

Chapter 374-10 WAC
STATE FINANCIAL ASSURANCE PROGRAM

NEW SECTION

WAC 374-10-010 Purpose. As authorized by chapter 70A.545 RCW, the purpose of this chapter is to establish criteria and procedures for the payment of costs from the state financial assurance program to the owners or operators of commercial petroleum underground storage tank systems. The agency will administer the program with a focus on release prevention and remediation and the equitable protection of human health and the environment. The program allows owners and operators to meet financial responsibility requirements.

NEW SECTION

WAC 374-10-020 Definitions. Unless the context requires otherwise, the definitions in this section shall apply throughout this chapter.

(1) "Agency" means the Washington state pollution liability insurance agency and may be referred to as PLIA throughout this chapter. For purposes of chapter 70A.545 RCW, agency or PLIA shall also mean staff or employees of the pollution liability insurance agency.

(2) "Bodily injury" means actual medically documented costs and medically documentable future costs of adverse health effects that have resulted from exposure to a release from a petroleum underground storage tank. The term does not include pain and suffering.

(3) "Director" means the director or designee of the Washington state pollution liability insurance agency.

(4) "Enrollment" or "enrolled" means the status of a petroleum underground storage tank where it has been accepted by the agency into the state financial assurance program, the enrollment agreement has been signed and payment for the program has been made by the owner or operator of the eligible petroleum underground storage tank.

(5) "Facility assessment" means an evaluation of a petroleum underground storage tank, its system, or the facility.

(6) "Financial assurance request" means a request for payment from the state financial assurance program filed by an owner or operator of an enrolled petroleum underground storage tank.

(7) "MTCA" means the Model Toxics Control Act (chapter 70A.305 RCW).

(8) "Online community" means the cloud-based application and data system used by the agency and the agency's customers to submit documentation and to report, process, and look up project information.

(9) "Owner or operator" means the entity in control of, or having a responsibility for, the daily operation of a petroleum underground storage tank.

(10) "Petroleum" means any petroleum-based substance, including crude oil or any fraction that is liquid at standard conditions of temperature and pressure. "Petroleum" includes, but is not limited to,

petroleum and petroleum-based substances comprised of a complex blend of hydrocarbons, such as motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, and used oils. The term does not include propane, asphalt, or any other petroleum product that is not liquid at standard conditions of temperature and pressure. Standard conditions of temperature and pressure are at 60 degrees Fahrenheit and 14.7 pounds per square inch absolute.

(11) "Petroleum underground storage tank" means an underground storage tank regulated under chapter 70A.355 RCW or subtitle I of the Solid Waste Disposal Act (42 U.S.C. chapter 82, subchapter IX) that is used for storing petroleum. This includes tanks owned or operated on property under the direct jurisdiction of either the federal government or tribal governments. Underground storage tanks used for the heating of residences on the premises where the tank is located are excluded in this definition.

(12) "Petroleum underground storage tank facility" means the location where the petroleum underground storage tank and its system is located. The term encompasses all real property under common ownership associated with the operation of the petroleum underground storage tank.

(13) "Petroleum underground storage tank system" means an underground storage tank, connected underground piping, underground ancillary equipment, and containment system, if any.

(14) "Prime consultant" means an environmental consultant or business contracted by the agency to perform remediation under the program.

(15) "Program" means the state financial assurance program established by chapter 70A.545 RCW.

(16) "Property damage" means a documented adverse physical impact to structures or property resulting from a release from a petroleum underground storage tank. The term does not include business income whose loss is related to the petroleum release or remediation activities.

(17) "Release" has the same meaning as defined in RCW 70A.305.020.

(18) "Remedial action" or "remedy" has the same meaning as defined in RCW 70A.305.020.

(19) "Site" has the same meaning as "facility" as defined in RCW 70A.305.020.

(20) "Third-party claim" means a claim for funds from the program by an injured party for bodily injury or property damages resulting from a release from a petroleum underground storage tank. The following entities are not considered a third party: A petroleum underground storage tank owner or operator from which the release occurred; the owner of the property where the petroleum underground storage tank is located; a person to whom properties are transferred in anticipation of damage due to a release; employees or agents of the operator; or employees or agents of the property owner.

NEW SECTION

WAC 374-10-030 Eligibility for financial assurance. (1) To participate in the financial assurance program, the owner or operator of a petroleum underground storage tank must apply and the tank must be

enrolled in the program. Enrollment is limited to a petroleum underground storage tank located in Washington. If the owner and operator of the petroleum underground storage tank are separate entities, only one entity at a time may enroll the tank.

(2) To be eligible to participate in the financial assurance program, the petroleum underground storage tank system must meet the following requirements:

(a) Maintain compliance with the requirements of chapter 173-360A WAC, Underground storage tank regulations or federal equivalent.

(b) Be registered with the department of ecology, the federal government, or a tribal government.

(3) An owner or operator of an enrolled petroleum underground tank determined to have committed fraud as described in WAC 374-10-130 is ineligible to later enroll that tank.

NEW SECTION

WAC 374-10-040 Application, enrollment, and fees. (1)(a) Applications for program enrollment are made using the agency's online community. If requested from the agency, alternative formats for application will be provided. The agency will review all applications for completeness. Incomplete applications will not be accepted.

(b) The application must include information on any known release from the petroleum underground storage tank system. To be considered for enrollment, one of the following requirements must be met and approved by the agency.

(i) The release has been reported to the department of ecology, federal, or tribal government as required, and remedial actions have been completed as an independent action or under an agreed order or consent decree. For an independent action, the release and remedial actions have been reviewed by either the department of ecology's voluntary cleanup program or the agency's technical assistance program and a no further action letter has been issued. For remedial actions completed under an agreed order or consent decree, the department of ecology must have issued a written determination that requirements of the order or decree have been met.

(ii) The release has been reported to the department of ecology and independent remedial actions have been planned but not yet completed or independent remedial actions completed but without a no further action letter from the department of ecology's voluntary cleanup program or the agency's technical assistance program. The planned remedial actions must be reviewed by the agency prior to enrollment, and the independent cleanup must be entered into the agency's technical assistance program. A remedial action schedule with milestones will be part of the enrollment agreement and must be adhered to for the tank to remain enrolled in the program.

(iii) The release has been reported to the department of ecology and remedial actions are required under an agreed order or consent decree. The remedial action schedule in the agreed order or consent decree must be adhered to for the tank to remain enrolled in the program.

(2) An enrolled petroleum underground storage tank may be randomly selected for a facility assessment. Those selected for a facility assessment will be notified.

(3) The agency will notify the applicant if their application has been accepted for enrollment. The petroleum underground storage tank is considered enrolled in the program on the date that the agency signs the enrollment agreement.

(4) The agency will notify the applicant if their application has been denied. Denial of enrollment will be documented in writing.

(5) The enrollment term is 12 months, with coverage commencing on the enrollment date (the date the agency signs the enrollment agreement). Renewals occur on the same date each subsequent year and coverage is continuous unless the agency or the enrolled owner or operator cancels enrollment.

(6) The enrollment fee pays for the enrollment of a petroleum underground storage tank for a term of 12 months. Enrollees may request a payment plan from the agency, but the entire enrollment fee amount must be paid to the agency within the 12-month enrollment term period. No refunds of the enrollment fee will be made, regardless of whether the petroleum underground storage tank coverage is canceled.

(7) The enrollment fees will be updated at least every four years and will be posted on the agency's website. The enrollment fee amount contributes to the agency's costs for program operations and administration.

(8) An enrollment fee may be discounted at the discretion of PLIA. Approved discounts are applied following the first year of enrollment on the renewal date for the second year of coverage and evaluated each subsequent year.

(9) Discounts may include, but are not limited to, the following factors:

(a) The age of the facility, individual petroleum tank system, and associated infrastructure;

(b) The physical condition of the facility; or

(c) Whether the owner or operator adheres to industry best practices for preventing releases from petroleum underground storage tanks.

NEW SECTION

WAC 374-10-050 Cancellation of enrollment. (1) The agency will cancel enrollment for any of the following reasons:

(a) Failure to maintain the petroleum tank system or tank facility to a standard established in the program policy or enrollment agreement;

(b) Failure to comply with remediation plans agreed to with a federal or state agency or tribal government;

(c) Refusal to allow the agency to conduct a facility assessment;

(d) Failure to meet any cleanup milestones listed and submitted with the enrollment agreement;

(e) Failure to notify the agency of a release from the enrolled petroleum underground storage tank;

(f) Failure to notify the agency of any notice of noncompliance or notice of violation issued by a regulatory agency;

(g) Failure to allow the agency access to the enrolled petroleum underground storage tank system;

(h) Failure to allow the agency to conduct remedial action(s) related to a release from the enrolled petroleum underground storage tank;

(i) Failure to fulfill terms of the enrollment agreement; and

(j) Fraud by any owner or operator, as described in WAC 374-010-130 regarding the enrolled tank.

(2) The agency will provide written notice of cancellation describing the reason(s) for cancellation to the owner or operator of the enrolled petroleum tank. The written notice will identify how to remedy the issues leading to cancellation.

(3) Cancellation by the agency is effective 45 calendar days from the date of written notice. Coverage under the program will end on that effective date unless the cancellation is disputed.

(4) The owner or operator may dispute the cancellation by requesting a review of the agency decision as described in WAC 374-10-140 within 45 calendar days from notice of the cancellation.

(a) Coverage under the program will continue during the dispute review process.

(b) If, after the review of the dispute, the agency determines that a cancellation is still appropriate, cancellation is effective 45 days from the date of the dispute review's written notice. Coverage under the program will end on that effective date.

(c) If the owner or operator seeks to appeal the agency's dispute review decision as allowed in WAC 374-10-140(4), the cancellation is still effective as of the date of the dispute review's written notice. Coverage under the program will not continue during the director review process.

(5) The owner or operator of an enrolled petroleum tank may request cancellation of enrollment at any time. Coverage will continue for the enrollment term, ending on the renewal date.

If the owner or operator uses another financial responsibility mechanism and requires coverage to address a release, this program's coverage is applied as secondary coverage.

(6) If an entity is no longer the owner or operator of the enrolled petroleum underground storage tank, then coverage under the program is canceled and the cancellation date is based on when the entity is no longer the owner or operator.

NEW SECTION

WAC 374-10-060 Financial assurance coverage. (1) Release from the petroleum underground storage tank after enrollment.

(a) The program will provide financial assurance funds of up to \$2,000,000, per tank, for remedial action costs to address a release that occurs after enrollment from a petroleum underground storage tank system, and any other petroleum releases which may be occurring simultaneously at the facility at which the petroleum underground storage tank is located.

A third-party claim will be distributed from these funds. Before funding any third-party claim resulting from a release, the agency must reserve the estimated cost of any remedial actions necessary to address the release, and if funding is remaining then payment may be made on an eligible third-party claim.

(b) If there is a dispute with the agency determination on timing of the release, the owner or operator must show by clear, cogent, and convincing evidence that a release occurred post enrollment.

(c) Failure to provide the agency with a property access agreement from the property owner where the petroleum underground storage tank is located will result in denial of financial assurance funds.

(2) Release from a petroleum underground storage tank prior to enrollment.

(a) The program will provide funds of up to \$1,000,000 for remedial action costs to address all releases from a petroleum underground storage tank system that occurred prior to enrollment.

(b) If there is a dispute with the agency determination on timing of the release, the owner or operator must show by clear, cogent, and convincing evidence that a release occurred post enrollment.

(c) Financial assurance funds provided under this subsection will be subject to cost recovery.

(3) Financial assurance coverage shall not exceed \$3,000,000 per state fiscal year for multiple occurrences involving a single petroleum underground storage tank.

(4) Priority coverage.

(a) Per RCW 70A.545.020(7), funding for remedial action is prioritized over third-party costs. The agency must reserve the estimated costs of necessary remedial actions, and then payment may be made on eligible third-party costs.

(b) Per RCW 70A.545.020(6), the agency may prioritize program funding for investigations and remedial actions deemed necessary to address:

(i) An emergency which threatens human health or the environment; or

(ii) A population threatened by the release that includes an overburdened community, as defined in RCW 70A.02.010(11), or a vulnerable population, as defined in RCW 70A.02.010(14).

(c) The director may prioritize funding at their discretion using factors specified by the agency.

(5) Once a no further action letter is issued by the agency's technical assistance program for the release from the enrolled petroleum underground storage tank, the financial assurance coverage is complete, and funding will no longer be available.

NEW SECTION

WAC 374-10-070 Financial assurance request. (1) All program enrollees must review and reference the program policy guidance prior to requesting coverage from the financial assurance program. The agency maintains this document on its website.

(2) An owner or operator of an enrolled petroleum underground storage tank must report a suspected or confirmed release to the department of ecology as required under WAC 173-360A-0700 and 173-360A-0750.

(3) To obtain financial assurance funding, a financial assurance request form must be filed with the agency after initial reporting to department of ecology. An access agreement from the owner of the property where the petroleum underground storage tank is located is required as part of the financial assurance request form.

(4) In a situation where a federal, state, or tribal agency has responded to the release, this information must be included in the financial assurance request.

(5) The agency will open a financial assurance request case. The agency will conduct a review to determine if the release meets conditions for coverage and whether coverage is for release after enrollment or for release prior to enrollment.

(6) The agency will notify the enrollee that the financial assurance request has been accepted and a FA project manager and site manager have been assigned.

(7) The remedial work conducted will meet the substantive and timing requirements of WAC 173-340-450 Releases from regulated underground storage tank systems.

(8) Once a no further action letter is issued by the agency's technical assistance program for the release from the enrolled petroleum underground storage tank, the financial assurance request is considered finished and funding will no longer be available.

(9) The owner or operator must accept the schedule and milestones created by the agency to maintain coverage for the release. Failure to accept the schedule and milestones set by the agency will result in cancellation of enrollment and ineligibility of the release to qualify for financial assurance funds.

(10) The owner or operator must provide access for the agency to the property where the enrolled petroleum underground storage tank is located. Failure to provide an access agreement for the property will result in cancellation of enrollment and ineligibility of the release to qualify for financial assurance funds.

(11) To address the release from an enrolled petroleum underground storage tank, the agency may need access and an agreement for the agency to conduct remedial actions on neighboring property not owned by the owner or operator. The agency will ask for an access agreement, including an agreement to allow for remedial actions. If access and/or an agreement to allow for remedial actions is denied, the agency will limit remediation to the property where the enrolled petroleum underground storage tank is located. Once that remediation is completed and a no further action letter is issued by the agency's technical assistance program, financial assurance funds will no longer be available.

NEW SECTION

WAC 374-10-080 Eligible third-party claims. (1) A third-party claim relating to a release prior to enrollment from a petroleum underground storage tank will not be eligible for funds under this program. The owner or operator of an enrolled tank or a third party have the burden to show the release occurred post enrollment.

(2) For a third-party property claim to be eligible, the following requirements must be met:

(a) If applicable, the third party must consent to property access and sign the access agreement.

(b) If applicable, the third party must allow remediation work to occur on their property.

(c) An agreement that the agency may conduct an audit of any claim honored by the agency and that the third party will reimburse

the agency for any disallowance of costs occasioned by such an audit. The third party must also agree to retain all records pertaining to the claim for a period determined by the agency, of at least three years after final payment on the claim, and to provide the records to the agency upon request. The three-year period shall be extended until the completion of any audit in progress.

(3) A financial assurance third-party request form must be submitted before the release receives a no further action letter from the agency's technical assistance program.

(4) After submittal of a financial assurance third-party request form, the agency will send notification of approval or denial of the request.

(a) The third party must report any legal claims against the owner or operator of the enrolled petroleum tank system when filing for financial assurance coverage. All legal claims for costs and damages resulting from a release from the enrolled tank must be completed or settled prior to seeking financial assurance coverage.

(b) The third party shall make available to the agency upon request all documentation of property damage necessary to prove that the property damage is reimbursable. This includes, but is not limited to, pleadings, or any other documents filed in any lawsuit for property damage or bodily injury.

(c) The third party shall make available to the agency upon request documentation of bodily injury to include medical reports, statements, investigative reports, or certifications from licensed health professionals necessary to prove that third-party bodily injuries are reimbursable.

(5) Any covered third-party property damage shall be based on the rental costs of comparable property during the period of loss of use up to a maximum amount equal to the fair market value. In the case of property that is destroyed because of a petroleum release, reimbursement shall be at an amount necessary to replace or repair the destroyed property.

NEW SECTION

WAC 374-10-090 Eligible and ineligible costs. (1) Eligible and ineligible costs are listed in the program guidance.

(2) Eligible costs covered by the financial assurance program include, but are not limited to, the following:

(a) Remedial action performed by an agency prime consultant for releases from a petroleum underground storage tank and its system. Actions may include excavation, treatment and/or removal and proper disposal of any soil or water contaminated by the accidental release, as well as proper disposal of nonrepairable petroleum underground storage tank or its system.

(b) Remedial action which will be compliant with state, federal, or tribal cleanup standards.

(c) Remedial action costs incurred by state, federal, or tribal agencies in responding to the release from the enrolled petroleum underground storage tank.

(d) Testing, monitoring, and assessments.

(e) Third-party costs as defined in WAC 374-10-080.

(f) Necessary infrastructure replacement costs.

(i) Replacement costs for a new petroleum underground storage tank or its system that meets the current standards for such tank systems, as specified in program guidance.

(ii) The costs for replacing certain equipment related to the operation of the affected petroleum tank system, including the fuel dispenser and pipe system.

(iii) Replacement of some surface features required by municipal law, including surface asphalt and concrete, curbs or lanes, and stormwater drainage.

(3) Ineligible costs include, but are not limited to, the following:

(a) Penalties or fines assessed by other state, federal, or tribal agencies.

(b) Third-party cost recovery under MTCA, CERCLA, and lawsuits that is not permitted by WAC 374-10-080 or not an eligible cost reimbursement for a state, federal, or tribal agency.

(c) Remedial action that exceeds cleanup levels required by MTCA or federal or tribal standards.

(d) Lost business income resulting from closures related to the release or remediation.

(e) Cleanup of contamination from other sources, unless the agency determines that it is necessary to complete remediation of a release from an enrolled petroleum underground storage tank.

(f) Legal defense costs, including the costs of legal representation, expert fees, and related costs and expenses incurred in defending against claims or actions brought by or on behalf of:

(i) The United States, Washington state, or a political subdivision of the United States or Washington state to require remedial action or to recover costs of remedial action; or

(ii) A third party for bodily injury or property damage caused by an accidental release.

NEW SECTION

WAC 374-10-100 Agency-led remediation. (1) The owner or operator of a nonenrolled petroleum underground storage tank system, or owner of a property with either a nonenrolled petroleum underground storage tank system or a past release that has been reported to the department of ecology, may submit an agency-led remediation request. An agency-led remediation project will involve the agency conducting remediation related to a release from the petroleum underground storage tank. The agency may seek cost recovery following completion of the remedial actions. This is intended to address properties without viable funding sources to address contamination where the contamination may be impacting drinking water or vulnerable communities.

(2) To qualify for an agency-led remediation request, the owner or operator, or owner of the property, must show the following:

(a) Per RCW 70A.545.060(1)(a), the release occurs in an area of risk for drinking water impacts or where addressing the release is necessary to equitably protect human health and the environment in communities that have been marginalized, overburdened, and underserved;

(b) The owner or operator, or owner of the property where the petroleum underground storage tank is located, has provided consent for the agency to:

(i) Conduct the remedial actions;

(ii) Enter upon the real property to conduct the remedial actions; and

(iii) Recover the costs of the remedial actions from the owner or operator or potentially liable persons; and

(c) The owner of the property consents to the agency's use of a lien as detailed in RCW 70A.545.070 on the property.

(3) The agency may accept an agency-led remediation request per the director's discretion, subject to program funding availability.

NEW SECTION

WAC 374-10-110 Cost recovery. The agency may recover the costs of remedial actions conducted under the program by use of cost recovery options in the Model Toxics Control Act, RCW 70A.305.080, 70A.545.060, and 70A.545.070, or other applicable federal or state laws.

NEW SECTION

WAC 374-10-120 Overpayments. (1) The agency may require an owner or operator to return any cost overpayment made by the program. Overpayments may occur if:

(a) Another party, such as an insurer, has paid costs prior to payments from the program; or

(b) The agency discovers an accidental overpayment has been made to an owner or operator for any reason.

(2) If a cost overpayment is not paid upon demand, the agency may pursue the following actions:

(a) Collections. The agency may request cost recovery with a debt collection agency.

(b) Lien filing. The agency may seek cost recovery of remedial action costs from any liable person by filing a lien on the petroleum underground storage tank facility as authorized under RCW 70A.545.070.

(c) Civil action. The agency may request the attorney general office to commence a civil action against the owner or operator in superior court to recover costs and the agency's administrative and legal expenses to pursue recovery.

NEW SECTION

WAC 374-10-130 Fraud and material omissions. (1) The agency may seek return of payments made if:

(a) Any party misrepresents or omits material facts relevant to the agency's determination of coverage; or

(b) Any party, with intent to defraud, initiates a financial assurance request or issues or approves an invoice or request for payment, with knowledge that the information submitted is false in whole or in part.

(2) If the agency determines that any party has committed program fraud or omitted material information relevant to financial assurance program enrollment or payment of remediation costs, the agency may request the attorney general office to:

(a) File a lien on the underground storage tank facility or other property owned by the owner or operator to recover the amount of payment that occurred as a result of the fraud or omission;

(b) Commence a civil action against the person in superior court; or

(c) Recover the overpayment costs and other expenses as determined by a court.

(3) If the agency determines that the owner or operator of an enrolled petroleum storage tank omitted material facts or intentionally defrauded the program, it will cancel enrollment of the affected petroleum tank, and any person or party determined to have committed program fraud may be prohibited from applying for future enrollment. The agency will report instances of fraud to the appropriate authorities including criminal referral for prosecution.

(4) Any party participating in the program must agree to allow the agency to conduct financial audits related to the receipt of payments intended for remedial actions.

NEW SECTION

WAC 374-10-140 Review of initial agency decisions. (1) Review of the following initial agency decisions may be requested, in writing, to the agency's legislative and policy manager:

(a) Denial of program eligibility;

(b) Cancellation of enrollment in the program or denial of reenrollment;

(c) Denial of eligibility for payment under the program;

(d) Amount of payment allowed for remedial actions;

(e) Eligibility and amount of payment allowed for a third-party claim;

(f) Agency requests for costs repayment under WAC 374-10-120; or

(g) Other agency program decisions detailed in the program policy guidance.

(2) Review of these initial agency decisions may be requested within 45 days by an applicant, the owner or operator of an enrolled petroleum underground storage tank system, or a third-party claimant.

(3) The written request must specify the basis for review and meet the agency's procedures outlined in the program policy guidance.

(4) If the applicant or participant seeks to appeal the final agency determination, the applicant or participant has 45 days after the agency determination to submit a written request to the director for an adjudicative hearing under chapter 34.05 RCW.