SPONSOR: Rep. Heffernan & Rep. Keeley & Rep. B. Short & Sen. McDowell
Reps. Baumbach, Q. Johnson, Kowalko, Mulrooney, Osienski, D.E. Williams; Sens. McBride, Peterson

HOUSE OF REPRESENTATIVES
147th GENERAL ASSEMBLY

HOUSE BILL NO. 95

AN ACT TO AMEND TITLE 7 OF THE DELAWARE CODE RELATING TO CONSERVATION AND ENVIRONMENTAL LIENS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend § 9117, Title 7 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§9117. ~~Obligations under bankruptcy.~~ Environmental liens.

~~No obligations imposed by this chapter shall constitute a lien or claim which may be limited or discharged in a bankruptcy proceeding. All obligations imposed by this chapter shall constitute continuing regulatory obligations imposed by the State.~~

(a) Pursuant to the provisions of this section, all costs related to any remedy undertaken by the State for which a person is liable under this chapter or the regulations promulgated pursuant thereto shall constitute a lien in favor of the State upon the real property where such remedy takes place.

(b) A lien created under this section constitutes record notice and attaches to and is perfected against real property when:

(1) No less that 21 days prior to the effective date of the lien, a notice of lien is sent by the Secretary, by means of certified or registered mail, to the last known address of all owners of the property;

(2) A notice of lien is filed by the Secretary with the Office of the Recorder of Deeds in the county in which the property is located; and

(3) Costs associated with any remedy at the property are incurred by the State.

(c) A person whose interest is substantially affected by any action of the Secretary taken pursuant to subsection (a) of this section may contest the imposition of a lien to the Environmental Appeals Board in accordance with § 6008 of this Title.

(d) A lien created under this section has priority over all other liens and encumbrances perfected after the date that the lien recorded pursuant to this section is perfected.

(e) A lien created under this section continues until fully satisfied or otherwise discharged in accordance with law.

(f) Upon satisfaction of the liability secured by a lien created under this section, the Secretary shall file a notice of release of lien with the Office of Recorder of Deeds in the county in which the real property is located.

(g) No lien or obligation created under this chapter may be limited or discharged in a bankruptcy proceeding. All obligations imposed by this chapter shall constitute regulatory obligations imposed by the State.

(h) If the Secretary determines that the funds projected to be available in order to satisfy the lien provided pursuant to subsection (a) of this section will be insufficient to permit the State to recover fully its costs, the Secretary may file a petition in the Court of Chancery seeking to impose an additional lien or liens upon other real property in this State owned by the same person or persons as the property where the costs are incurred.

(1) A petition filed by the Secretary pursuant to this subsection shall describe with particularity the real property to which the requested lien will attach.

(2) Upon filing of a petition by the Secretary, the Court shall schedule a hearing to determine whether the petition should be granted. Notice of the hearing shall be provided to the Secretary, the owner or owners of the real property which is the subject of the petition, and any person holding a lien or a perfected security interest in the property.

Section 2. Amend § 7419, Title 7 of the Delaware Code by making insertions as shown by underlining and deletions as shown by strike through as follows:

§ 7419. ~~Recovery of expenditures.~~ Environmental liens; recovery of expenditures.

~~The Department shall seek recovery of moneys expended from the fund for corrective action under this chapter where the owner or operator has violated substantive regulations pertaining to underground storage tanks which have been promulgated by the Department or has engaged in grossly negligent conduct.~~

(a) Pursuant to the provisions of this section, all costs expended by the State related to investigating a release or suspected release of a regulated substance from an underground storage tank system including, but not limited to, performing inspections, release detection monitoring, site assessments, removal of regulated substances, removal or closure in place of any part of the underground storage tank system, actions necessary to abate an emergency situation such as installing water treatment, supplying drinking water, installing wells and venting petroleum vapors, as well as other necessary corrective actions for which a person is liable under this chapter or the regulations promulgated pursuant thereto shall constitute a lien in favor of the State upon the real property where such activities occur.

(b) A lien created under this section constitutes record notice and attaches to and is perfected against real property when:

(1) No less that 21 days prior to the effective date of the lien, a notice of lien is sent by the Secretary, by means of certified or registered mail, to the last known address of all owners of the property;

(2) A notice of lien is filed by the Secretary with the Office of the Recorder of Deeds in the county in which the property is located; and

(3) Costs associated with corrective action at the property as described in subsection (a) of this section are incurred by the State.

(c) A person whose interest is substantially affected by any action of the Secretary taken pursuant to subsection (a) of this section may contest the imposition of a lien to the Environmental Appeals Board in accordance with § 6008 of this Title.

(d) A lien created under this section has priority over all other liens and encumbrances perfected after the date that the lien recorded pursuant to this section is perfected.

(e) A lien created under this section continues until fully satisfied or otherwise discharged in accordance with law.

(f) Upon satisfaction of the liability secured by a lien created under this section, the Secretary shall file a notice of release of lien with the Office of Recorder of Deeds in the county in which the real property is located.

(g) No lien or obligation created under this chapter may be limited or discharged in a bankruptcy proceeding. All obligations imposed by this chapter shall constitute regulatory obligations imposed by the State.

(h) If the Secretary determines that the funds projected to be available in order to satisfy the lien provided pursuant to subsection (a) of this section will be insufficient to permit the State to recover fully its costs, the Secretary may file a petition in the Court of Chancery seeking to impose an additional lien or liens upon other real property in this State owned by the same person or persons as the property where the costs are incurred.

(1) A petition filed by the Secretary pursuant to this subsection shall describe with particularity the real property to which the lien will attach.

(2) Upon filing of a petition by the Secretary, the Court shall schedule a hearing to determine whether the petition should be granted. Notice of the hearing shall be provided to the Secretary, the owner or owners of the real property which is the subject of the petition, and any person holding a lien or a perfected security interest in the property.

(i) The provisions of this section shall not apply to those classes of underground storage tanks set forth in § 7404(1) and (2) of this chapter.

Section 3. Amend Chapter 74A, Title 7 of the Delaware Code by re-designating current § 7416A as § 7417A and by inserting a new § 7416A as shown by underlining as follows:

§ 7416A. Environmental liens; recovery of expenditures.

(a) Pursuant to the provisions of this section, all costs expended by the State related to investigating a release or suspected release of a regulated substance from an aboveground storage tank including, but not limited to, performing inspections, tests and repairs, release detection monitoring, site assessments, removal of regulated substances, removal or closure in place of any part of the aboveground storage tank, actions necessary to abate an emergency situation such as installing water treatment, supplying water, installing wells, and removing contaminated media, and abating hazardous vapors, as well as other necessary corrective actions for which a person is liable under this chapter or the regulations promulgated pursuant thereto shall constitute a lien in favor of the State upon the real property where such activities take place.

(b) A lien created under this section constitutes record notice and attaches to and is perfected against real property when:

(1) No less that 21 days prior to the effective date of the lien, a notice of lien is sent by the Secretary, by means of certified or registered mail, to the last known address of all owners of the property;

(2) A notice of lien is filed by the Secretary with the Office of the Recorder of Deeds in the county in which the property is located; and

(3) Costs associated with corrective action at the property as described in subsection (a) of this section are incurred by the State.

(c) A person whose interest is substantially affected by any action of the Secretary taken pursuant to subsection (a) of this section may contest the imposition of a lien to the Environmental Appeals Board in accordance with § 6008 of this Title.

(d) A lien created under this section has priority over all other liens and encumbrances perfected after the date that the lien recorded pursuant to this section is perfected.

(e) A lien created under this section continues until fully satisfied or otherwise discharged in accordance with law.

(f) Upon satisfaction of the liability secured by a lien created under this section, the Secretary shall file a notice of release of lien with the Office of Recorder of Deeds in the county in which the property is located.

(g) No lien or obligation created under this chapter may be limited or discharged in a bankruptcy proceeding. All obligations imposed by this chapter shall constitute regulatory obligations imposed by the State.

(h) If the Secretary determines that the funds projected to be available in order to satisfy the lien provided pursuant to subsection (a) of this section will be insufficient to permit the State to recover fully its costs, the Secretary may file a petition in the Court of Chancery seeking to impose an additional lien or liens upon other real property in this State owned by the same person or persons as the property where the costs are incurred.

(1) A petition filed by the Secretary pursuant to this subsection shall describe with particularity the real property to which the lien will attach.

(2) Upon filing of a petition by the Secretary, the Court shall schedule a hearing to determine whether the petition should be granted. Notice of the hearing shall be provided to the Secretary, the owner or owners of the real property which is the subject of the petition, and any person holding a lien or a perfected security interest in the property.

(i) The provisions of this section shall not apply to those classes of aboveground storage tanks set forth in § 7404A(a)(1), (3) and (4) of this chapter.

Section 4. If any provision of this Act or the application thereof is held invalid, such invalidity shall not affect the provisions of this Act that can be given effect without such invalid provisions or application, and to this end the provisions of this Act are declared to be severable.

SYNOPSIS

This Act provides the Department of Natural Resources and Environmental Control with the authority to impose environmental liens on real property in an effort to recover taxpayers' money expended by the State in order to investigate and clean up contaminated properties in circumstances where the property owners who caused the contamination have failed to do so. This bill originates from a recommendation made by the 2003 Metachem Task Force, chaired by the Honorable William T. Quillen. As the Task Force Report noted, currently at least thirty-four states (including all of our neighboring states) and the federal government have statutory authority to impose environmental liens. Besides bringing Delaware law in line with the vast majority of our sister states and the United States, this Act provides an important means of protecting the public treasury while holding responsible property owners accountable for the environmental harm they cause.

Section 1 of the Act provides DNREC with authority to impose an environmental lien when a violation of the Delaware Hazardous Substance Cleanup Act (HSCA) has resulted in the expenditure of State funds to protect human health and the environment. Specifically, if DNREC must perform a remedy at a property using public funds, it can impose an environmental lien in order to attempt to recover the State's costs provided it gives prior notice to the property owner who has failed to perform or pay for the required remedial activities. An environmental lien when filed will have priority over subsequently filed liens. Such a lien will be discharged upon full satisfaction by the property owner of the liability for the remediation costs incurred by the State. A property owner who seeks to challenge the filing of an environmental lien can contest the imposition of the lien before the Environmental Appeals Board subject to the applicable statutory procedures contained in 7 Del. C. §6008. Additionally, if DNREC determines that the imposition of an environmental lien will be insufficient to enable it to recover its costs of performing a remedy in a particular case, it can petition the Delaware Court of Chancery to seek the imposition of an additional lien or liens on any other Delaware real property owned by the same person or persons as the property where the remediation activities occurred.

Section 2 of the Act extends the same provisions applicable to a violation of HSCA to a violation of the Delaware Underground Storage Tank Act (7 Del. C. Chapter 74). As is the case with the other provisions of the Underground Storage Tank Act, certain agricultural, residential and non-commercial underground storage tanks are exempted from the provisions of this Act.

Section 3 of the Act extends the same provisions applicable to a violation of HSCA and the Delaware Underground Storage Tank Act to the Jeffrey Davis Aboveground Storage Tank Act (7 Del. C. Chapter 74A). As is the case with the other provisions of the Aboveground Storage Tank Act, certain agricultural, residential and non-commercial aboveground storage tanks are exempted from the provisions of this Act.

Section 4 of the Act provides that its provisions are severable.