

SENATE BILL REPORT

SB 5890

As Reported By Senate Committee On:
Financial Institutions & Housing, February 28, 1995

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: Senators Fraser, Hale, Prentice, Deccio and Kohl.

Brief History:

Committee Activity: Financial Institutions & Housing: 2/24/95, 2/28/95 [DPS].

SENATE COMMITTEE ON FINANCIAL INSTITUTIONS & HOUSING

Majority Report: That Substitute Senate Bill No. 5890 be substituted therefor, and the substitute bill do pass.

Signed by Senators Prentice, Chair; Fraser, Vice Chair; Hale, Roach, Sellar, Smith and Sutherland.

Staff: Catherine Mele (786-7470)

Background: In 1980, Congress passed the Comprehensive Environmental Response Compensation, and Liability Act (called CERCLA or Superfund). Washington adopted a similar law called the Model Toxics Control Act (MTCA) by initiative in November 1988. Both the federal and state laws provide for a comprehensive program for the cleanup of hazardous waste sites. Under both acts, past and present owners and operators, as well as those who generate or transport waste, are jointly and severally liable for all the costs of cleanup of a contaminated site. Under "joint and several" liability, any person may be liable for 100 percent of the cleanup costs.

The MTCA currently provides an exception to "joint and several" liability to lenders who hold a security interest in property. Some 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. However, some courts narrowly define the security interest exemption, finding banks liable by acquiring title through foreclosure, or by merely having the capacity to influence the owner or operator.

In 1993, the Environmental Protection Agency (EPA) adopted a rule clarifying CERCLA's security interest 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. In 1994, the court struck down this rule holding that the EPA lacked the statutory authority to enact such a rule.

In response to the EPA's rule, the state Department of Ecology convened a work group to establish a similar policy for the state's cleanup program. During the creation of this policy, the courts invalidated the federal EPA rule. Thus, instead of developing a policy, the work group developed legislation to address this issue.

Summary of Substitute Bill: The Washington Model Toxics Control Act (MTCA) 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 contaminated site 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 the statutory restrictions. The operating or participating in management of a facility or site must be to prepare the site for sale or to protect 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 Department of Ecology is given authority to issue orders to holders which require holders to abate an imminent or substantial endangerment. New language is added which allows prospective holders to require owners and operators to take specific action as a precondition to a loan. When a holder requires such actions before giving a loan, the holder is not considered participating in the management of the property. The five-year holding period for properties currently acquired begins the effective date of the act. Other technical changes are made.

Appropriation: None.

Fiscal Note: Requested on February 15, 1995.

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

Testimony For: This bill clarifies that if lenders only have a security interest in property, they will not be liable under the Model Toxics Control Act. Lenders are cautious about taking contaminated property as collateral. This is a balanced approach to address the issue. If lenders act responsibly when they hold the property, then they will not be liable under the Model Toxics Control Act. This bill is the result of a work group and has a broad base of support.

Testimony Against: None.

Testified: Bruce Wishart, Sierra Club; PRO: Mary Burg, Ecology; Mike Sciacca, WA Oil Marketers Assn.; Meara Nisbet, WA Bankers Assoc.; Lyle Jacobsen, WA Savings League.