HOUSE BILL REPORT
SSB 5873

As Passed House:
February 27, 1998

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

Brief Description: Defining terms under the model toxics control act.

Sponsors: Senate Committee on Financial Institutions, Insurance & Housing (originally sponsored by Senators Benton and Winsley).

Brief History:
Committee Activity:
Agriculture & Ecology: 2/18/98 [DP].
Floor Activity:
Passed House: 2/27/98, 94-0.

HOUSE COMMITTEE ON AGRICULTURE & ECOLOGY

Majority Report: Do pass. Signed by 9 members: Representatives Chandler, Chairman; Parlette, Vice Chairman; Schoesler, Vice Chairman; Linville, Ranking Minority Member; Anderson, Assistant Ranking Minority Member; Cooper; Koster; Regala and Sump.

Staff: Margaret Allen (786-7110).

Background: The Model Toxics Control Act (MTCA) addresses the cleanup of hazardous waste sites. Adopted by initiative in 1988, the MTCA requires the Department of Ecology, among other things, to conduct or require remedial action to remedy releases of hazardous substances. The current owner or operator of the site, the owner or operator of the site at the time the substance was released, persons who own, possess, or transport the substance, and a person who both sells a hazardous substance and is responsible for written instructions for its use, may be jointly and severally liable for the costs of site cleanup.

"Owner or operator" is defined broadly, but excludes lenders with security interests in affected facilities. To qualify for the exclusion, lenders who have foreclosed their interests must: (1) maintain environmental compliance measures already in place at the facility; (2) comply with reporting requirements; (3) comply with any order issued by the department to abate an imminent or substantial endangerment; (4) allow the department

or potentially liable persons access to the facility to conduct remedial actions; (5) conduct any of its own remedial actions in compliance with pre-existing departmental requirements or rules; and (6) not exacerbate an existing release of a hazardous substance.
Lenders are not exempt, however, if they are liable on some other basis, or if they cause or contribute to a new release or threatened release of hazardous substances and fail to establish that: (1) the new release has been remediated according to the requirements of the MTCA; and (2) any hazardous substances remaining at the facility after remediation of the new release are divisible from the new release.

The MTCA does not explicitly exempt fiduciaries. A fiduciary is a person or institution that manages money or property on behalf of another.

Summary of Bill: A fiduciary is exempted from liability under the MTCA if the fiduciary, to the extent empowered to do so, fulfills the same six requirements imposed on lenders who have foreclosed their security interests. The exemption does not apply where the fiduciary's powers to fulfill the requirements were limited with the objective purpose of avoiding liability under, or compliance with, the MTCA.

Similar to the limitations on the exemption for lenders, the exemption for fiduciaries does not apply to the extent the person or institution acting as the fiduciary is liable, on some other basis, for actions taken either independently or in a fiduciary capacity. Also, the exemption for fiduciaries does not apply to actions taken in a fiduciary capacity that cause or contribute to a new release or threatened release, or exacerbate an existing release, of hazardous substances if the fiduciary fails to establish that: (1) the new release has been remediated according to the requirements of the MTCA; and (2) any hazardous substances remaining at the facility after remediation of the new release are divisible from the new release.

The exemption does not preclude a claim against an estate or trust administered by the fiduciary, or against someone retained by the fiduciary other than an employee.

"Fiduciary" is defined at length. In general, a fiduciary is defined as a person acting for the benefit of another party under specified circumstances, such as serving as a trustee, executor, administrator, custodian, guardian, receiver, or conservator.

Also, numerous circumstances are specified under which a person will not be considered a fiduciary. Examples include acting as a fiduciary for a trust or estate organized to carry on a business for profit, acquiring ownership or control of a facility to avoid liability, acting in some additional capacity and benefiting from a trust or fiduciary relationship, receiving benefits that substantially exceed customary or reasonable compensation, or acting as a trustee of state or federal lands or resources.

The liability of a fiduciary will not exceed the assets held in the fiduciary capacity unless the exemption for fiduciaries does not apply.

Appropriation: None.

Fiscal Note: Not requested.

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

Testimony For: This bill exempts innocent fiduciaries from liability under the Model Toxics Control Act. It will apply only to the individual assets of the innocent fiduciary, and if the fiduciary would not otherwise be liable. The issue is one of fairness. Interested parties worked together to craft the language of the bill and support it.

Testimony Against: None.

Testified: Denny Eliason and Ivan Landreth, Seafirst Bank; and Lydia Lindwall, Department of Ecology.