

# HOUSE BILL REPORT

## SSB 5449

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

**Brief History:**

**Committee Activity:**

Natural Resources, Ecology & Parks: 3/24/05, 3/31/05 [DPA].

**Brief Summary of Substitute Bill  
(As Amended by House Committee)**

- 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 certain mortgage liens, liens filed by the DOE have priority in rank over all other privileges, liens, encumbrances, or other security interests affecting the property.

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**HOUSE COMMITTEE ON NATURAL RESOURCES, ECOLOGY & PARKS**

**Majority Report:** Do pass as amended. Signed by 7 members: Representatives B. Sullivan, Chair; Upthegrove, Vice Chair; Blake, Dickerson, Eickmeyer, Hunt and Williams.

**Minority Report:** Do not pass. Signed by 4 members: Representatives Buck, Ranking Minority Member; Kretz, Assistant Ranking Minority Member; DeBolt and 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.

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### **Summary of Amended 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 DOE may file a lien against the property. Except for local and special district property tax assessments and certain 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, 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 foreclosure 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 or lender holding a mortgage on real 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.

**Amended Bill Compared to Substitute Bill:**

The amended bill removes owners failing to substantially comply with a DOE order from a category of liens that has rank over all other privileges and liens. The amended bill specifies that only mortgage liens recorded before liens or notices of intent to conduct remedial actions have priority in rank. The amended bill authorizes the DOE to record a copy of the notice regarding remedial actions with the county, establishing a priority date for the lien if it is filed. The amended bill authorizes the Attorney General to foreclose a lien in the same manner prescribed for the judicial closure of a mortgage. The amended bill authorizes lenders holding a mortgage to petition the DOE to have a lien removed.

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**Appropriation:** None.

**Fiscal Note:** Available.

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

**Testimony For:** This bill would hold polluters responsible by authorizing the DOE to file liens to recover cleanup costs. Other states have this authority, and it allows the state to recover public funds. The original bill had a stronger lien authority, which concerned banks, contractors, and other stakeholders. Language changes were negotiated with stakeholders to address their concerns.

**Testimony Against:** Title companies are concerned about the super priority rights given in the bill, without any protection to prior mortgage lenders. The state's lien authority should not be able to eliminate a lien if the contamination occurs after a mortgage company has previously secured a lien. The DOE should be able to enforce liens only against mortgage

lenders who have not recorded mortgages prior to the DOE's cleanup. Title companies and mortgage bankers have some proposed amendments to address these concerns.

**Persons Testifying:** (In support) Senator Poulsen, prime sponsor; and Jim Pendowski, Department of Ecology.

(Opposed) Dwight Bickel, Washington Land Title Association; and Shannon Skinner, Washington Mortgage Lender Association.

**Persons Signed In To Testify But Not Testifying:** None.