

# SENATE BILL REPORT

## SSB 5449

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As Passed Senate, March 14, 2005

**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:** Water, Energy & Environment: 1/25/05, 3/2/05 [DPS, DNP].  
Passed Senate: 3/14/05, 36-12.

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### SENATE COMMITTEE ON WATER, ENERGY & ENVIRONMENT

**Majority Report:** That Substitute Senate Bill No. 5449 be substituted therefor, and the substitute bill do pass.

Signed by Senators Poulsen, Chair; Rockefeller, Vice Chair; Morton, Ranking Minority Member; Fraser, Pridemore and Regala.

**Minority Report:** Do not pass.

Signed by Senator Mulliken.

**Staff:** Sam Thompson (786-7413)

**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 does not have authority to file a lien on property to facilitate cleanup cost recovery, and faces difficulties in recouping costs when a liable party is absent or bankrupt. DOE usually has lower priority in recovering its cleanup costs in bankruptcy proceedings than most secured creditors (e.g., 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 of Bill:** 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 Department of Ecology (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 or other means agreed to by DOE.

Lien for Up to Full Amount of State Cleanup Costs. Except for liens for local and special district property tax assessments and for mortgages, these liens will have priority over all other encumbrances affecting the property.

Lien Limited to Increase in Fair Market Value Due to State Cleanup. Liens limited in this way have priority over all other encumbrances affecting the property. They may only be filed in instances where the owner has abandoned the property (i.e., there has no significant business activity for three years or property taxes are three years in arrears) or has failed to substantially comply with a cleanup order. Increase in fair market value will be determined by the bona fide purchase price of property or a DOE real estate appraiser.

Notice. When notifying persons of potential liability under the Model Toxics Control Act (MOTCA), DOE will include a notice stating that if it incurs cleanup costs that it cannot recover, DOE may file a lien against the property.

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.

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 responding with a defense. 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.

Appeal. An owner of property subject to a DOE lien may petition DOE to remove or reduce the lien. If 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 MOTCA, and reduced if they can prove that 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.

**Appropriation:** None.

**Fiscal Note:** Available for original bill.

**Committee/Commission/Task Force Created:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** Taxpayers have an interest in recovering public sums spent to clean up privately-owned toxic waste sites. This legislation would enable DOE to recoup as much as \$1.5 million in prior state-funded cleanups, and an estimated \$4.5 million of \$12 million projected to be spent cleaning up "orphaned" and abandoned toxic waste sites. The Federal Environmental Protection Authority and several states already have authority to recover "windfall" increases in property value due to government-funded cleanup. This legislation would improve implementation of the state Model Toxics Control Act.

**Testimony Against:** DOE already has lien authority, and should not be granted a lien superior to those held by banks and other creditors. Redevelopment of previously-contaminated property would be discouraged if purchasers were liable to DOE for the increase in property value; also, determining the cause of a "windfall" can be uncertain. A DOE lien should not have priority over liens held by lenders; lenders need first priority liens to ensure that loans are not overly costly or unavailable in previously contaminated industrial and low-income areas. Saleability of loans on the secondary market would be chilled. The standard of review for DOE lien filing decisions is inappropriate.

**Who Testified:** PRO: Jim Pendowski, Department of Ecology; Mo McBroom, WashPIRG.

CON: Eric Johnson, Washington Public Ports Association; Denny Eliason, Washington Bankers Association; Stacy Augustine, Washington Credit Union League; Tom McBride, Association of Washington Business.

**House Amendment(s):** The amendment adds a provision giving DOE the option, before commencing cleanup, of recording notice of a cleanup action, with a legal description of the property; if the agency later files a lien, this recording establishes the priority date. It is clarified that DOE liens will not have priority over non-monetary encumbrances (such as utility easements) and that mortgages recorded before DOE files a lien or records notice of a cleanup action have priority over the DOE lien.

The amendment also clarifies that a DOE lien can only be filed on property that is being cleaned up, not on a "facility" (which could include adjoining properties to which contamination may have migrated).

DOE authority to file a lien when an owner has failed to substantially comply with an order is deleted.

Language is added providing that Attorney General will conduct any lien foreclosure in the standard manner prescribed for mortgage foreclosures.

A provision is added allowing a lender holding a mortgage to challenge a DOE lien.

House Passed: 67-29.