

# HOUSE BILL REPORT

## SSB 5170

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**As Reported by House Committee On:**  
Environment

**Title:** An act relating to independent remedial actions under the model toxics control act.

**Brief Description:** Concerning independent remedial actions under the model toxics control act.

**Sponsors:** Senate Committee on Energy, Environment & Telecommunications (originally sponsored by Senator Ericksen).

**Brief History:**

**Committee Activity:**

Environment: 3/20/17, 3/28/17 [DPA].

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

- Directs the Department of Ecology to establish an optional joint voluntary remedial action plan program for persons wishing to conduct an independent remedial action under the Model Toxics Control Act.
- Exempts a person conducting an independent remedial action pursuant to a joint voluntary remedial action plan from the procedural and permitting requirements of the following state environmental laws: the Washington Clean Air Act, the Solid Waste Management – Reduction and Recycling Act, the Hazardous Waste Management Act, Construction Projects in State Waters, the Water Pollution Control Act, and the Shoreline Management Act.

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### HOUSE COMMITTEE ON ENVIRONMENT

**Majority Report:** Do pass as amended. Signed by 8 members: Representatives Fitzgibbon, Chair; Peterson, Vice Chair; Taylor, Ranking Minority Member; Maycumber, Assistant Ranking Minority Member; Buys, Dye, Fey and Kagi.

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

**Staff:** Robert Hatfield (786-7117).

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*This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.*

## **Background:**

### The Model Toxics Control Act.

The Model Toxics Control Act (MTCA) was enacted as a result of the passage of Initiative 97 in 1988. The stated primary purpose of the MTCA is raising "sufficient funds to clean up all hazardous waste sites and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state's lands and waters." The MTCA also grants the Department of Ecology (Ecology) authority to develop rules and oversee the cleanups done by public and private entities throughout the state.

Ecology's work under the MTCA is funded primarily by revenue from the Hazardous Substances Tax, which is imposed on the first possession in the state of petroleum products, pesticides, and certain chemicals. These substances are taxed at the rate of 0.70 percent of the wholesale value. Funding is also provided by cost recovery from remedial actions conducted by Ecology, and to a lesser extent, mixed waste fees, fines, penalties, and other charges.

### Hazardous Waste Sites.

A hazardous waste site under the MTCA is any site where Ecology has confirmed a release or a threatened release of a hazardous substance that requires remedial action. A site is defined by the nature and extent of contamination associated with one or more releases of hazardous substances. Contaminated sites on land are known as upland sites, and contaminated sites along waterways are known as sediment sites.

### Remedial Actions.

Remedial actions are the collective planning, investigative, and technical work needed to cleanup hazardous waste sites. Remedial actions include actions such as excavation and removal of contaminated soils, or in-place treatment of contaminated soil and groundwater.

### Independent Remedial Actions.

Independent remedial actions, also referred to as independent cleanups, are remedial actions conducted without Ecology oversight or approval, and not under an order, agreed order, or consent decree.

### The Model Toxics Control Act Site Cleanup Process.

Since the MTCA's inception, Ecology has identified more than 12,000 sites in Washington as having suspected or confirmed contamination. Of these, approximately 6,300 sites have been determined to require no further action, and approximately 5,700 sites have suspected or confirmed contamination and have not yet been cleaned up. Ecology maintains a database of all of these sites in its Integrated Site Information System database. On average, between 200 and 300 sites are added to the list each year, and cleanups are completed at a rate of approximately 200 sites per year.

Cleanups of hazardous waste sites under the MTCA can be conducted in one of three general ways:

- independent cleanups, in which the property owner cleans up the property independently, either with or without Ecology consultation;

- Ecology-supervised cleanups, in which Ecology supervises a cleanup conducted by a potentially liable person under either an administrative order or a court-approved consent decree; or
- Ecology-conducted cleanups, in which Ecology conducts the cleanup under a state contract, such as when no potentially liable person can be identified, or when such persons are unable or unwilling to pay for the cleanup.

#### Independent Cleanups.

Under an independent cleanup, also referred to as independent remedial actions, a property owner may cleanup either with or without any consultation by Ecology.

- Cleanup without Ecology consultation: Under a cleanup conducted without Ecology consultation, the property owner determines the cleanup schedule, as well as the scope and extent of the cleanup. However, Ecology will not provide an opinion on the sufficiency of the cleanup. Independent cleanups do not require public notice.
- Cleanup with Ecology consultation: As with a cleanup without Ecology consultation, the property owner determines the cleanup schedule, as well as the scope and extent of the cleanup. However, through the MTCA's Voluntary Cleanup Program, a property owner may request technical assistance and an opinion on the sufficiency of the cleanup from Ecology. The property owner must cover the costs of the reviews and technical assistance provided by Ecology. Based on the review, Ecology either issues a letter stating that the site needs no further action, or identifies what additional work is needed.

#### Ecology-Supervised Cleanups.

Cleanup of a hazardous waste site may proceed under Ecology supervision in one of three different ways.

- Ecology-supervised cleanup under an agreed order: Under this option, cleanup is supervised by Ecology under an agreed order. Schedules are negotiated with Ecology and cleanup plans are subject to public review and Ecology approval. Cleanups under an agreed order do not resolve questions of liability or provide protection against third-party contribution claims.
- Ecology-supervised cleanups under a consent decree: Under this option, cleanup is supervised by both Ecology and the Attorney General under a consent decree filed in court. Schedules are negotiated with Ecology and the Attorney General, and cleanup plans are subject to public review and Ecology approval. The consent decree process allows for resolution of questions of liability, and provides protection from third-party claims for contribution.
- Ecology-supervised cleanup under an enforcement order: Under this option, Ecology has the authority to issue an enforcement order to compel cleanup.

#### Ecology-Conducted Cleanups.

In addition to the cleanup options described above, the MTCA also authorizes Ecology to conduct cleanup activities. Ecology typically conducts and pays for cleanups when liable persons are unwilling or unable to pay to conduct the cleanup, or when no liable person can be identified.

#### Compliance With Other Environmental Laws.

Cleanups conducted by or supervised by Ecology are exempt from the procedural requirements, including permitting requirements, of other state environmental laws, including the Washington Clean Air Act, the Solid Waste Management – Reduction and Recycling Act, the Hazardous Waste Management Act, Construction Projects in State Waters, the Water Pollution Control Act, and the Shoreline Management Act. Ecology still must ensure that Ecology-conducted and Ecology-supervised cleanups meet the substantive requirements of these other environmental laws. Ecology must also ensure that such cleanups comply with the substantive provisions of any laws requiring or authorizing local government permits or approvals.

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**Summary of Amended Bill:**

Independent remedial actions for which a person has obtained a joint voluntary remedial action plan from the Department of Ecology (Ecology) are exempt from the procedural requirements of the following environmental laws: The Washington Clean Air Act, the Solid Waste Management – Reduction and Recycling Act, the Hazardous Waste Management Act, Construction Projects in State Waters, the Water Pollution Control Act, and the Shoreline Management Act.

Ecology is authorized to offer site-specific technical advice and assistance regarding the substantive requirements of the environmental laws listed above to persons who are conducting an independent remedial action after obtaining a joint voluntary remedial action plan from Ecology.

Ecology is directed to establish, by January 1, 2019, an optional program for persons conducting independent remedial actions, that describes in a joint voluntary remedial action plan the applicable state and local environmental and land use statutes, administrative rules, ordinances, and development regulations applicable to a particular independent remedial action. Beginning January 1, 2019, a person wishing to conduct an independent remedial action will have the option of obtaining a joint voluntary remedial action plan from Ecology.

The joint voluntary remedial action plan must describe, at a minimum, the site-specific requirements associated with permits issued under the Washington Clean Air Act, the Solid Waste Management – Reduction and Recycling Act, the Hazardous Waste Management Act, Construction Projects in State Waters, the Water Pollution Control Act, and the Shoreline Management Act, as well as any permits issued under any land use or environmental laws that require or authorize local government permits or approvals.

As part of the joint voluntary remedial action plan, Ecology must develop a consolidated application to be used by the person conducting the independent remedial action, to communicate relevant details concerning the action and the subject property. Ecology must communicate the information in the consolidated application to appropriate local governments, who will then have 30 days to communicate to Ecology the site-specific requirements associated with any statutes, administrative rules, ordinances, or development regulations administered by the local government.

Ecology must use the information from the consolidated application, as well as the information received from local governments in response to the consolidated application, to provide the person conducting the independent remedial action with a joint voluntary remedial action plan that addresses the state and local land use and environmental statutes, administrative rules, ordinances, and development regulations applicable to the property that is the subject of the independent remedial action.

The following environmental laws—the Washington Clean Air Act, the Solid Waste Management – Reduction and Recycling Act, the Hazardous Waste Management Act, Construction Projects in State Waters, the Water Pollution Control Act, and the Shoreline Management Act—are modified to specify that the procedural requirements of each of the laws do not apply to a person conducting an independent remedial action for which the person has obtained a joint voluntary remedial action plan from Ecology.

The environmental laws listed above are modified to specify that Ecology is not responsible for ensuring that independent remedial actions for which a person has obtained a joint voluntary remedial action plan from Ecology comply with the substantive requirements of each of the laws.

A joint voluntary remedial action plan neither enlarges nor reduces a person's legal obligations under any state and local land use and environmental statute, administrative rule, ordinance, or development regulation applicable to the property that is the subject of the independent remedial action.

A joint voluntary remedial action plan may not serve as the basis of a cause of action under the Model Toxics Control Act or under any state or local land use or environmental statute, administrative rule, ordinance, or development regulation that may be addressed in the joint voluntary remedial action plan.

**Amended Bill Compared to Substitute Bill:**

The striking amendment retains the bill's exemption from the procedural requirements of certain environmental laws for independent remedial actions, but limits the exemption to independent remedial actions conducted pursuant to a joint voluntary remedial action plan obtained from Ecology. Ecology is directed to establish an optional joint voluntary remedial action plan program.

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**Appropriation:** None.

**Fiscal Note:** Available. New fiscal note requested on March 28, 2017.

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

**Staff Summary of Public Testimony:**

(In support) This bill targets voluntary cleanups, which tend to be small in scale. This is just another tool to get the job done. It only deals with procedural requirements, not substantive requirements. This is just a way to get cleanups done more quickly. The goal is to get the property back in use. Given the backlog of projects, it is important to get something like this going.

(Opposed) This bill erodes the ability to protect public health. It suspends local oversight of some cleanups. There is a misconception that local oversight stalls cleanups. Contamination from contaminated sites often moves off-site and into the right of way, where it is then encountered by public works crews, to their detriment. Property owners often ask for enforcement letters so they can tap into insurance dollars, because insurers often will not pay for strictly voluntary cleanups.

There are significant concerns with this bill. Ecology-supervised cleanups are exempt from the procedural requirements of certain laws, which requires Ecology to step into the shoes of the project proponent and monitor compliance with those laws. Ecology provides notice and an opportunity to comment on Ecology-supervised cleanups, and does environmental review under the State Environmental Policy Act. This bill would extend this procedural exemption to independent cleanups, but without Ecology oversight. It does not provide for public review or comment. Notice and comment are essential, because it ensures that impacts are appropriately mitigated. This bill is unnecessary. There is already a voluntary cleanup program that lets property owners cleanup on their own, but with some level of Ecology oversight.

(Other) There are concerns with this bill. Some of the laws and regulations addressed in the bill are under the enforcement jurisdiction of counties. It is the process of the permit that lets people know what they can and cannot do. It is easier to follow up when there is an issue, and easier to monitor.

**Persons Testifying:** (In support) Senator Ericksen, prime sponsor.

(Opposed) Brad Harp, Tacoma-Pierce County Health Department; Denise Clifford, Department of Ecology; and Darcy Nonemacher, Washington Environmental Council.

(Other) Laura Berg, Washington State Association of Counties.

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