

WSR 22-08-021
PROPOSED RULES
POLLUTION LIABILITY
INSURANCE AGENCY

[Filed March 25, 2022, 2:05 p.m.]

Original Notice.

Preproposal statement of inquiry was filed as WSR 21-21-030.

Title of Rule and Other Identifying Information: Chapter 374-80 WAC, Advice and technical assistance program.

Hearing Location(s): On May 11, 2022, at 11:30 a.m. - 1:00 p.m., virtual meeting; on May 18, 2022, at 3:30 - 5:30 p.m., virtual meeting; and on May 24, 2022, at 11:30 a.m. - 1:30 p.m., virtual meeting. Meeting link can be found on pollution liability insurance agency's (PLIA) website www.plia.wa.gov.

Date of Intended Adoption: June 3, 2022.

Submit Written Comments to: Phi Ly, P.O. Box 40930, Olympia, WA 98504-0930, email rules@plia.wa.gov, by May 31, 2022.

Assistance for Persons with Disabilities: Contact Xyzlinda Marshall, phone 360-407-0515, TTY 711 or 800-833-6388, email rules@plia.wa.gov, by May 25, 2022.

Purpose of the Proposal and Its Anticipated Effects, Including Any Changes in Existing Rules: PLIA provides an effective and efficient government funding model to support owners and operators in meeting financial responsibility and environmental clean-up requirements for underground storage tanks.

Under this program, the agency provides advice and technical assistance regarding a completed or proposed independent remedial action and application of chapters 70A.330 and 70A.305 RCW. The proposed changes to the rule language clarify program procedures for administering the program that include: (1) Program eligibility, (2) services, (3) conditions when an opinion would be rescinded, and (4) program termination.

Reasons Supporting Proposal: This chapter supports the state's clean-up rules by providing advice and technical assistance to owners and operators who are conducting independent clean-ups of petroleum releases. The amended rule clarifies the process, procedures, and guidelines for how PLIA operates the program.

Statutory Authority for Adoption: RCW 70A.330.040; and chapter 70A.305 RCW.

Statute Being Implemented: Not applicable.

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

Agency Comments or Recommendations, if any, as to Statutory Language, Implementation, Enforcement, and Fiscal Matters: Not applicable.

Name of Agency Personnel Responsible for Drafting, Implementation, and Enforcement: Phi Ly, 500 Columbia Street N.W., Olympia, WA 98501, 360-407-0517.

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. Cost-benefit analysis is not required for an existing program.

This rule proposal, or portions of the proposal, is exempt from requirements of the Regulatory Fairness Act because the proposal:

Is exempt under RCW 19.85.025(3) as the rules are adopting or incorporating by reference without material change federal

statutes or regulations, Washington state statutes, rules of other Washington state agencies, shoreline master programs other than those programs governing shorelines of statewide significance, or, as referenced by Washington state law, national consensus codes that generally establish industry standards, if the material adopted or incorporated regulates the same subject matter and conduct as the adopting or incorporating rule.

March 25, 2022

Phi Ly

Legislative and Policy Manager

OTS-3669.2

AMENDATORY SECTION (Amending WSR 22-01-069, filed 12/9/21, effective 1/9/22)

WAC 374-80-010 Authority and purpose. The purpose of this chapter is to establish a program for providing technical assistance (~~to a person~~) regarding a release or suspected release (~~of (1) heating oil from an active, decommissioned, or abandoned heating oil tank; or (2) petroleum~~) from (~~a qualified petroleum~~) an eligible petroleum storage tank system. Under this program, the agency will provide advice and technical assistance regarding a completed or proposed independent remedial action and application of chapters 70A.330 and 70A.305 RCW.

Any opinion provided by the agency under this program is advisory only and not binding upon either the pollution liability insurance agency or the department of ecology. Participation in this program is not a settlement with the state under the Model Toxics Control Act. Persons conducting independent remedial actions do so at their own risk(~~r~~) and may be required to take additional remedial actions by the department of ecology if such actions are determined to be necessary under the Model Toxics Control Act.

[Statutory Authority: RCW 70A.01.010 and 70A.01.020. WSR 22-01-069, § 374-80-010, filed 12/9/21, effective 1/9/22. Statutory Authority: RCW 70.149.040. WSR 20-02-071, § 374-80-010, filed 12/26/19, effective 1/26/20. Statutory Authority: Chapter 70.148 RCW. WSR 03-06-015, § 374-80-010, filed 2/21/03, effective 3/24/03. Statutory Authority: Chapter 70.149 RCW. WSR 97-20-094, § 374-80-010, filed 9/29/97, effective 10/30/97.]

AMENDATORY SECTION (Amending WSR 22-01-069, filed 12/9/21, effective 1/9/22)

WAC 374-80-020 Definitions. Unless the context requires otherwise, the definitions in this section shall apply throughout this chapter.

(1) "Abandoned heating oil tank" means a consumptive use heating oil tank system that has been abandoned or decommissioned and is no longer in service or use.

(2) "Active heating oil tank" means a consumptive use heating oil tank system that is in use.

(3) "Agency" means the Washington state pollution liability insurance agency (PLIA).

(4) "Applicant" means the (~~(person)~~) party who is seeking advice and assistance from the (~~(petroleum)~~) advice and technical assistance program, whose application has been accepted by the agency.

(5) "Decommissioned heating oil tank" means a heating oil tank system that has been removed from operation by an approved method such as abandonment in place (e.g., cleaning and filling with an inert material) or by removal from the ground.

(6) "Director" means the director of the Washington state pollution liability insurance agency.

(7) "Eligible petroleum storage tank system" means the following petroleum storage tank systems:

(a) An active, decommissioned, or abandoned heating oil tank; or

(b) A petroleum storage tank system identified by the agency or department of ecology based on the relative risk posed by the release to human health and the environment as determined under chapter 70A.305 RCW, or other factors identified by the department of ecology.

(8) "Heating oil" means any petroleum product used for space heating in oil-fired furnaces, heaters and boilers, including stove oil, diesel fuel, or kerosene. "Heating oil" does not include petroleum products used as fuel in motor vehicles, marine vessels, trains, buses, aircraft, or any off-highway equipment not used for space heating, or the generation of electrical energy or waste oil, hoists, pipelines, spills from transportation or a form of transport.

~~((8))~~ (9) "Heating oil tank system" means a tank and its connecting pipes, whether above or below ground, or in a basement, with pipes connected to the tank for space heating of human living or working space on the premises where the tank is located.

~~((9))~~ (10) "MTCA" means the Model Toxics Control Act, chapter 70A.305 RCW and implementing regulations in chapters 173-340 and 173-204 WAC.

~~((10))~~ (11) "Petroleum" means any petroleum-based substance including crude oil or any fraction that is liquid at standard conditions of temperature and pressure. The term 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, used oils, mineral spirits, Stoddard solvents, waste oils and heating oils. The term petroleum 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 (~~(sixty)~~) 60 degrees Fahrenheit and 14.7 pounds per square inch absolute.

~~((11))~~ (12) "Petroleum storage tank system" means a storage tank system that contains petroleum or a mixture of petroleum with de minimis quantities of other substances. The systems include those containing motor fuels, jet fuels, distillate fuel oils, residual fuel oils, lubricants, petroleum solvents, used oils, and heating oils. "Petroleum storage tank system" does not include any storage tank system regulated under chapter (~~(70A.305)~~) 70A.300 RCW.

~~((12))~~ (13) "Program" or "technical assistance program" means ~~((petroleum))~~ advice and technical assistance program authorized under RCW 70A.330.040(7).

~~((13) "Qualified petroleum storage tank system" means a storage tank system that has been identified as eligible for services under the petroleum technical assistance program by the department of ecology based on the relative risk posed by the release to human health and the environment.)~~

(14) "Release" means any intentional or unintentional entry of petroleum into the environment including, but not limited to, a spill, leak, emission, escape, or leaching into the environment.

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

(16) "Sampling and testing" means a PLIA-approved and recognized technique(s) or procedure(s) for measuring or determining the presence and extent of hydrocarbons in ~~((soil and/or water))~~ the environment.

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

~~((18) "Site characterization" means an investigation of the nature and extent of the release.)~~

[Statutory Authority: RCW 70A.01.010 and 70A.01.020. WSR 22-01-069, § 374-80-020, filed 12/9/21, effective 1/9/22. Statutory Authority: RCW 70.149.040. WSR 20-02-071, § 374-80-020, filed 12/26/19, effective 1/26/20. Statutory Authority: Chapter 70.149 RCW. WSR 97-20-094, § 374-80-020, filed 9/29/97, effective 10/30/97.]

AMENDATORY SECTION (Amending WSR 20-02-071, filed 12/26/19, effective 1/26/20)

WAC 374-80-040 Procedures. (1) **Application.** To ~~((receive advice and technical assistance))~~ request services under this program, ~~((a person who is conducting or otherwise interested in independent remedial actions where there is a suspected or confirmed release of petroleum or heating oil from a qualified petroleum storage tank system or a heating oil tank,))~~ an applicant must submit an application ~~((provided by the agency requesting advice and assistance and agreeing))~~ and agree to the terms ~~((of the program))~~ specified by the agency.

(2) **Eligibility.**

(a) To be eligible to request services for a site under the technical assistance program, the applicant must demonstrate the following:

(i) A release from an eligible petroleum storage tank system is suspected or confirmed at the site;

(ii) The release has been reported to the department of ecology in accordance with WAC 173-340-310; and

(iii) The applicant is conducting or otherwise interested in conducting independent remedial actions at the site.

(b) An applicant that has received funding from the PLIA underground storage tank loan and grant program; the heating oil pollution liability insurance program; or the commercial underground storage tank reinsurance program ((are)) is presumed eligible for the technical assistance program unless ~~((a specific determination is made by PLIA))~~ the agency or the department of ecology determines that the ap-

plicant does not have (~~a qualified petroleum~~) an eligible storage tank system.

(3) **Services.** The agency may provide the following advice and technical assistance under the program:

(a) Observe and/or interpret the results of site investigation including, but not limited to, sampling and testing, (~~site characterization results,~~) or other appropriate assessments conducted by the applicant;

(b) Provide technical assistance on how to meet the substantive requirements of MTCA;

(c) Review planned independent remedial actions for a site or property and provide written opinions on whether further remedial action is likely necessary to meet the substantive requirements of MTCA;

(d) Review completed independent remedial actions for a site or property and provide written opinions on whether further remedial action is necessary to meet the substantive requirements of MTCA;

(~~and~~)

(e) Work with the applicant to monitor progress towards milestones and provide written opinions upon request at each stage of cleanup; and

(f) Other appropriate activities approved by the director.

(4) The applicant may select an independent contractor to perform (~~site characterization, sampling and testing, or other~~) remedial actions at the site. The independent contractor is not to be considered for any purpose an employee or agent of PLIA. The applicant will enter into an agreement with the contractor regarding scope or extent of work and fees for services.

(5) **Sampling(~~(7)~~) and testing(~~(, and site characterization)~~) protocols.** The agency will provide requested advice and technical assistance only if sampling(~~(7)~~) and testing(~~(, and site characterization)~~) are performed in accordance with (~~protocols~~) agency-approved (~~by the director~~) methodology.

(6) **Rescinding opinions.** The agency may rescind (~~a no further action determination if PLIA's understanding of the~~) any written opinion if the agency received information that conditions at the site (~~change and~~) changed or the site no longer meets the substantive requirements of MTCA.

(a) Where the issues are minor or administrative in nature, the agency will provide the applicant with (~~a~~) written notice (~~of suspension~~) detailing the issues to be addressed. The applicant will have (~~sixty~~) 60 days to (~~address the issues. If~~) respond to the agency with how the issues are addressed (~~to PLIA's satisfaction, the notice of suspension will be removed~~). If the issues are not addressed to PLIA's satisfaction, the agency (~~will~~) may issue a letter rescinding the (~~no further action determination~~) written opinion. PLIA (~~may~~) will notify the department of ecology (~~of this action~~) if PLIA rescinds a no further action opinion.

(b) Where the issues are substantive in nature, the agency (~~will~~) may issue a letter rescinding the (~~no further action determination~~) written opinion. PLIA will notify the department of ecology (~~of this action~~) if PLIA rescinds a no further action opinion.

[Statutory Authority: RCW 70.149.040. WSR 20-02-071, § 374-80-040, filed 12/26/19, effective 1/26/20. Statutory Authority: Chapter 70.148 RCW. WSR 03-06-015, § 374-80-040, filed 2/21/03, effective 3/24/03. Statutory Authority: Chapter 70.149 RCW. WSR 97-20-094, § 374-80-040, filed 9/29/97, effective 10/30/97.]

AMENDATORY SECTION (Amending WSR 20-02-071, filed 12/26/19, effective 1/26/20)

WAC 374-80-045 Environmental covenant. (1) **Consultation.** Where PLIA issues a written opinion under this program, and the remedial action requires an environmental covenant, ((PLIA)) the applicant must consult with and seek comment on the draft environmental covenant from a city or county department with land use planning authority for real property subject to the covenant. The consultation and opportunity for comment must take place before the property owner records the environmental covenant.

(2) **Periodic review.** Where PLIA has issued a written opinion under this program, and the remedial action requires an environmental covenant, PLIA must conduct a review of the effectiveness of the environmental covenant ((periodically)). The agency must conduct the periodic review at least once every five years.

(3) **Violation.** If the terms of the environmental covenant are not complied with, the agency may rescind the no further action ((determination)) opinion.

(a) Where the issues are minor or administrative in nature, the agency will provide the applicant with ((a)) written notice ((of suspension)) detailing the issues to be addressed. The applicant must address the issues within ((sixty)) 60 days. ((If the issues are addressed to PLIA's satisfaction, the notice of suspension will be removed.)) If the issues are not addressed to PLIA's satisfaction, the agency will issue a letter rescinding the no further action ((determination)) opinion. PLIA ((may)) will notify the department of ecology of this action.

(b) Where the issues are substantive in nature, the agency will issue a letter rescinding the no further action ((determination)) opinion. PLIA will notify the department of ecology of this action.

(4) **Termination.** If the conditions at the site requiring an environmental covenant no longer exist, the property owner may petition the agency to have the covenant terminated. PLIA will seek public comment on the proposed termination of the environmental covenant. If, after the public comment period, PLIA agrees to the termination of the environmental covenant, the agency will seek termination by consent of the covenant.

(5) **Reimbursement.** The agency may recover costs related to environmental covenants from the applicant and/or the property owner. These costs are not covered by WAC 374-80-050.

[Statutory Authority: RCW 70.149.040. WSR 20-02-071, § 374-80-045, filed 12/26/19, effective 1/26/20.]

AMENDATORY SECTION (Amending WSR 20-02-071, filed 12/26/19, effective 1/26/20)

WAC 374-80-050 Reimbursement. (1) The agency must collect, from the applicant, a fee to cover the costs incurred in providing advice and technical assistance under the program.

(2) The ((fee for providing advice and technical assistance under this program is:

~~(a) One thousand dollars if there is a release or suspected re-lease of heating oil from an active, decommissioned, or abandoned heating oil tank system.~~

~~(b) Seven thousand five hundred dollars if there is a release or threatened release of petroleum from a qualified petroleum storage tank system.)~~ agency will post the fee for providing advice and technical assistance under this program on the agency's website and in the program guidance.

(a) The agency will adjust the enrollment fee on an annual basis in July of each calendar year.

(b) The fee is based on the calculation of the costs incurred providing advice and technical assistance and other factors identified by the agency. The agency will make the fee calculation of identified costs available upon request.

(3) The applicant must pay the fee upon acceptance into the program. No advice or technical assistance will be provided until the fee has been paid.

(4) ~~((The fee is nonrefundable. However, if))~~ Unless the agency determines that an applicant's petroleum storage tank system is ineligible after the applicant enters the program, ~~((the agency may re-fund))~~ the fee is nonrefundable.

(5) Fees received by the agency under the program must be deposited in the heating oil pollution liability trust account.

[Statutory Authority: RCW 70.149.040. WSR 20-02-071, § 374-80-050, filed 12/26/19, effective 1/26/20. Statutory Authority: Chapter 70.148 RCW. WSR 03-06-015, § 374-80-050, filed 2/21/03, effective 3/24/03. Statutory Authority: Chapter 70.149 RCW. WSR 97-20-094, § 374-80-050, filed 9/29/97, effective 10/30/97.]

AMENDATORY SECTION (Amending WSR 97-20-094, filed 9/29/97, effective 10/30/97)

WAC 374-80-060 Liability. (1) The state of Washington and/or the pollution liability insurance agency accepts no liability, nor portion of liability, from the ~~((heating oil tank owner or operator))~~ applicant.

(2) The state of Washington, the pollution liability insurance agency, and its officers and employees are immune from all liability, and no cause of action arises from any act or omission in providing, or failing to provide, advice, opinion, conclusion, or assistance under this program.

[Statutory Authority: Chapter 70.149 RCW. WSR 97-20-094, § 374-80-060, filed 9/29/97, effective 10/30/97.]

NEW SECTION

WAC 374-80-070 Termination. (1) The issuance of a no further action opinion constitutes notice of termination of the program agreement by the agency.

(2) The agency may terminate a program agreement for other reasons including, but not limited to, inactivity at the site for 12 consecutive months or violating the agency code of conduct.

(3) The applicant may terminate the program agreement at any time. As specified in WAC 374-80-050, the fee is nonrefundable.

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