

HOUSE BILL REPORT

HB 1856

As Reported By House Committee On: Financial Institutions & Insurance

Title: An act relating to clarifying the liability of lenders under the model toxics control act.

Brief Description: Clarifying the liability of lenders under the model toxics control act.

Sponsors: Representatives Blanton, Costa, Dickerson, D. Schmidt, Thompson, Radcliff, Sherstad, Beeksma and Romero.

Brief History:

Committee Activity:

Financial Institutions & Insurance: 2/22/95, 2/23/95 [DPS].

HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS & INSURANCE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives L. Thomas, Chairman; Beeksma, Vice Chairman; Smith, Vice Chairman; Wolfe, Ranking Minority Member; Campbell; Costa; Dellwo; Dyer; Huff; Kessler; Ogden and Pelesky.

Staff: Charlie Gavigan (786-7340).

Background: In 1980, Congress passed the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund). CERCLA makes past or present owners and operators of sites containing hazardous waste, as well as the generator or transporter of the waste, jointly and severally liable for the cleanup costs. An exception is provided for lenders' security interests. While many courts hold that a lender must participate in the management of a business to incur liability, and that merely acquiring ownership through foreclosure is not sufficient to make lenders liable, some courts have narrowly defined this security interest exemption, finding banks liable by merely acquiring title through foreclosure or by having the capacity to influence the owner or operator.

In 1993, the Environmental Protection Agency (EPA) adopted a rule clarifying CERCLA's security exemption for lenders. This rule clarified that a lender could acquire title to protect its security interest and still not be liable under CERCLA as an owner or operator. The rule also clarified that a lender could temporarily manage the

facility or site after acquiring title. This rule was struck down by the court in 1994; the court held that the EPA lacked statutory authority to enact this rule.

Washington adopted the Model Toxics Control Act (MTCA) by initiative in 1989. This law is similar to CERCLA. It requires the Department of Ecology to conduct or require remedial action to remedy releases of hazardous substances. Under the MTCA, the current owner of the site, the owner at the time of waste disposal, and those generating or transporting the waste are jointly and severally liable for the costs of site cleanup. An exception is provided for lenders' security interests.

Summary of Substitute Bill: The Washington Model Toxics Control Act is modified to clarify the liability of lenders. A lender is not liable as an owner or operator if the lender acquires title to a site that has hazardous waste simply by foreclosing under the security agreement. A lender can operate or participate in management of a facility or site without being liable under the MTCA, provided the lender complies with statutory restrictions. Operating or participating in management of a facility or site must be related to preparing the site for sale or protecting the lender's interest, and can only be done up to one year prior to acquiring title or up to five years after acquiring title.

Substitute Bill Compared to Original Bill: The substitute bill makes technical corrections, clarifies definitions and terms, and clarifies the Department of Ecology's authority.

Appropriation: None.

Fiscal Note: Not requested.

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

Testimony For: This bill clarifies the existing state law exempting lenders from liability as owners or operates if they are simply protecting their security interest. The bill will result in more lending, improved economic development, and more and faster clean-ups of contaminated property.

Testimony Against: None.

Testified: Mike Sciacca, Washington Oil Marketers Association (pro); Mary Burg, Ecology (pro); Lyle Jacobson, Washington Savings League (pro); Don Ford, US Bank (pro); Meara Nisbit, Washington Bankers Association (pro); Don Chance, Association of Washington Business (pro); and Rep. Jerry Blanton, prime sponsor (pro).