

# SENATE BILL REPORT

## SHB 1856

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As Reported By Senate Committee On:  
Financial Institutions & Housing, March 21, 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:** House Committee on Financial Institutions & Insurance (originally sponsored by Representatives Blanton, Costa, Dickerson, D. Schmidt, Thompson, Radcliff, Sherstad, Beeksma and Romero).

**Brief History:**

**Committee Activity:** Financial Institutions & Housing: 3/21/95 [DP].

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### SENATE COMMITTEE ON FINANCIAL INSTITUTIONS & HOUSING

**Majority Report:** Do pass.

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

**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 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.

The Department of Ecology is given authority to issue orders to holders which require holders to abate an imminent or substantial endangerment.

**Appropriation:** None.

**Fiscal Note:** Not requested.

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

**Testimony For:** Witnesses referred to testimony provided on the companion Senate bill.

**Testimony Against:** None.

**Testified:** Representative Les Thomas, prime sponsor; Pete Kmet, Department of Ecology (pro); Lyle Jacobsen, Washington Savings League, Washington Mortgage Lenders (pro); Meara Nisbet, Washington Bankers Association (pro).