Updates
May 28, 2019

Washington State Legislature Increases Hazardous Substance Tax, Providing Additional Funds to Address Contaminated Sites

In the waning hours of the 2019 session, the Washington Legislature narrowly passed SB 5993, which increases the tax on petroleum that primarily funds the state's contaminated site cleanup program, protects the funds from being used for other purposes and amends the state's cleanup law, the Model Toxics Control Act, RCW 70.105D (MTCA), to expand the Washington State Department of Ecology's (Ecology) authority to issue cleanup grants.

SB 5993 will increase available funding for Ecology staffing and cleanup grants to local governments and other eligible parties and, thus, has important implications for parties that are liable under MTCA and for parties that are considering the redevelopment of brownfield properties.

Background: The Hazardous Substance Tax and Shortfall of MTCA Funds

MTCA was passed by citizen initiative in 1988 to be the state's cleanup law and is modeled on the federal "Superfund" statute, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.* To fund the MTCA program, the initiative created a new tax on a number of hazardous substances, including petroleum products. The vast majority of the new MTCA funds were collected through a tax on the wholesale value of petroleum products, which, in practice, meant that the revenue created by the tax fluctuated significantly based on the price of oil.

In addition to this volatility built into MTCA's funding, budget shifts by the Legislature and Ecology during the 2008 recession diverted millions of dollars from the MTCA accounts. The Legislature frequently "swept" hazardous substance tax funds from the MTCA accounts into the state's general fund to plug shortfalls. As the recession eased, Washington's economy rapidly recovered and unprecedented development, especially in Seattle, led to the discovery of many new contaminated sites, even as the MTCA funds were increasingly diverted for non-cleanup purposes. Over the past several years, the pace of cleanups has slowed because Ecology has had to reduce staff overseeing contaminated sites and has had far fewer resources to fund grants for eligible entities.

Key Provisions in SB 5993

The most important change in SB 5993 is its shift from a tax based on the price of oil to a volumetric tax of $1.09 per barrel of oil. (SB 5993 does not change the value-based tax on non-petroleum hazardous substances.) This shift to a volume-based tax is intended to reduce volatility in the funds. It is also a significant tax increase for those entities that pay the tax. Not surprisingly, petroleum producers and refiners lobbied vigorously against the bill. Preliminary estimates by the Washington State Department of Revenue indicated that the new tax would generate approximately $165 million in additional funds during the 2019-2021 biennium. Moreover, while the original hazardous substance tax rate had not changed since 1988, SB 5993 builds in an automatic increase by adjusting the new volumetric tax based on price analyses from the federal government.

SB 5993 also overhauls MTCA by creating three new funding accounts. Ecology will fund the MTCA program, including staffing, from the operating account, which will receive 60% of the volumetric tax revenue. The capital account will receive 25% of the revenue and fund Ecology's cleanup grants to eligible entities, such as local governments and, with the passage of SB 5993, affordable housing developers. The new stormwater account will receive the final 15% of the tax's revenue and fund activities relating to stormwater pollution control.

In addition to these tax and account changes, SB 5993 gives Ecology new grant authority. The bill authorizes Ecology to use capital account funds to provide grants to clean up and redevelop contaminated sites for affordable housing. This authority supports Ecology's recent efforts to support and fund cleanup projects where developers that have not caused or contributed to contamination step forward to remediate and redevelop contaminated property to build affordable housing.

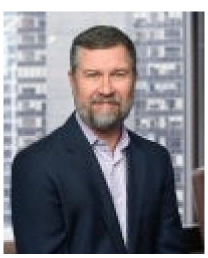
Notably, SB 5993 protects the MTCA funds from being diverted to the general fund for non-cleanup purposes only for the 2019-2021 biennium; additional action by the Legislature will be necessary to extend the protection.

Broader Implications for Cleanups Under MTCA

Ultimately, the additional revenue generated by the volumetric tax should lead to more cleanups every year and should enhance state and local government efforts to combat the effects of stormwater pollution. Currently, there are contaminated sites waiting to be cleaned up because Ecology lacks the staff to oversee cleanups by liable parties. Additional Ecology staff available for cleanup oversight is good news for those seeking regulatory closure, including developers and lenders.

It may not be good news for those liable parties that find themselves compelled by Ecology to remediate contaminated properties. Increased revenue into the capital account should lead to additional grant funds to local governments and affordable housing developers, allowing more contaminated properties to be cleaned up and redeveloped into productive use.

Authors



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