

# FINAL BILL REPORT

## SSB 5449

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Synopsis as Enacted

**Brief Description:** Providing lien authority to the department of ecology to facilitate the recovery of remedial action costs under the model toxics control act.

**Sponsors:** Senate Committee on Water, Energy & Environment (originally sponsored by Senators Poulsen, Swecker, Pridemore, Kline, Fraser and Rockefeller).

**Senate Committee on Water, Energy & Environment**  
**House Committee on Natural Resources, Ecology & Parks**

**Background:** The state Model Toxics Control Act authorizes the Department of Ecology (DOE) to recover, from liable parties, costs the agency incurs in cleaning up toxic-contaminated sites. DOE uses recovered costs to fund cleanup of other contaminated sites.

DOE may face difficulties in recouping its costs, particularly when a liable party is absent or insolvent. The agency has lower priority in recovering its cleanup costs in bankruptcy proceedings than secured creditors such as mortgagees.

It has been suggested that DOE be authorized to file a priority lien to recover its cleanup costs and that it also be permitted to recover increases in property value attributable to state-funded cleanup.

**Summary:** If the state incurs costs when cleaning up real property contaminated by toxics, and is unable to recover its costs from a liable party, the DOE may file a lien against the property. The lien, which may be for either the full amount of state cleanup costs or the increase in fair market value due to state cleanup, cannot in any case exceed DOE's cleanup costs. Unless DOE determines that it is in the public interest to remove the lien, it will continue until liability has been satisfied through sale of the property, foreclosure, or other means agreed to by the agency. The Attorney General will conduct any lien foreclosure in the standard manner prescribed for mortgage foreclosures.

Lien for Up to Full Amount of State Cleanup Costs. This lien has priority over all other monetary encumbrances, except for liens for local and special district property tax assessments and mortgages recorded before DOE files the lien or records notice of its authority to file a lien prior to initiating cleanup.

Lien Limited to Increase in Fair Market Value Due to State Cleanup. A lien limited in this way has priority over all other monetary encumbrances affecting the property. It may only be filed if the property is abandoned--i.e., there has not been significant business activity for three years or property taxes are three years in arrears prior to DOE cleanup. Increase in fair market value will be determined by the bona fide purchase price of property or a real estate appraiser retained by DOE.

Notice of Potential Liability. When notifying persons of potential liability under the Model Toxics Control Act (MOTCA), DOE must include a notice stating that if it incurs unrecovered cleanup costs, the agency may file a lien against the property.

Notice Prior to Initiating Cleanup. Except for emergency cleanup actions, DOE must, before starting cleanup conducted by a contractor, provide notice to the property owner, mortgagees, lienholders of record, and contractors of its authority to file a lien. For emergency cleanup actions, DOE must provide this notice within 30 days after starting cleanup. DOE may record a copy of the notice, along with a legal description of the property, with the auditor in the county where the property is located. If DOE subsequently files a lien, the lien's effective date will be the date this notice was recorded.

Notice Prior to Filing Lien. Before filing a lien, DOE must give the property owner, mortgagees, and lienholders notice of its intent to file a lien. The notice must specify the lien's purpose, a property description, the state's cleanup costs, probable cause that the identified property is subject to the costs, and a 30-day time limit for a response. DOE must provide notice by certified mail.

Filing. DOE may file a lien if it receives no response or receives a response but determines that there is probable cause for filing the lien. The lien is effective when filed with the auditor in the county where the property is located. A filed lien statement must include a property description and the amount of the lien.

If exigent circumstances require filing a lien prior to giving notice, or prior to expiration of the 30-day time limit for a response, DOE may file the lien immediately. Exigent circumstances include an imminent bankruptcy filing by the owner, imminent property transfer, or both.

Challenge. An owner of property or a lender holding a mortgage on property subject to a DOE line may petition the agency to remove or reduce the lien. If DOE denies the request, the petitioner may, within 90 days, file suit to remove or reduce the lien. The lien will be removed if the petitioner can prove that they are not liable under MOTCA, and reduced if they can prove that the lien exceeds DOE cleanup costs. A lien limited to the increase in fair market value due to DOE cleanup will be reduced if the lien exceeds DOE cleanup costs or exceeds the increase in fair market value solely attributable to DOE cleanup.

DOE's decisions regarding filing, removing or reducing a lien are reviewable exclusively in superior court MOTCA actions, including cost recovery suits, suits to enforce an order or seek a civil penalty, suits for reimbursement, suits to compel investigative or remedial action, and citizens' suits.

Exemptions. Exemptions are specified for property owned by a local government or special purpose district and for residential property consisting of four residential units or less, unless the property was used for illegal drug manufacturing and storage.

**Votes on Final Passage:**

Senate	36	12	
House	67	29	(House amended)
Senate	41	6	(Senate concurred)

**Effective:** July 24, 2005