

WSR 24-12-082
PROPOSED RULES
POLLUTION LIABILITY
INSURANCE AGENCY

[Filed June 4, 2024, 4:11 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 23-22-072.

Title of Rule and Other Identifying Information: Chapter 374-10 WAC, State financial assurance program, a rule establishing the state financial assurance program (program) for owners and operators of petroleum underground storage tanks (UST).

Hearing Location(s): On Wednesday, July 10, 2024, at 5:00 - 6:30 p.m.; on Friday, July 12, 2024, at 12:00 - 1:30 p.m.; and on Wednesday, July 17, 2024, at 10:00 - 11:30 a.m., virtual Zoom sessions. Please submit written comments to rule@plia.wa.gov. See <https://plia.wa.gov/public> for more details and links to the Zoom sessions.

Date of Intended Adoption: August 12, 2024.

Submit Written Comments to: Phi V. Ly, P.O. Box 40930, Olympia, WA 98504-0930, email rules@plia.wa.gov, 800-822-3905, beginning 8:00 a.m., June 20, 2024, by 5:00 p.m., July 19, 2024.

Assistance for Persons with Disabilities: Contact Xyzlinda Marshall, phone 360-407-0515, TTY 711 or 800-833-6388, email rules@plia.wa.gov, beginning 8:00 a.m., June 20, 2024, by 5:00 p.m., July 19, 2024.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: The Washington state pollution liability insurance agency (PLIA) provides an effective and efficient government funding model to support owners and operators in meeting financial responsibility and environmental cleanup requirements for USTs.

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 program to remediate contamination caused by releases from petroleum USTs. Remediation efforts are managed and directed by PLIA to ensure that all petroleum cleanup meet the substantive requirements of the Model Toxics Control Act, chapter 70A.305 RCW and chapter 173-340 WAC. The rule establishes program eligibility and coverage limitations for owners or operators of commercial petroleum UST systems seeking an alternative financial responsibility mechanism. This program does not change any existing rules found in Title 374 WAC.

Reasons Supporting Proposal: The program provides owners and operators of petroleum USTs with a financial responsibility mechanism that meets federal and state requirements for liability coverage for petroleum releases and their associated expenses. The program focuses on prevention of releases, responsiveness to any release, and emphasizes remediation of releases in areas of risk for drinking water impacts or to equitably protect human health and the environment in communities that are marginalized, overburdened, and underserved.

Statutory Authority for Adoption: RCW 70A.545.020.

Statute Being Implemented: Chapter 70A.545 RCW, Petroleum underground storage tanks—Financial assurance program.

Rule is not necessitated by federal law, federal or state court decision.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Phi V. Ly, 500 Columbia Street N.W., #103, Olympia, WA 98501, 360-407-0520.

A school district fiscal impact statement is not required under RCW 28A.305.135.

A cost-benefit analysis is not required under RCW 34.05.328. The proposed rule does not meet the conditions of RCW 34.05.328 (5) (a) that mandate a cost-benefit analysis, and PLIA is not choosing to voluntarily subject the rule to a cost-benefit analysis.

Scope of exemption for rule proposal from Regulatory Fairness Act requirements:

Is not exempt.

The proposed rule does impose more-than-minor costs on businesses.

Small Business Economic Impact Statement (SBEIS)

Section 1: Introduction: PLIA proposes a new rule to administer a program giving owners and operators of commercial petroleum USTs an alternative mechanism to meet federal¹ and state² financial responsibility requirements. The proposed rule will define criteria and procedures for a state-run program that will replace the state's existing UST reinsurance program. Since the proposed rule has the potential to impose more-than-minor costs on businesses, an SBEIS is required by law (RCW 19.85.030). This study has been developed to analyze the compliance costs of the proposed rule to small and large businesses to determine whether small businesses will bear a disproportionate share of these costs or experience any economic impacts from participating in the program.

Objective of the SBEIS: The objective of the SBEIS, as established in RCW 19.85.040, is to identify and evaluate the various requirements and costs that the rule might impose on businesses. In particular, the purpose is to determine whether a disproportionate impact of the compliance costs is borne by small businesses in the state. The legislative purpose of the Regulatory Fairness Act (RFA, chapter 19.85 RCW) is set out in RCW 19.85.011:

"The legislature finds that administrative rules adopted by state agencies can have a disproportionate impact on the state's small businesses because of the size of those businesses. This disproportionate impact reduces competition, innovation, employment, and new employment opportunities, and threatens the very existence of some small businesses. The legislature therefore enacts the Regulatory Fairness Act with the intent of reducing the disproportionate impact of state administrative rules on small business."

The specific purpose of the SBEIS is identified in RCW 19.85.040:

"A small business economic impact statement must include [1] a brief description of the reporting, recordkeeping, and other compliance requirements of the proposed rule, and [2] the kinds of professional services that a small business is likely to need in order to comply with such requirements. [3] It shall analyze the costs of compliance for businesses required to comply with the proposed rule adopted pursuant to RCW 34.05.320, including costs of equipment, supplies, labor, and increased administrative costs. [4] It shall consider, based on input received, whether compliance with the rule will cause businesses to lose sales or revenue. [5] To determine whether the proposed rule will have a disproportionate impact on small businesses, the impact statement must compare the cost of compliance for small business with the cost of compliance for the ten percent of businesses that are the largest businesses required to comply with the proposed

rules using one or more of the following as a basis for comparing costs:

- (a) Cost per employee;
- (b) Cost per hour of labor; or
- (c) Cost per one hundred dollars of sales.

(2) A small business economic impact statement must also include:

(a) [6] A statement of the steps taken by the agency to reduce the costs of the rule on small businesses as required by RCW 19.85.030(3), or reasonable justification for not doing so, addressing the options listed in RCW 19.85.030(3);

(b) [7] A description of how the agency will involve small businesses in the development of the rule;

(c) [8] A list of industries that will be required to comply with the rule. However, this subsection (2)(c) shall not be construed to preclude application of the rule to any business or industry to which it would otherwise apply and;

(d) An estimate of the number of jobs that will be created or lost as the result of compliance with the proposed rule."

Summary of Proposed Rule: Federal and state laws require petroleum UST owners and operators to demonstrate financial responsibility through a form of liability coverage that can pay for costs arising from releases or contamination from such tanks. Owners and operators can meet financial responsibility through an allowable mechanism such as personal guarantee, self-insurance, or a liability insurance policy. Since 1989, PLIA has administered the reinsurance program whereby PLIA serves as a reinsurer for policies through three private insurance companies that UST owners or operators use to apply for coverage. As the reinsurer, the state, through PLIA, covers claim costs over \$75,000 up to the policy limit of \$1 million. Essentially, private insurance companies are only responsible for a maximum payment of \$75,000 per settlement, leaving PLIA responsible for settlement costs over \$75,000. It should be noted that PLIA only covers total settlement costs up to \$1 million, so the maximum PLIA reinsurance responsibility is \$925,000 per settlement. For tanks older than 30 years of age, PLIA covers only 90 percent of the total settlement cost. While PLIA is responsible for covering these settlement costs, the private insurance company is still responsible for hiring contractors to cleanup releases and address any contamination. PLIA is charged for all costs that exceed the \$75,000 threshold. From 2018 through 2023, the number of insurance claims has increased,³ as has the number of denied claims and denied coverage applications by private insurance companies.⁴

PLIA obtained legislative authority in 2023 to establish and administer a state-run program that allows UST owners and operators to maintain financial responsibility and to work directly with the state in addressing releases and contamination from their USTs.

The proposed program rule provides for implementation of a program for UST owners and operators that will be administered by PLIA.

Under the reinsurance program, PLIA only charges the private insurance companies one percent of the primary insurance policy premiums (which is far less than the typical charge for reinsurance coverage).⁵ Such reductions in costs can assist in making liability insurance, (which is a federal requirement), more affordable for UST owner and operators.

Under the proposed program, PLIA will offer direct coverage for remediation costs incurred by UST owners and operators enrolled in the

program. PLIA will cover claims up to \$2 million. They will offer coverage of up to \$1 million to UST owners and operators that require remedial action costs resulting from a petroleum release from a UST prior to enrollment. The main difference between the new program and the current reinsurance program is that the private insurance companies will not be involved in coverage decisions and that the claim cap per site will now cover claims up to \$2 million. UST owners and operators will continue to have the option to purchase private liability insurance if they would prefer to do so.

Once the program is implemented, PLIA will begin the transition out of the reinsurance program through treaty negotiations with the private insurers. PLIA may honor and continue management of any existing, unsettled reinsurance claims. Once the transition is complete, UST owners and operators may still purchase pollution liability insurance from private insurers at market rate.

Eligible costs covered by the program include, but are not limited to, remedial action, testing, monitoring, assessments, third-party costs as defined in WAC 374-10-080, necessary infrastructure replacement costs, and replacement costs for a new petroleum UST or its system that meets the current standards for such tank systems, as specified in program guidance. Ineligible costs include, but are not limited to, penalties or fines issued by other agencies, third-party recovery not permitted by WAC 374-10-080, remedial action that exceeds cleanup level standards, lost business income, cleanup of contamination from other sources, and legal defense costs.

The program will have certain eligibility requirements for a UST:

- Maintain compliance with the requirements of chapter 173-360A WAC, UST regulations or federal equivalent.
- Be registered with the department of ecology (ecology), the federal government, or a tribal government.

Any owner or operator of an enrolled petroleum UST determined to have committed fraud under WAC 374-10-130 is ineligible to enroll in the program. In addition, those wishing to participate in the program must apply and the tank must be enrolled in the program to be eligible. The tank must be located in the state of Washington, and only one entity at a time may enroll a specific tank.

Under the current reinsurance program, UST owners and operators cannot make a claim for a preexisting leak. Under the proposed program, UST owners and operators may still be accepted into the program even if their UST has a preexisting leak so long as the applicant discloses known releases from the UST or its system and are actively seeking or working through remediation. The historic release must have been reported to ecology and remedial actions completed, planned, or scheduled. The new program will provide funds up to \$1 million for remedial actions costs for leaks that occur prior to enrollment with the intent that these costs may be recovered by PLIA.

Applications for enrollment in the program will be available online. PLIA will notify applicants if they have been accepted or denied into the program. The enrollment term is 12 months, and coverage starts on the enrollment date with renewals occurring annually on that date. Those enrolled in the program must pay an annual enrollment fee. The enrollment fee is reviewed every four years based on costs associated with administration of the program. After the first year of enrollment, the enrollment fee may be discounted based on the following factors:

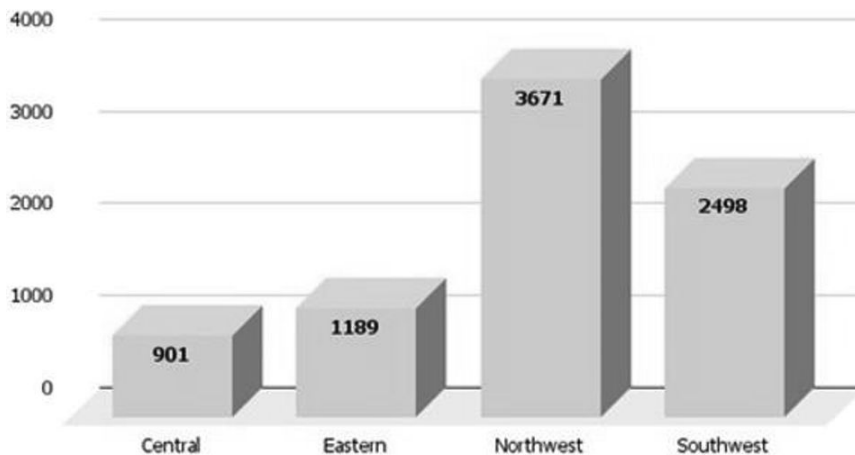
- Age of UST, the facility, and associated infrastructure;
- Physical condition of the facility; and
- Whether the owner or operator adheres to industry best practices for preventing releases from USTs.

The enrollment fee structure is still being developed during this rule-making stage; however, the enrollment fee cannot exceed \$25,000.

Industries Required to Comply With New Rule: UST owners and operators can be found in several different industries throughout Washington. The following analysis of Washington state UST operational sites by site type was conducted using an extensive database⁶ which contains all regulated tanks installed and documented in the state since 1900 and was made available through ecology's website.⁷ The database includes important information regarding the sites, tanks, and tank compartments. For example, the database lists each site name, region of the state, county, the number of tanks, date of installment, the material stored in each tank, and the material used to construct each tank. The database does not include information about tank conditions, nor the type of business using the tanks, nor did it contain any information regarding the status or cost of their liability coverage.

Valuable information can be found using this database. For instance, there are more operational tanks in western Washington compared to the eastern and central parts of the state. The Northwest region is comprised of only seven counties, but these counties house over 3,600 USTs. The Central region also contains seven counties but houses less than 1,000 USTs. The Southwest region (12 counties) and Eastern region (13 counties) also contain a similar number of counties, but the Southwest region has double the number of USTs. As seen in the graphic below, the northwestern region has the greatest number of USTs with triple the number of operational tanks compared to the Central region and the Eastern region (see Figure 1).

Figure 1: Total Number of Operational UST by Region in the State



As of April 2024, there are 3,235 sites with at least one tank listed as "operational." Tanks are given various different statuses, such as "Removed," "Closed In Place," "Closure In Progress," "Temporarily Closed," "Red Tag," and more. As seen in the table below, of the 15,078 total UST systems in the ecology UST database, 8,251 are labeled operational. There is an average of 2.6 operational tanks per site.

Table 1: UST by Status

UST Status	Number of UST
Operational	8,251
Change in Service	14
Closed in Place	427
Closure in Process	73
Exempt	326
Red Tag	26
Removed	5,609
Temporarily Closed	331
Unknown	16
Unregister 30-day Notice	5

Of the operational tanks, the vast majority are between 25 and 40 years of age, nearing or at the end of their viable lifespan. The table below highlights this trend (see Table 2).

Table 2: Age Breakdown of Operational UST

Age in yrs.	0-9	10-14	15-19	20-24	25-29	30-24	35-40	40-44	45+
# of Operational Tanks	505	292	364	446	1,590	2,128	1,586	648	687

Small gas stations made up the largest portion of operational sites. A series of informed data refinements were employed to estimate the number of sites that are small gas stations (including those with a convenience store attached), and the share of all operational tanks represented by this group. The first step in this process involved isolating the group of tanks with contents labeled under both "Motor Fuel for Vehicles" and "Unleaded Gasoline," as those are the classifications that at least one tank at every small gas station would adhere to. Following this, the hypermarkets of Costco, Safeway, Walmart, and Fred Meyer were filtered out, and a word search was employed to remove sites with naming conventions not likely to be used by small gas stations. For example, this method eliminated all police departments, fire departments, hospitals, Washington state department of transportation (WSDOT) fueling stations, and sites with "port of" or "city of" in their name. This analysis resulted in a final list of 2,360 sites, or approximately 73 percent of all operational sites.

Emergency generator tanks (EGTs) are the next most common type of UST held by a broad variety of business types. These represent just over nine percent, followed by large gas stations (hypermarkets such as Costco and Safeway) at 5.4 percent. The table below contains around 90 percent of the total 3,235 operational sites. The remaining 10 percent belong to a diverse array of groups from large fleet owning companies like Microsoft to small businesses with niche UST needs. While the larger organizations might also apply to the proposed program, identifying the specific type of business was not possible with the available data. However, the table below provides a general overview of UST owners and operators potentially affected by the proposed program (see Table 3).

Table 3: Statewide Breakdown of UST Sites

Site Type	Percentage of Operational Sites	Number of Operational Sites
Small Gas Stations	73.0%	2,360
Large Gas Stations (Hypermarkets)	5.4%	176
Emergency Generator Tanks	9.2%	298
Aviation Fuel Supply Tanks	1.4%	45

Site Type	Percentage of Operational Sites	Number of Operational Sites
Heating Fuel Supply Tanks	0.8%	26
Hospitals	1.0%	31
Truck Stops	0.5%	16
Total	91.3%	2,952

Based on the information available from the ecology UST database, the following table lists the industrial codes (NAICS) for the sectors that will potentially be impacted by this new rule (see Table 4). UST owners and operators fall under a wide variety of industries, which makes it challenging to compile a complete NAICS list of industries potentially impacted by the new program. Some of the potentially affected entities are in such broad industries that only the two-digit NAICS code is provided.

Table 4: NAICS for Industries Potentially Impacted by Proposed Program

Type of Business	NAICS Code/s		
Petroleum Refineries	324110		
Gas Stations/Truck Stops	447190		
Convenience Stores (w/ gas station)	447110		
Heating Oil Distributors	454310		
Hospitals	622110	622310	622210
Airports	488119		
Fleets	532112		
Agriculture	11		
Government	92		

Methods of Analysis: This analysis compares the cost of compliance per \$100 of sales between large and small businesses that own USTs, in order to determine whether small businesses will bear a disproportionate share of these costs. Based on sales, the hypermarkets, or large gas stations are considered the largest businesses in this analysis. Small businesses, most of which are small gas stations, are aggregated, and the total per \$100 of sales cost is compared with that for the largest businesses to assess whether or not a disproportionate impact is expected for small businesses.

Section 2: Compliance Costs for Washington Businesses: Beside self-insurance, UST owners have a few other options for liability coverage today including bonds, personal guarantees and other mechanisms that add up to the \$1 million required coverage. The most common way to meet the coverage requirement is to purchase a policy through the private insurance market. Private insurers charge a premium that must be paid by the UST owner or operator. A separate database containing premium payment information regarding UST owners was provided by PLIA for the explicit purposes of this report.⁸ The annual premium amount is listed alongside the deductible amount, the number of tanks on site, whether the site is insured by PLIA or not, and both the date on which the insurance became effective and the date on which it expires.

The policy premiums presented in the database also have different deductibles, which primarily fall between \$1,000 and \$10,000, with the average being \$6,098. Interestingly, policies with higher deductibles do not always have a lower premium. This finding is highlighted in the four tables attached in Appendix A. It is likely that other factors such as tank age or tank material impact the policy fee and deductible

under each policy. The table below includes the average insurance premium per tank paid by UST owners and operators per month and annually in 2024 (see Table 5). The premiums are shown by number of tanks per site. With private insurance, UST owners and operators are paying between \$700 and \$1,600 on average per tank per year for coverage. UST owners with more tanks generally pay less per tank than those with fewer tanks per site. However, this trend is not consistent. After removing outliers, the premiums had an average of \$2,966, a median of \$1,902, and a mode of \$1,058. It should be noted that premiums scale based on the number of tanks on site. Included among these sites are 116 that host more than 15 UST systems. These USTs likely belong to large businesses that have policies for multiple tanks.

Table 5: Average Private Insurance Premiums per Tank and Total for UST Sites by Number of Tanks, 2019 - 2024

	All UST sites	UST sites with 1 tank	UST sites with 2 tanks	UST Sites with 3 tanks	UST sites with 4 tanks
Annual premium per tank	\$922	\$1,730	\$824	\$841	\$796
Annual premium	\$2,966	\$1,730	\$1,648	\$2,523	\$3,182
Monthly premium per tank	\$76	\$144	\$68	\$70	\$66
Monthly premium	\$247	\$144	\$137	\$210	\$265

Given the incomplete nature of available data on costs, some inferences need to be developed to assess the costs to small businesses who are UST owners. In addition to the premiums, some portion of these firms will also experience a leak, and likely need to pay the deductible in addition to the premium in the year that the tank leaks. It is difficult to predict leakage, however there are records going back to the 1990s that were analyzed in a report on USTs in Washington from 2015.⁹ This work suggests that between 1990 and 2015, there were 6,805 leaks, or about 272 per year. Knowing that since that time, the numbers of storage tank leaks have been reduced overall,¹⁰ a conservative estimate might be a 10 percent leak rate going forward for the 1,632 existing UST sites. Using a \$10,000 deductible (most common), this suggests that on average, UST owners pay an additional \$100 per year in deductible. That is, if there is a 10 percent chance of failure each year, then over 10 years, each owner might be expected to pay the deductible one time.

Since the current policy premiums and deductibles do not have the typical inverse relationship commonly seen under most insurance policies, it is safe to assume that other factors impact the premium costs and deductible for each UST coverage policy holder. The enrollment fee associated with the program will similarly be affected by these other UST factors.

Those who enroll their tanks in the program will pay a standard enrollment fee for the first year they are enrolled. The enrollment fee will not exceed \$25,000 a year. After the first year, enrollment discounts may be available to tanks based on condition, best practices, etc. and will be offered to those whose tanks meet the criteria for these discounts.

Based on the analysis of current premiums and the discount categories listed under the proposed program, tank age and tank material are key factors that impact claim costs. Newer tanks are less likely to leak than older tanks, except for tanks that have had bioremediation. The analysis of the ecology UST database indicated that around 52 percent of operational tanks are composed of steel, and the remain-

ing tanks were constructed out of fiberglass reinforced plastic. Table 6 shows an analysis of the operational tanks in Washington, broken down by age (greater than, or less than 30 years) and tank material - whether made of steel or fiberglass. Although the largest of the four groups is steel tanks older than 30 years, the breakdown suggests that the tanks are distributed within these four groups.

Table 6: Operational Tanks by Age and Tank Material

Category of UST	Percentage of Operational UST
Fiberglass construction <30 years old	20.6%
Fiberglass construction > 30 years old	26.6%
Steel construction <30 years old	19.4%
Steel construction >30 years old	33.7%

The program enrollment fee will cover the administration and expense of administering the program, and as such, will be determined based on anticipated administration costs and risks with petroleum cleanup. Discounts, available after year one, will likely be determined by the age of the tanks, tank construction materials, and proactive actions that owners and operators can take to mitigate release. Though the enrollment fee structure is still under development, the following assumptions have been made:

- The enrollment fee will be similar to the mean (\$2,966), median (\$1,902), and mode (\$1,058) of the private insurance premium data.
 - o The enrollment fee per tank will likely be between \$1,250 and \$2,000 based on these values.
- Age, tank material, and tank operation management are key factors in predicting potential leaks, and therefore will likely have an impact on enrollment fee discounts, which will become available after the first year of the program.
 - o Other factors such as best practices will also impact enrollment fees after the first year.

Some UST owners and operators are likely paying higher premiums because their tanks are older and/or made of less robust material. These UST owners may qualify for any future discounts on the financial assurance enrollment fee. After the first year, the PLIA reinsurance program will likely cease, which may result in UST owners and operators having to pay more for private or commercial reinsurance. At this point, UST owners and operators with lower premiums may have to pay more under private insurance without the support of reinsurance.

After qualified tanks have been enrolled for one year, PLIA will start offering discounts on their enrollment fee for USTs based on age, material and best practices utilized, reducing their enrollment fee for UST owners and operators with newer tanks. The discounts will make the PLIA enrollment fee drop closer to the premium payments currently paid by UST owners and operators with newer tanks. The reduction in enrollment fee cost paired with the removal of the reinsurance program will result in similar insurance costs for most UST owners and operators today. The system is designed so that UST owners and operators will always have options for liability coverage, and that this public option is always available.

Table 7: Expected Average Annual Enrollment Fee per Site and per Tank for the Financial Assurance Program

Current Premium Statistic	Anticipated Enrollment Fee per Site	Anticipated Enrollment Fee per Tank
Mean	\$2,966	\$945
Median	\$1,902	\$752
Mode	\$1,058	\$529

An SBEIS must also include a discussion of costs related to reporting and recordkeeping, additional professional services, compliance costs, and loss of revenue and sales anticipated under the new regulation, which is the proposed program in this instance.

In terms of recordkeeping and reporting, there are no additional costs anticipated. The application form will be available online and PLIA is willing to provide other formats to applicants if the online application is not suitable. There should be no more recordkeeping or reporting requirements than are currently required under private insurance coverage. In terms of additional professional services, particularly for small businesses, none are anticipated. The application is available online and while PLIA may randomly select the facility for an assessment, this will not require any effort, or services conducted by the UST owner or operator. There are currently no compliance costs associated with this new program, though PLIA may require upgrades to some system parts like alarm systems. Those who voluntarily choose to enroll in the program will be subject to an enrollment fee. This fee would replace the premium fees currently charged under private insurance, and again, is not mandatory. Finally, there are no anticipated losses of revenue or sales to UST owners and operators. So long as businesses apply for the program or private insurance before their previous coverage ends, their business should remain unaffected by the change or reapplication in coverage.

Since the program requires almost identical recordkeeping, professional services, and compliance costs as the other private insurance options that are available today and will remain available in the future, the number of jobs is not expected to change for the impacted businesses. However, the management of this program will create 32¹¹ full time equivalents (FTE) jobs within PLIA.

Section 3: Analysis of Impact on Small Businesses: The proposed program will be voluntary. It will not replace the private insurance market, but rather, provide an additional mechanism for UST owners and operators to use in meeting federal and state liability coverage requirements.

To determine if the proposed program will have a disproportionate impact on small businesses relative to large businesses, both small and large businesses were identified. As mentioned in section 1, the top 10 percent of businesses are considered large businesses. For this analysis, hypermarkets, or large gas station corporations are considered large businesses. Additionally, hospitals and aviation fuel supply tanks are also considered large businesses. Though they make up just under eight percent of the ecology UST database, this is the only group of affected businesses that consistently fall in the top 10 percent of annual sales and have more than 50 employees, which is the distinction for small businesses. The vast majority of USTs belong to small businesses, almost all of which are independently owned gas stations. The remaining small businesses with USTs come from other industries (e.g., construction, nonretail facilities) and are harder to identify. Therefore, small, independently owned gas stations will represent small businesses for this analysis, while hypermarkets, hospi-

tals, and airports represent large businesses within this analysis (see Table 8).

Table 8: Breakdown of Small and Large Businesses Potentially Impacted by Proposed Program:

Sector Class	Description of Sector Class	Average Annual Sales	Number of Businesses
Large	Hyper markets (Costco, Safeway, Fred Meyers), hospitals and airports		~254
Small	Small independently owned gas stations	\$9.8 million ¹²	~2,360

Hypermarkets, like Costco and Safeway, are generally self-insured, meaning that the larger corporation has the financial capacity to pay for leak repairs, remediation, and cleanup without additional financial support. Those utilizing self-insurance do not have to pay private insurers for coverage. It is unlikely that these groups will switch to the program when they currently pay no additional costs utilizing self-insurance. As a result, the anticipated cost of the program to the largest businesses will be zero.

Smaller businesses and other larger groups that are not self-insured are presently insured through the risk management pools. During 2025, the reinsurance program will still be operating, and so firms will have the choice to switch from their current private insurers to the PLIA program. After 2025, the PLIA reinsurance program will be replaced by the program, and so these businesses have the option to switch from private insurance to the program. As mentioned in the previous section, the enrollment fee for the first year of the program is expected to be roughly equivalent to the premiums that these firms currently face (see Table 7). However, after 2025, potential discounts for preventative measures that owners can take will mean that firms will have the option to receive discounts for year two and every following year. Hence, small businesses may end up paying less for coverage than they would have with private insurance.

UST owners and operators will continue to have choices for meeting financial responsibility through the mechanisms in the state regulations, chapter 173-360A WAC, Part 10. With that in mind, large and small businesses alike are not expected to enroll in the proposed program unless it reduces their liability coverage costs. The hypermarket groups are not expected to be impacted as they are currently and likely will remain self-insured even with the program in place. And in general, small businesses are expected to face enrollment fees similar to the premiums that they are currently paying during the first year and will have the option to reduce their annual payments in future years. Hence, they are not expected to incur any additional costs in the long run. In fact, the fee structure will reward proactive maintenance, and therefore should reduce claims in the long run too, and claimants in those cases would have to pay a deductible on top of their premiums.

Ultimately, there are three potential cases. In the first case, there is the potential that the enrollment fees for the new program are higher than the current private insurance cost for a particular firm, which is possible because coverage is more expansive under the program compared to private insurance coverage (e.g. no deductible). In this case, UST owners and operators are under no obligation to switch to the program and might elect to continue insuring USTs through private insurance for the first year. Hence in this case,

there will be no additional costs associated with the new rule in that first year.

A second case could be that the enrollment fee an owner faces is essentially the same as the premiums offered by private insurers. In this case, there will again be no additional cost to the UST owners, because whichever option is selected will not present an additional cost to the owner. However, with no deductible required in the program, these owners may be expected to switch to the program.

Finally, if the program offers a less costly alternative to private coverage for some small business UST owners, then those businesses would also be expected to switch to the PLIA program and as such, would be positively impacted by the rule through cost savings and expanded coverage.

Ultimately, small businesses as a group are not expected to be disproportionately impacted by the proposed program. If anything, their federally required liability coverage will become more affordable than it is under the private insurance market.

Section 4: Small Business Involvement in Rule Making and Impact Reduction Efforts: Involvement of Small Business in the Development of the Proposed Rule: Prior to the 2023 legislation, PLIA engaged with stakeholders including Washington Independent Dealers of Energy (WIDE) - (formerly known as Washington Oil Marketers Association or WOMA), legislators, and the legal community to vet the program concept. During the legislative session, PLIA also drafted fact sheets and provided legislative staff with background information about UST financial requirements and raised issue over the current reinsurance program in which private insurance groups lead cleanup efforts, despite their priorities not always aligning with state cleanup standards.

In addition, PLIA held two public listening sessions as part of their outreach efforts. These public listening sessions invited the public and interested parties to offer feedback to help develop rules for the program. These sessions were held on September 19 and October 24, 2023. Several of the summarized comments are small business specific, indicating participation from small businesses.¹³ From the listening session comments summary, participants in the session expressed hope that:

- The program will open up more options and funds for smaller businesses in the more rural areas of the state;
- Funding may be provided prior to a leak to main infrastructure and reduce leaks; and
- PLIA will continue to ask for feedback during the program.¹⁴

Once the draft rule language is made available in spring 2024, through the next rule-making filing, PLIA will host virtual public comment hearings so that stakeholders, including small business UST owners and operators may voice questions and/or comments.¹⁵ PLIA will also be accepting written comments at this time. The feedback gathered from this outreach will be considered before the rule is finalized.

These public outreach efforts are intended to engage the public in the rule-making process, especially those who will be impacted by this new rule. Small businesses will also have the opportunity to write in comments if the public comment sessions do not fit into their schedule.

Actions Taken to Reduce the Impact of the Rule on Small Businesses: PLIA has taken several steps to reduce the impacts to small and minority owned businesses. By incorporating potential discounts, based

on prevention measures that owners can proactively take, into the enrollment fee structure of the program, the proposed program reduces impacts on small businesses. The UST owners and operators may receive a discount if they adhere to industry best practices for preventing releases from USTs. This is an area in which small businesses could receive a discounted enrollment fee. Finally, the enrollment fee has been capped at \$25,000, meaning that under no circumstances will any business pay more than \$25,000 a year for the program.

- 1 40 C.F.R. Part 280 Subpart H – Financial Responsibility
- 2 WAC 173-360A-1000 to – 1097, Part 10 – Financial Responsibility.
- 3 Washington State Pollution Liability Insurance Agency (PLIA). 2024. PLIA Book Quarterly Updates through December 2023.
- 4 Ibid.
- 5 Ibid.
- 6 Department of Ecology. Regulated Underground Storage Tanks (USTs).
- 7 It should be noted that the percentages presented in the table below should be viewed as estimations while a thorough examination of the database was conducted, some site types were harder to identify than others based on naming practice among other challenges.
- 8 PLIA. 2024. Confidential Insurance Report.
- 9 Integrative Economics, LLC, Sound Resource Economics. 2015. "Economic Report on Petroleum Storage Tanks in Washington."
- 10 USEPA, "20 Years of Progress Closing LUST Sites" PowerPoint from EPA Website on Underground Storage Tanks, 2023, December.
- 11 PLIA. 2023. "Petroleum storage tanks," Fiscal Note Package 68557.
- 12 From IMPLAN, 2022. Unites States (US Totals) Region. Available at: <https://implan.com>
- 13 PLIA. Financial Assurance Program Listening Sessions.
- 14 Ibid.
- 15 PLIA. 2024. Financial Assurance Program Frequently Asked Questions. April 2nd.

A copy of the statement may be obtained by contacting Phi V. Ly, P.O. Box 40930, Olympia, WA 98504-0930, phone 360-407-0520, email Phi.Ly@plia.wa.gov.

June 4, 2024
Phi V. Ly
Legislative and Policy Manager

OTS-5288.2

**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 com-

munity. 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 re-view 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.