c) This section does not alter any right, duty, obligation, or liability of any
8 owner, operator, or other responsible party under any other provision of law.
- 9 (d) As used in this section:
- 10 (1) 'Unrestricted use standards' means generally applicable standards,
11 guidance, or established methods governing contaminants that are
12 established by statute or adopted, published, or implemented by the
13 Environmental Management Commission, the Commission for Health
14 Services, or the Department. Cleanup or remediation of real property
15 to unrestricted use standards means that the property is restored to a
16 condition such that the property and any use that is made of the
17 property does not pose a danger or risk to public health, the
18 environment, or users of the property that is significantly greater than
19 that posed by use of the property prior to its having been contaminated.
- 20 (2) 'Risk-based', when used in connection with cleanup, remediation, or
21 similar terms, means cleanup or remediation of contamination of real
22 property to a level that, although not in compliance with unrestricted
23 use standards, does not pose a significant danger or risk to public
24 health, the environment, or users of the real property so long as the
25 property remains in the condition and is used in a manner that is
26 consistent with the assumptions as to the condition and use of the
27 property on which the determination that the level of risk is acceptable
28 is based."

29 **SECTION 2.** G.S. 143B-279.10(g) reads as rewritten:

30 "(g) This section does not apply to the cleanup pursuant to a ~~risk-based~~ remedial
31 action plan that addresses environmental damage resulting from a discharge or release
32 of petroleum from an underground storage tank pursuant to Part 2A of Article 21A of
33 Chapter 143 of the General Statutes."

34 **SECTION 3.** G.S. 143B-279.11(a) reads as rewritten:

35 "(a) The definitions set out in G.S. 143-215.94A and G.S. 143B-279.9 apply to
36 this section. This section applies only to a cleanup pursuant to a ~~risk-based~~ remedial
37 action plan that addresses environmental damage resulting from a discharge or release
38 of petroleum from an underground storage tank pursuant to Part 2A of Article 21A of
39 Chapter 143 of the General Statutes."

40 **SECTION 4.** G.S. 143-215.94W(a)(5) reads as rewritten:

41 "(5) Violates or fails to act in accordance with the terms, conditions, or
42 requirements of any special order or other appropriate document issued
43 pursuant to ~~G.S. 143-215.2~~ G.S. 143-215.2 or fails to comply with the
44 requirements of G.S. 143B-279.9 through G.S. 143B-279.11."

1 **SECTION 5.** G.S. 143-215.94Y reads as rewritten:

2 "**§ 143-215.94Y. Enforcement procedures; injunctive relief.**

3 Whenever the Department has reasonable cause to believe that any person has
4 violated or is threatening to violate any of the provisions of this Part, any of the terms of
5 any permit issued pursuant to this Part, or a rule implementing this ~~Part~~,Part or has
6 failed to comply with the requirements of G.S. 143B-279.9 through G.S. 143B-279.11,
7 the Department may, either before or after the institution of any other action or
8 proceeding authorized by this Part, request the Attorney General to institute a civil
9 action in the name of the State upon the relation of the Department for injunctive relief
10 to restrain the violation or threatened violation and for such other and further relief in
11 the premises as the court shall deem proper. The Attorney General may institute such
12 action in the superior court of the county in which the violation occurred or may occur
13 or, in his discretion, in the superior court of the county in which the person responsible
14 for the violation or threatened violation resides or has his or its principal place of
15 business. Upon a determination by the court that the alleged violation of the provisions
16 of this ~~Part or Part~~, the regulations-rules of the Commission-Commission, or the failure
17 to comply with the requirements of G.S. 143B-279.9 through G.S. 143B-279.11 has
18 occurred or is threatened, the court shall grant the relief necessary to prevent or abate
19 the violation or threatened violation. Neither the institution of the action nor any of the
20 proceedings thereon shall relieve any party to such proceedings from any penalty
21 prescribed for violation of this ~~Part~~,Part or for failure to comply with the requirements
22 of G.S. 143B-279.9 through G.S. 143B-279.11."

23 **SECTION 6.** This act is effective retroactively to 1 September 2001. This
24 act applies retroactively to any cleanup of a discharge or release of petroleum from an
25 underground storage tank pursuant to Part 2A of Article 21A of Chapter 143 of the
26 General Statutes except that land-use restrictions and recordation of residual
27 contamination are not required with respect to a discharge or release of petroleum for
28 which the Department of Environment and Natural Resources issued a determination
29 that no further action is required prior to 1 September 2001.