

NEW SECTION. Sec. 18. Sections 1 through 17 of this act shall constitute a new chapter in Title 18 RCW.

NEW SECTION. Sec. 19. The sum of forty-eight thousand dollars, or as much thereof as may be necessary, is appropriated from the general fund to the department of licensing for the biennium ending June 30, 1991, to carry out the purposes of this act. The amount spent shall be repaid to the general fund from fees imposed as a result of this act prior to the end of the biennium ending June 30, 1993.

Passed the House April 20, 1989.

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CHAPTER 383

[Second Substitute House Bill No. 1180]

UNDERGROUND STORAGE TANKS—STATE FINANCIAL RESPONSIBILITY PROGRAM

AN ACT Relating to underground petroleum storage tanks; adding a new chapter to Title 70 RCW; adding a new chapter to Title 82 RCW; prescribing penalties; making appropriations; providing an effective date; providing an expiration date; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Sec. 1. (1) The legislature finds that:

(a) Final regulations adopted by the United States environmental protection agency (EPA) require owners and operators of underground petroleum storage tanks to demonstrate financial responsibility for accidental releases of petroleum as a precondition to continued ownership and operation of such tanks;

(b) Financial responsibility is demonstrated through the purchase of pollution liability insurance or an acceptable alternative such as coverage under a state financial responsibility program, in the amount of at least five hundred thousand dollars per occurrence and one million dollars annual aggregate depending upon the nature, use, and number of tanks owned or operated;

(c) Many owners and operators of underground petroleum storage tanks cannot purchase pollution liability insurance either because private insurance is unavailable at any price or because owners and operators cannot meet the rigid underwriting standards of existing insurers, nor can many owners and operators meet the strict regulatory standards imposed for alternatives to the purchase of insurance; and

(d) Without a state financial responsibility program for owners and operators of underground petroleum storage tanks, many tank owners and operators will be forced to discontinue the ownership and operation of these tanks.

(2) The purpose of this chapter is to create a state financial responsibility program meeting EPA standards for owners and operators of underground petroleum storage tanks in a manner that:

(a) Minimizes state involvement in pollution liability claims management and insurance administration;

(b) Protects the state of Washington from unwanted and unanticipated liability for accidental release claims;

(c) Creates incentives for private insurers to provide needed liability insurance; and

(d) Parallels generally accepted principles of insurance and risk management.

To that end, this chapter establishes a program to provide pollution liability reinsurance at a price that will encourage a private insurance company or risk retention group to sell pollution liability insurance in accordance with the requirements of this chapter to owners and operators of underground petroleum storage tanks, thereby allowing the owners and operators to comply with the financial responsibility regulations of the EPA.

(3) It is not the intent of this chapter to permit owners and operators of underground petroleum storage tanks to obtain pollution liability insurance without regard to the quality or condition of their storage tanks or without regard to the risk management practices of tank owners and operators, nor is it the intent of this chapter to provide coverage or funding for past or existing petroleum releases. Further, it is the intent of the legislature that the program follow generally accepted insurance underwriting and actuarial principles and to deviate from those principles only to the extent necessary to make pollution liability insurance reasonably affordable and available to owners and operators who meet the requirements of this chapter.

NEW SECTION. Sec. 2. Unless the context requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Accidental release" means any sudden or nonsudden release of petroleum arising from operating an underground storage tank that results in a need for corrective action, bodily injury, or property damage neither expected nor intended by the owner or operator.

(2) "Administrator" means the Washington pollution liability reinsurance program administrator.

(3) "Bodily injury" means bodily injury, sickness, or disease sustained by any person, including death at any time resulting from the injury, sickness, or disease.

(4) "Corrective action" means those actions reasonably required to be undertaken by the insured to remove, treat, neutralize, contain, or clean up an accidental release in order to comply with any statute, ordinance, rule, regulation, directive, order, or similar legal requirement of the United States, the state of Washington, or any political subdivision of the United

States or the state of Washington in effect at the time of an accidental release. "Corrective action" includes, when agreed to in writing, in advance by the insurer, action to remove, treat, neutralize, contain, or clean up an accidental release to avert, reduce, or eliminate the liability of the insured for corrective action, bodily injury, or property damage. "Corrective action" also includes actions reasonably necessary to monitor, assess, and evaluate an accidental release.

"Corrective action" does not include:

(a) Replacement or repair of storage tanks or other receptacles;
(b) Replacement or repair of piping, connections, and valves of storage tanks or other receptacles;

(c) Excavation or backfilling done in conjunction with (a) or (b) of this subsection; or

(d) Testing for a suspected accidental release if the results of the testing indicate that there has been no accidental release.

(5) "Defense costs" include 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:

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

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

(6) "Washington pollution liability reinsurance program" or "program" means the excess of loss reinsurance program created by this chapter.

(7) "Insured" means the owner or operator who is provided insurance coverage in accordance with this chapter.

(8) "Insurer" means the insurance company or risk retention group licensed or qualified to do business in Washington and authorized by the administrator to provide insurance coverage in accordance with this chapter.

(9) "Occurrence" means an accident, including continuous or repeated exposure to conditions, that results in a release from an underground storage tank.

(10) "Operator" means a person in control of, or having responsibility for, the daily operation of an underground storage tank.

(11) "Owner" means a person who owns an underground storage tank.

(12) "Person" means an individual, trust, firm, joint stock company, corporation (including government corporation), partnership, association, consortium, joint venture, commercial entity, state, municipality, commission, political subdivision of a state, interstate body, the federal government, or any department or agency of the federal government.

(13) "Petroleum" means crude oil or any fraction of crude oil that is liquid at standard conditions of temperature and pressure, which means at

sixty degrees Fahrenheit and 14.7 pounds per square inch absolute and includes gasoline, kerosene, heating oils, and diesel fuels.

(14) "Property damage" means:

(a) Physical injury to, destruction of, or contamination of tangible property, including the loss of use of the property resulting from the injury, destruction, or contamination; or

(b) Loss of use of tangible property that has not been physically injured, destroyed, or contaminated but has been evacuated, withdrawn from use, or rendered inaccessible because of an accidental release.

(15) "Release" means the emission, discharge, disposal, dispersal, seepage, or escape of petroleum from an underground storage tank into or upon land, ground water, surface water, subsurface soils, or the atmosphere.

(16) "Tank" means a stationary device, designed to contain an accumulation of petroleum, that is constructed primarily of nonearthen materials such as wood, concrete, steel, or plastic that provides structural support.

(17) "Underground storage tank" means any one or a combination of tanks including underground pipes connected to the tank, that is used to contain an accumulation of petroleum and the volume of which (including the volume of the underground pipes connected to the tank) is ten percent or more beneath the surface of the ground.

NEW SECTION. Sec. 3. The pollution liability reinsurance program trust account is established in the custody of the state treasurer. All funds appropriated for this chapter and all premiums collected for reinsurance shall be deposited in the account. Expenditures from the account shall be used exclusively for the purposes of this chapter including payment of costs of administering the program. The account is subject to allotment procedures under chapter 43.88 RCW. Expenditures for payment of the costs of administering the program may be made only after appropriation by statute. No appropriation is required for other expenditures from the account. The earnings on any surplus balances in the pollution liability reinsurance program trust account shall be credited to the account notwithstanding RCW 43.84.090.

NEW SECTION. Sec. 4. (1) The Washington pollution liability reinsurance program is created as an independent agency of the state. The administrative head and appointing authority of the program shall be the administrator who shall be appointed by the governor, with the consent of the senate, and shall serve at the pleasure of the governor. The salary for this office shall be set by the governor pursuant to RCW 43.03.040. The administrator shall appoint an assistant administrator. The administrator, assistant administrator, and up to three other employees are exempt from the civil service law, chapter 41.06 RCW.

(2) The administrator shall employ such other staff as are necessary to fulfill the responsibilities and duties of the administrator. The staff is subject to the civil service law, chapter 41.06 RCW. In addition, the administrator

may contract with third parties for services necessary to carry out its activities where this will promote economy, avoid duplication of effort, and make best use of available expertise. Any such contractor or consultant is prohibited from releasing, publishing, or otherwise using any information made available to it under its contractual responsibility without specific permission of the program administrator. The administrator may call upon other agencies of the state to provide technical support and available information as necessary to assist the administrator in meeting the administrator's responsibilities under this chapter. Agencies shall supply this support and information as promptly as circumstances permit.

(3) The governor shall appoint a standing technical advisory committee that is representative of the public, the petroleum marketing industry, business and local government owners of underground storage tanks, and insurance professionals. Individuals appointed to the technical advisory committee shall serve at the pleasure of the governor and without compensation for their services as members, but may be reimbursed for their travel expenses in accordance with RCW 43.03.050 and 43.03.060.

(4) A member of the technical advisory committee of the program is not civilly liable for any act or omission in the course and scope of his or her official capacity unless the act or omission constitutes gross negligence.

NEW SECTION. Sec. 5. The administrator may adopt rules consistent with this chapter to carry out the purposes of this chapter. All rules shall be adopted in accordance with chapter 34.05 RCW.

NEW SECTION. Sec. 6. The administrator has the following powers and duties:

(1) To design and from time to time revise an excess of loss reinsurance contract providing coverage to an insurer meeting the requirements of this chapter. In designing the reinsurance contract the administrator shall consider common insurance industry excess of loss reinsurance contract provisions and shall design the contract in accordance with the following guidelines:

(a) The contract shall provide coverage to the insurer for the liability risks of owners and operators of underground storage tanks for third party bodily injury and property damage and corrective action that are underwritten by the insurer.

(b) In the event of an insolvency of the insurer, the reinsurance contract shall provide reinsurance payable directly to the insurer or to its liquidator, receiver, or successor on the basis of the liability of the insurer in accordance with the reinsurance contract. In no event may the program be liable for or provide coverage for that portion of any covered loss that is the responsibility of the insurer whether or not the insurer is able to fulfill the responsibility.

(c) The total limit of liability for reinsurance coverage shall not exceed one million dollars per occurrence and two million dollars annual aggregate

for each policy underwritten by the insurer less the ultimate net loss retained by the insurer as defined and provided for in the reinsurance contract.

(d) Disputes between the insurer and the reinsurance program shall be settled through arbitration.

(2) To design and implement a structure of periodic premiums due the administrator from the insurer that takes full advantage of revenue collections and projected revenue collections to ensure affordable premiums to the insured consistent with sound actuarial principles.

(3) To periodically review premium rates for reinsurance to determine whether revenue appropriations supporting the program can be reduced without substantially increasing the insured's premium costs.

(4) To solicit bids from insurers and select an insurer to provide pollution liability insurance to owners and operators of underground storage tanks for third party bodily injury and property damage and corrective action.

(5) To monitor the activities of the insurer to ensure compliance with this chapter and protect the program from excessive loss exposure resulting from claims mismanagement by the insurer.

(6) To monitor the success of the program and periodically make such reports and recommendations to the legislature as the administrator deems appropriate.

(7) To annually report the financial and loss experience of the insurer as to policies issued under the program and the financial and loss experience of the program to the legislature.

(8) To evaluate the effects of the program upon the private market for liability insurance for owners and operators of underground storage tanks and make recommendations to the legislature on the necessity for continuing the program to ensure availability of such coverage.

(9) To enter into contracts with public and private agencies to assist the administrator in his or her duties to design, revise, monitor, and evaluate the program and to provide technical or professional assistance to the administrator.

(10) To examine the affairs, transactions, accounts, records, documents, and assets of insurers as the administrator deems advisable.

NEW SECTION. Sec. 7. (1) All examination and proprietary reports and information obtained by the administrator and the administrator's staff in soliciting bids from insurers and in monitoring the insurer selected by the administrator shall not be made public or otherwise disclosed to any person, firm, corporation, agency, association, governmental body, or other entity.

(2) Subsection (1) of this section notwithstanding, the administrator may furnish all or part of examination reports prepared by the administrator or by any person, firm, corporation, association, or other entity preparing the reports on behalf of the administrator to:

- (a) The Washington state insurance commissioner;
- (b) A person or organization officially connected with the insurer as officer, director, attorney, auditor, or independent attorney or independent auditor; and
- (c) The attorney general in his or her role as legal advisor to the administrator.

(3) Subsection (1) of this section notwithstanding, the administrator may furnish all or part of the examination or proprietary reports or information obtained by the administrator to:

- (a) The Washington state insurance commissioner; and
 - (b) A person, firm, corporation, association, governmental body, or other entity with whom the administrator has contracted for services necessary to perform his or her official duties.
- (4) Examination reports and proprietary information obtained by the administrator and the administrator's staff are not subject to public disclosure under chapter 42.17 RCW.

(5) A person who violates any provision of this section is guilty of a gross misdemeanor.

NEW SECTION. Sec. 8. (1) In selecting an insurer to provide pollution liability insurance coverage to owners and operators of underground storage tanks, the administrator shall evaluate bids based upon criteria established by the administrator that shall include:

- (a) The insurer's ability to underwrite pollution liability insurance;
- (b) The insurer's ability to settle pollution liability claims quickly and efficiently;
- (c) The insurer's estimate of underwriting and claims adjustment expenses;
- (d) The insurer's estimate of premium rates for providing coverage;
- (e) The insurer's ability to manage and invest premiums; and
- (f) The insurer's ability to provide risk management guidance to insureds.

The administrator shall select the bidder most qualified to provide insurance consistent with this chapter and need not select the bidder submitting the least expensive bid. The administrator may consider bids by groups of insurers and management companies who propose to act in concert in providing coverage and who otherwise meet the requirements of this chapter.

(2) The successful bidder shall agree to provide liability insurance coverage to owners and operators of underground storage tanks for third party bodily injury and property damage and corrective action consistent with the following minimum standards:

- (a) The insurer shall provide coverage for defense costs.
- (b) The insurer shall collect a deductible from the insured for corrective action in an amount approved by the administrator.

(c) The insurer shall provide coverage for accidental releases in the amount of five hundred thousand dollars per occurrence and one million dollars annual aggregate but no more than one million dollars per occurrence and two million dollars annual aggregate exclusive of defense costs.

(d) The insurer shall require insurance applicants to meet at least the following underwriting standards before issuing coverage to the applicant:

(i) The applicant must be in compliance with statutes, ordinances, rules, regulations, and orders governing the ownership and operation of underground storage tanks as identified by the administrator by rule; and

(ii) The applicant must exercise adequate underground storage tank risk management as specified by the administrator by rule.

(e) The insurer may exclude coverage for losses arising before the effective date of coverage, and the administrator may adopt rules establishing standards for determining whether a loss was incurred before the effective date of coverage.

(f) The insurer may exclude coverage for bodily injury, property damage, and corrective action as permitted by the administrator by rule.

(g) The insurer shall use a variable rate schedule approved by the administrator taking into account tank type, tank age, and other factors specified by the administrator.

(3) The administrator shall adopt all rules necessary to implement this section. In developing and adopting rules governing rates, deductibles, underwriting standards, and coverage conditions, limitations, and exclusions, the administrator shall balance the owner and operator's need for coverage with the need to maintain the actuarial integrity of the program and shall consult with the standing technical advisory committee established under section 4(3) of this act. In developing and adopting rules governing coverage exclusions affecting corrective action, the administrator shall consult with the Washington state department of ecology.

(4) Notwithstanding the definitions contained in section 2 of this act, the administrator may permit an insurer to use different words or phrases describing the coverage provided under the program. In permitting such deviations from the definitions contained in section 2 of this act, the administrator shall consider the regulations adopted by the United States environmental protection agency requiring financial responsibility by owners and operators of underground petroleum storage tanks.

(5) Owners and operators of underground storage tanks or sites containing underground storage tanks where a preexisting release has been identified or where the owner or operator knows of a preexisting release are eligible for coverage under the program subject to the following conditions:

(a) The owner or operator must have a plan for proceeding with corrective action; and

(b) If the owner or operator files a claim with the insurer, the owner or operator has the burden of proving that the claim is not related to a preexisting release until the owner or operator demonstrates to the satisfaction of the administrator that corrective action has been completed.

NEW SECTION. Sec. 9. If the insurer cancels or refuses to issue or renew a policy, the affected owner or operator may appeal the insurer's decision to the administrator. The administrator shall conduct a brief adjudicative proceeding under chapter 34.05 RCW.

NEW SECTION. Sec. 10. (1) The activities and operations of the program are exempt from the provisions and requirements of Title 48 RCW and to the extent of their participation in the program, the activities and operations of the insurer selected by the administrator to provide liability insurance coverage to owners and operators of underground storage tanks are exempt from the requirements of Title 48 RCW except for:

- (a) Chapter 48.03 RCW pertaining to examinations;
- (b) RCW 48.05.250 pertaining to annual reports;
- (c) Chapter 48.12 RCW pertaining to assets and liabilities;
- (d) Chapter 48.13 RCW pertaining to investments;
- (e) Chapter 48.30 RCW pertaining to deceptive, false, or fraudulent acts or practices; and
- (f) Chapter 48.92 RCW pertaining to liability risk retention.

(2) To the extent of their participation in the program, the insurer selected by the administrator to provide liability insurance coverage to owners and operators of underground storage tanks shall not participate in the Washington insurance guaranty association nor shall the association be liable for coverage provided to owners and operators of underground storage tanks issued in connection with the program.

NEW SECTION. Sec. 11. (1) The administrator shall report to the legislature by January 1, 1990, on the estimated costs to the insured and the state of implementing the program including proposed coverage, rates, and underwriting the insurer recommended by the administrator. The administrator shall seek advice from the department of revenue on the tax rate imposed under section 16 of this act and include a recommendation in the report on any necessary tax rate adjustments.

(2) Until and unless the legislature enacts legislation authorizing the administrator to fully implement the program, the administrator shall take no action nor enter into any contract that binds the state to providing pollution liability insurance or reinsurance as provided in this chapter.

(3) Nothing contained in this section shall prohibit the administrator from entering into contracts to assist in the development or analysis of information necessary to complete the report to the legislature nor shall this section prohibit the administrator from entering into contracts to analyze

and design insurance and reinsurance policies to the extent necessary to develop the probable costs of full program implementation.

NEW SECTION. Sec. 12. The legislature reserves the right to amend or repeal all or any part of this chapter at any time, and there is no vested right of any kind against such amendment or repeal. All the rights, privileges, or immunities conferred by this chapter or any acts done under it exist subject to the power of the legislature to amend or repeal this chapter at any time.

NEW SECTION. Sec. 13. This chapter shall expire June 1, 1995.

NEW SECTION. Sec. 14. It is the intent of this chapter to impose a tax only once for each petroleum product possessed in this state and to tax the first possession of all petroleum products. This chapter is not intended to exempt any person from tax liability under any other law.

NEW SECTION. Sec. 15. Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Petroleum product" means plant condensate, lubricating oil, gasoline, aviation fuel, kerosene, diesel motor fuel, benzol, fuel oil, residual oil, liquefied or liquefiable gases such as butane, ethane, and propane, and every other product derived from the refining of crude oil, but the term does not include crude oil.

(2) "Possession" means the control of a petroleum product located within this state and includes both actual and constructive possession. "Actual possession" occurs when the person with control has physical possession. "Constructive possession" occurs when the person with control does not have physical possession. "Control" means the power to sell or use a petroleum product or to authorize the sale or use by another.

(3) "Previously taxed petroleum product" means a petroleum product in respect to which a tax has been paid under this chapter and that has not been remanufactured or reprocessed in any manner (other than mere repackaging or recycling for beneficial reuse) since the tax was paid.

(4) "Wholesale value" means fair market wholesale value, determined as nearly as possible according to the wholesale selling price at the place of use of similar products of like quality and character, in accordance with rules of the department.

(5) Except for terms defined in this section, the definitions in chapters 82.04, 82.08, and 82.12 RCW apply to this chapter.

NEW SECTION. Sec. 16. (1) A tax is imposed on the privilege of possession of petroleum products in this state. The rate of the tax shall be fifty one-hundredths of one percent multiplied by the wholesale value of the petroleum product.

(2) Moneys collected under this chapter shall be deposited in the pollution liability reinsurance program trust account under section 3 of this act.

(3) Chapter 82.32 RCW applies to the tax imposed in this chapter. The tax due dates, reporting periods, and return requirements applicable to chapter 82.04 RCW apply equally to the tax imposed in this chapter.

(4) Within thirty days after the end of each calendar quarter the department shall determine the "quarterly balance," which shall be the balance in the pollution liability reinsurance program trust account as of the last day of that calendar quarter. Balance determinations by the department under this section are final and shall not be used to challenge the validity of any tax imposed under this section. For each calendar quarter, tax shall be imposed under this section during the entire calendar quarter unless:

(a) Tax was imposed under this section during the immediately preceding calendar quarter, and the most recent quarterly balance is more than fifteen million dollars; or

(b) Tax was not imposed under this section during the immediately preceding calendar quarter, and the most recent quarterly balance is more than seven million five hundred thousand dollars.

NEW SECTION. Sec. 17. The following are exempt from the tax imposed in this chapter:

(1) Any successive possession of a previously taxed petroleum product. If tax due under this chapter has not been paid with respect to a petroleum product, the department may collect the tax from any person who has had possession of the petroleum product. If the tax is paid by any person other than the first person having taxable possession of a petroleum product, the amount of tax paid shall constitute a debt owed by the first person having taxable possession to the person who paid the tax.

(2) Any possession of a petroleum product by a natural person under circumstances where the substance is used, or is to be used, for a personal or domestic purpose (and not for any business purpose) by that person or a relative of, or person residing in the same dwelling as, that person.

(3) Persons or activities which the state is prohibited from taxing under the United States Constitution.

(4) Any persons possessing a petroleum product where such possession first occurred before the effective date of this section.

(5) Any possession of (a) natural gas, (b) petroleum coke, or (c) liquid fuel or fuel gas used in petroleum processing.

(6) Any possession of petroleum products that are exported for use or sale outside this state as fuel.

(7) Any possession of petroleum products packaged for sale to ultimate consumers.

NEW SECTION. Sec. 18. (1) Credit shall be allowed in accordance with rules of the department of revenue for taxes paid under this chapter with respect to fuel carried from this state in the fuel tank of any airplane, ship, truck, or other vehicle.

(2) Credit shall be allowed, in accordance with rules of the department, against the taxes imposed in this chapter for any petroleum product tax paid to another state with respect to the same petroleum product. The amount of the credit shall not exceed the tax liability arising under this chapter with respect to that petroleum product. For the purpose of this subsection:

(a) "Petroleum product tax" means a tax:

(i) That is imposed on the act or privilege of possessing petroleum products, and that is not generally imposed on other activities or privileges; and

(ii) That is measured by the value of the petroleum product, in terms of wholesale value or other terms, and in the determination of which the deductions allowed would not constitute the tax an income tax or value added tax.

(b) "State" means (i) a state of the United States other than Washington, or any political subdivision of such other state, (ii) the District of Columbia, and (iii) any foreign country or political subdivision thereof.

NEW SECTION. Sec. 19. The sum of four hundred thousand dollars, or as much thereof as may be necessary, is appropriated from the pollution liability reinsurance program trust account to the Washington pollution liability reinsurance program for the biennium ending June 30, 1991, to carry out the purposes of this act.

NEW SECTION. Sec. 20. If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. Sec. 21. Sections 1 through 13 of this act constitute a new chapter in Title 70 RCW. Sections 14 through 18 of this act shall constitute a new chapter in Title 82 RCW.

NEW SECTION. Sec. 22. This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately, except sections 14 through 19 of this act shall take effect July 1, 1989.

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