

HOUSE BILL REPORT

HB 1866

As Reported by House Committee On:
Natural Resources, Ecology & Parks

Title: An act relating to providing the department of ecology with lien authority to facilitate the recovery of remedial action costs.

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: Representatives Williams, Buck, Upthegrove, Blake, Eickmeyer, Nixon and Simpson.

Brief History:

Committee Activity:

Natural Resources, Ecology & Parks: 2/17/05, 3/1/05 [DPS].

Brief Summary of Substitute Bill

- Authorizes the Department of Ecology (DOE) to file a lien against a property where the State of Washington has incurred a remedial action cost that is unrecovered.
- Except for property tax assessments and mortgage liens, liens filed by the DOE have priority in rank over all other privileges, liens, encumbrances, or other security interests affecting the property.

HOUSE COMMITTEE ON NATURAL RESOURCES, ECOLOGY & PARKS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 10 members: Representatives B. Sullivan, Chair; Upthegrove, Vice Chair; Buck, Ranking Minority Member; Kretz, Assistant Ranking Minority Member; Blake, DeBolt, Dickerson, Eickmeyer, Hunt and Williams.

Minority Report: Do not pass. Signed by 1 member: Representative Orcutt.

Staff: Jeff Olsen (786-7157).

Background:

The state Model Toxics Control Act (MTCA) requires sites contaminated with hazardous materials to be cleaned up by liable parties. The MTCA is carried out by the Department of Ecology (DOE) to ensure that the vast majority of sites at which hazardous substances have been released are cleaned up.

The DOE's primary responsibility for hazardous waste cleanup under MTCA include: (1) investigating and prioritizing cleanup sites; (2) providing technical assistance to a potentially liable party desiring to perform cleanups; (3) setting cleanup standards for hazardous substances; and (4) requiring or undertaking cleanups where appropriate. The DOE is also granted enforcement authority, including the ability to enter property, enter into settlements, file actions or issue orders to compel cleanup, and impose civil penalties and seek recovery of state cleanup costs. The MTCA authorizes the DOE to recover costs the agency incurs in cleaning up toxic-contaminated sites from liable parties. The DOE uses recovered costs to fund cleanup of other contaminated sites. The DOE does not have authority to file a lien on property to facilitate cleanup cost recovery.

Summary of Substitute Bill:

If the state incurs remedial action costs when cleaning up real property and is unable to recover its costs from a liable party, the Department of Ecology (DOE) may file a lien against the property. Except for local and special district property tax assessments and mortgage liens, the lien has priority over all other liens or encumbrances. The amount of the lien cannot exceed the cost of the cleanup.

If the facility is abandoned or the owner has failed to comply with order by the DOE, the DOE may choose to limit the amount of the lien to the increase in the fair market value attributable to the cleanup. The increase in value, to be measured at the time the property is sold, will be determined by subtracting the county assessor's valuation for the most recent year prior to the cleanup from the sale price after the cleanup.

Unless the DOE determines that it is in the public interest to remove the lien, the lien will continue in force until the liability is satisfied through the sale of the property or other means agreed to by the DOE. The DOE's decisions regarding filing of a lien are reviewable exclusively in superior court.

Before filing a lien, the DOE must give the property owner, mortgagees, lienholders, and persons and contractors known to be conducting remedial actions at the facility 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 time period for responding with comments. The DOE must provide notice of its intent to file a lien by certified mail or if the owner is unknown provide notice in a local newspaper.

The DOE may file the lien if it receives no response or receives a response but determines that there is probable cause to file a 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 time period for comments, the DOE may file the lien immediately. Exigent circumstances include an imminent bankruptcy filing by the owner, imminent property transfer, or both.

An exemption from the lien authority is specified for real property owned by a local government or special purpose district or residential property consisting of four residential units or less, unless the property was used for illegal drug manufacturing and storage.

The owner of property subject to a DOE lien may petition the DOE to remove or reduce the lien. If the DOE denies the request, the owner may, within 90 days, file suit to remove or reduce the lien. The lien will be removed if the owner can prove by a preponderance of the evidence that they are not liable under the MTCA, and reduced if they can prove that the lien exceeds the DOE cleanup costs. A lien for increase in fair market value due to the DOE cleanup will be reduced if the lien exceeds the DOE cleanup costs or exceeds the increase in fair market value solely attributable to the DOE cleanup.

Substitute Bill Compared to Original Bill:

The substitute bill provides exceptions to the DOE's lien priority to recover cleanup costs for local and special district property tax assessments and mortgage liens. The substitute bill provides flexibility for the DOE to limit the lien amount for abandoned properties to the increase in the fair market value of the property attributable to the cleanup, and those liens have priority over all other liens. The substitute bill directs the DOE to provide notice before initiating cleanup using contractors. The substitute bill exempts from the DOE's lien authority property owned by a local government or special purpose district. The substitute bill allows any person who owns property subject to the lien to petition the DOE to have the lien removed or reduced. The substitute bill removed the authority for the DOE to accept a payment not to exceed the increase in the fair market value of the property attributable to the remedial action if it is in the public interest, the current owner is not liable under the MTCA, or the Attorney General determines that a settlement is warranted.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: (In support of original bill) The Department of Ecology usually does not propose changes to the initiative that created the MTCA, however, this change would ensure that the state's public resources that are used to clean up contaminated properties would be protected. Recently, with funding for the Clean Sites Initiative, additional moneys are being spent to clean up orphan sites and other properties. This bill would ensure that the state has a tool to protect these investments.

(With concerns on original bill) Washington has a favorable lending environment and a favorable regulatory framework. A basic tenet of this framework is that financial institutions have first rank and first priority for liens. The original bill changes this framework, but stakeholders have worked out a solution in the amendment to the bill. For properties having a

blended public investment, such as local governments, special purpose districts and ports, there should be exceptions to protect investments made by other public entities. Contractors working on these properties have an interest in when these liens are filed and language that recognizes their interests should be incorporated into the substitute bill.

Testimony Against: None.

Persons Testifying: (In support of original bill) Jim Pendowski, Department of Ecology.

(With concerns on original bill) Eric Johnson, Washington Public Ports Association; Duke Schaub, Washington Association of General Contractors; Brad Tower, Washington Independent Community Bankers; and Denny Eliason, Washington Bankers Association.

Persons Signed In To Testify But Not Testifying: None.