

Chapter 88.40 RCW
TRANSPORT OF PETROLEUM PRODUCTS—FINANCIAL RESPONSIBILITY

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Ocean resources management act: Chapter 43.143 RCW.

Oil or gas exploration in marine waters: RCW 90.58.550.

RCW 88.40.005 Intent. The legislature recognizes that oil and hazardous substance spills and other forms of incremental pollution present serious danger to the fragile marine environment of Washington state. It is the intent and purpose of this chapter to define and prescribe financial responsibility requirements for vessels that transport petroleum products as cargo or as fuel across the waters of the state of Washington and for facilities that store, handle, or transfer oil or hazardous substances in bulk on or near the navigable waters. [1991 c 200 § 701; 1990 c 116 § 29; 1989 1st ex.s. c 2 § 1.]

Effective dates—1991 c 200: See RCW 90.56.901.

Findings—Severability—1990 c 116: See notes following RCW 90.56.210.

RCW 88.40.011 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Barge" means a vessel that is not self-propelled.

(2) "Bulk" means material that is stored or transported in a loose, unpackaged liquid, powder, or granular form capable of being conveyed by a pipe, bucket, chute, or belt system.

(3) "Cargo vessel" means a self-propelled ship in commerce, other than a tank vessel, fishing vessel, or a passenger vessel, of three hundred or more gross tons.

(4) "Certificate of financial responsibility" means an official written acknowledgment issued by the director or the director's designee that an owner or operator of a covered vessel or facility, or the owner of the oil, has demonstrated to the satisfaction of the director or the director's designee that the relevant entity has the financial ability to pay for costs and damages caused by an oil spill.

(5) "Covered vessel" means a tank vessel, cargo vessel, or passenger vessel.

(6) "Department" means the department of ecology.

(7) "Director" means the director of the department of ecology.

(8) (a) "Facility" means any structure, group of structures, equipment, pipeline, or device, other than a vessel, located on or near the navigable waters of the state that transfers oil in bulk to or from any vessel with an oil carrying capacity over two hundred fifty barrels or pipeline, that is used for producing, storing, handling, transferring, processing, or transporting oil in bulk.

(b) A facility does not include any: (i) Railroad car, motor vehicle, or other rolling stock while transporting oil over the highways or rail lines of this state; (ii) retail motor vehicle motor fuel outlet; (iii) facility that is operated as part of an exempt agricultural activity as provided in RCW 82.04.330; (iv) underground storage tank regulated by the department or a local government under chapter 70A.355 RCW; or (v) marine fuel outlet that does not dispense more than three thousand gallons of fuel to a ship that is not a covered vessel, in a single transaction.

(9) "Fishing vessel" means a self-propelled commercial vessel of three hundred or more gross tons that is used for catching or processing fish.

(10) "Gross tons" means tonnage as determined by the United States coast guard under 33 C.F.R. section 138.30.

(11) "Hazardous substances" means any substance listed as of March 1, 2003, in Table 302.4 of 40 C.F.R. Part 302 adopted under section 102(a) of the federal comprehensive environmental response, compensation, and liability act of 1980, as amended by P.L. 99-499. The following are not hazardous substances for purposes of this chapter:

(a) Wastes listed as F001 through F028 in Table 302.4; and

(b) Wastes listed as K001 through K136 in Table 302.4.

(12) "Navigable waters of the state" means those waters of the state, and their adjoining shorelines, that are subject to the ebb and flow of the tide and/or are presently used, have been used in the past, or may be susceptible for use to transport intrastate, interstate, or foreign commerce.

(13) "Offshore facility" means any facility located in, on, or under any of the navigable waters of the state, but does not include a facility any part of which is located in, on, or under any land of the state, other than submerged land.

(14) "Oil" or "oils" means oil of any kind that is liquid at twenty-five degrees Celsius and one atmosphere of pressure and any fractionation thereof, including, but not limited to, crude oil, bitumen, synthetic crude oil, natural gas well condensate, petroleum, gasoline, fuel oil, diesel oil, biological oils and blends, oil sludge, oil refuse, and oil mixed with wastes other than dredged spoil. Oil does not include any substance listed as of March 1, 2003, in Table 302.4 of 40 C.F.R. Part 302 adopted under section 102(a) of the federal comprehensive environmental response, compensation, and liability act of 1980, as amended by P.L. 99-499.

(15) "Onshore facility" means any facility any part of which is located in, on, or under any land of the state, other than submerged land, that because of its location, could reasonably be expected to cause substantial harm to the environment by discharging oil into or on the navigable waters of the state or the adjoining shorelines.

(16) (a) "Owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, the vessel; (ii) in the case of an onshore or offshore facility, any person owning

or operating the facility; and (iii) in the case of an abandoned vessel or onshore or offshore facility, the person who owned or operated the vessel or facility immediately before its abandonment.

(b) "Operator" does not include any person who owns the land underlying a facility if the person is not involved in the operations of the facility.

(17) "Passenger vessel" means a ship of three hundred or more gross tons with a fuel capacity of at least six thousand gallons carrying passengers for compensation.

(18) "Ship" means any boat, ship, vessel, barge, or other floating craft of any kind.

(19) "Spill" means an unauthorized discharge of oil into the waters of the state.

(20) "Tank vessel" means a ship that is constructed or adapted to carry, or that carries, oil in bulk as cargo or cargo residue, and that:

(a) Operates on the waters of the state; or

(b) Transfers oil in a port or place subject to the jurisdiction of this state.

(21) "Waters of the state" includes lakes, rivers, ponds, streams, inland waters, underground water, salt waters, estuaries, tidal flats, beaches and lands adjoining the seacoast of the state, sewers, and all other surface waters and watercourses within the jurisdiction of the state of Washington. [2022 c 202 § 1; 2020 c 20 § 1489. Prior: 2015 c 274 § 9; 2007 c 347 § 4; 2003 c 56 § 2; 2000 c 69 § 30; 1992 c 73 § 12; 1991 c 200 § 702.]

Reviser's note: The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

Effective date—2015 c 274: See note following RCW 90.56.005.

Finding—Intent—2003 c 56: "The legislature finds that the current financial responsibility laws for vessels are in need of update and revision. The legislature intends that, whenever possible, the standards set for Washington state provide the highest level of protection consistent with other western states and to ultimately achieve a more uniform system of financial responsibility on the Pacific Coast." [2003 c 56 § 1.]

Effective dates—1992 c 73: See RCW 82.23B.902.

Effective dates—1991 c 200: See RCW 90.56.901.

RCW 88.40.020 Financial responsibility for vessels—Department may update hazardous substances. (1) The owner or operator of any barge that transports hazardous substances in bulk as cargo, using any port or place in the state of Washington or the navigable waters of the state shall demonstrate financial responsibility in the amount of the greater of \$5,000,000, or \$300 per gross ton of such vessel.

(2)(a) Except as provided in (b) or (c) of this subsection, the owner or operator of a tank vessel that carries oil as cargo in bulk shall demonstrate financial responsibility to pay at least \$1,000,000,000.

(b) The director by rule may establish a lesser standard of financial responsibility for tank vessels of 300 gross tons or less.

The standard shall set the level of financial responsibility based on the quantity of cargo the tank vessel is capable of carrying. The director shall not set the standard for tank vessels of 300 gross tons or less below that required under federal law.

(c) The owner or operator of a tank vessel who is a member of an international protection and indemnity mutual organization and is covered for oil pollution risks up to the amounts required under this section is not required to demonstrate financial responsibility under this chapter. The director may require the owner or operator of a tank vessel to prove membership in such an organization.

(3) (a) The owner or operator of a cargo vessel or passenger vessel that carries oil as fuel shall demonstrate financial responsibility to pay at least \$300,000,000. However, the owner or operator of a passenger vessel that transports passengers and vehicles between Washington state and a foreign country shall demonstrate financial responsibility to pay the greater of at least \$600 per gross ton or \$500,000.

(b) The owner or operator of a cargo vessel or passenger vessel who is a member of an international protection and indemnity mutual organization and is covered for oil pollution risks up to the amounts required under this section is not required to demonstrate financial responsibility under this chapter. The director may require the owner or operator of a cargo vessel or passenger vessel to prove membership in such an organization.

(4) The owner or operator of a fishing vessel while on the navigable waters of the state must demonstrate financial responsibility in the following amounts: (a) For a fishing vessel carrying predominantly nonpersistent product, \$133.40 per incident, for each barrel of total oil storage capacity, persistent and nonpersistent product, on the vessel or \$1,334,000, whichever is greater; or (b) for a fishing vessel carrying predominantly persistent product, \$400.20 per incident, for each barrel of total oil storage capacity, persistent product and nonpersistent product, on the vessel or \$6,670,000, whichever is greater.

(5) In order to demonstrate financial responsibility as required under this section, the owner or operator of a vessel must, effective upon a date specified in rules adopted by the department, obtain a certificate of financial responsibility from the department, except as provided in RCW 88.40.040. The certificate of financial responsibility is conclusive evidence that the person or entity holding the certificate is the party responsible for the specified vessel, facility, or oil for purposes of determining liability under chapter 90.48 RCW.

(6) The requirements of this section do not apply to a covered vessel owned or operated by the federal government or by a state or local government.

(7) The department may by rule update the hazardous substances subject to the requirements of this section to maintain consistency with any changes to federal regulations adopted after 2003 to the hazardous substances identified under section 102(a) of the federal comprehensive environmental response, compensation, and liability act of 1980. [2022 c 202 § 2. Prior: 2003 c 91 § 3; 2003 c 56 § 3; 2000 c 69 § 31; 1992 c 73 § 13; 1991 c 200 § 703; 1990 c 116 § 31; 1989 1st ex.s. c 2 § 3.]

Finding—Intent—2003 c 56: See note following RCW 88.40.011.

Effective dates—1992 c 73: See RCW 82.23B.902.

Effective dates—1991 c 200: See RCW 90.56.901.

Findings—Severability—1990 c 116: See notes following RCW 90.56.210.

RCW 88.40.025 Financial responsibility for onshore or offshore facilities. An onshore or offshore facility shall demonstrate financial responsibility in an amount determined by the department as necessary to compensate the state and affected federally recognized Indian tribes, counties, and cities for damages that might occur during a reasonable worst case spill of oil from that facility into the navigable waters of the state. The department shall adopt a rule that considers such matters as the worst case amount of oil that could be spilled, as calculated in the applicant's oil spill contingency plan approved under chapter 90.56 RCW, the cost of cleaning up the spilled oil, the frequency of operations at the facility, the damages that could result from the spill, and the commercial availability and affordability of financial responsibility. In order to demonstrate financial responsibility as required under this section, the owner or operator of a facility must obtain a certificate of financial responsibility from the department. The requirements of this section do not apply to an onshore or offshore facility owned or operated by the federal government or by the state or local government. [2022 c 202 § 3; 1991 c 200 § 704.]

Effective dates—1991 c 200: See RCW 90.56.901.

RCW 88.40.030 Financial responsibility—Documentation—Qualification as self-insurer—Certificate. (1) The owner or operator of a vessel or facility that is required to demonstrate financial responsibility under this chapter may do so by any one of, or a combination of, the following methods acceptable to the department:

- (a) Evidence of insurance;
- (b) Surety bonds;
- (c) Guaranty;
- (d) Letter of credit;
- (e) Certificates of deposit;
- (f) Protection and indemnity club membership;
- (g) A certificate evidencing compliance with the requirements of another state's financial responsibility requirements or federal financial responsibility requirements if the state or federal government requires a level of financial responsibility the same as or greater than that required under this chapter; or
- (h) Other evidence of financial responsibility deemed acceptable by the department.

(2) In addition to the options provided in subsection (1) of this section, the owner or operator of a vessel or facility may demonstrate financial responsibility under this chapter through qualification as a self-insurer. Rules adopted by the department that provide a self-insurance option for vessels and facilities must require the applicant to thoroughly demonstrate the security of the applicant's financial position, which may include a demonstration of a combination of the

applicant's assets, cash flow, equity, liabilities, and bond ratings. The department may require a certificate applicant relying on qualification as a self-insurer to demonstrate a greater monetary amount of financial responsibility than is required of applicants relying on a form of financial responsibility described in subsection (1) of this section. In adopting rules pertaining to self-insurance requirements, the department must establish standards that are no less protective than the qualification standards for self-insurance established in other jurisdictions with similar programs as of January 1, 2022, and from which Washington imports significant volumes of oil or petroleum products or to which Washington exports significant volumes of oil or petroleum products.

(3) Upon determining that the owner or operator of a vessel or facility has adequately demonstrated financial responsibility to the department, the department must issue a certificate of financial responsibility to the owner or operator of the vessel or facility.

(4) Any bond filed with the department to demonstrate financial responsibility under this chapter must be issued by a bonding company authorized to do business in the United States.

(5) A certificate of financial responsibility, or a certificate specified in subsection (1)(g) of this section, must be kept on any covered vessel and filed with the department at least 24 hours before entry of the vessel into the navigable waters of the state. The owner or operator of a covered vessel must notify the department but is not required to file a certificate of financial responsibility 24 hours before entry of the vessel into the navigable waters of the state, if the vessel has filed documentation of financial responsibility with the federal government, and the level of financial responsibility required by the federal government is the same as or exceeds state requirements.

(6) A certificate of financial responsibility issued by the department under this chapter or otherwise used for compliance with this chapter may not have a term greater than two years. [2022 c 202 § 4; 2000 c 69 § 32; 1991 c 200 § 705; 1990 c 116 § 32; 1989 1st ex.s. c 2 § 4.]

Effective dates—1991 c 200: See RCW 90.56.901.

Findings—Severability—1990 c 116: See notes following RCW 90.56.210.

RCW 88.40.040 Financial responsibility—Enforcement of federal oil pollution act—Holder of certificate, duties—Director. (1) The owner or operator of a vessel is not required to demonstrate financial responsibility under this chapter prior to using any port or place in Washington or state waters when necessary to avoid injury to the vessel's crew or passengers. Any vessel owner or operator that does not meet the financial responsibility requirements of this chapter and any rules prescribed thereunder or the federal oil pollution act of 1990 shall be reported by the department to the United States coast guard.

(2) The department may enforce section 1016 of the federal oil pollution act of 1990 as authorized by section 1019 of the federal act.

(3) (a) (i) The holder of a certificate under this chapter must notify the director of an oil spill or discharge in state waters consistent with chapters 90.48 and 90.56 RCW.

(ii) The holder of a certificate of financial responsibility for more than one covered vessel or facility must notify the director if it experiences a spill or spill from a vessel or facility in another jurisdiction for which it may be liable and which may incur damages that exceed 15 percent of the financial resources reflected by the certificate.

(b) Upon notification of an oil spill or discharge or other potential liability by the owner or operator of a vessel or facility that holds a certificate of financial responsibility under (a) of this subsection, the director may reevaluate the validity of the certificate of financial responsibility under this chapter. The director must reevaluate the validity of a certificate of financial responsibility under this chapter upon notification of a spill for which the certificate holder may be liable and which may incur damages that exceed 25 percent of the financial resources reflected by the certificate. The director may suspend or revoke a certificate of financial responsibility if the director determines that, because of a spill, discharge, or other action or potential liability, the holder of the certificate is likely to no longer have the financial resources to both pay damages for the oil spill or discharge or other action or potential liability and have resources remaining available in an amount sufficient to meet the requirements of this chapter, effective 10 days after its determination.

(c) Upon a determination by the director under (a) of this subsection that a certificate has been suspended or revoked as a result of a spill, the owner or operator of a facility or vessel required to obtain a certificate of financial responsibility under this chapter may receive a new certificate of financial responsibility from the director upon a demonstration to the satisfaction of the director the amount of financial ability required pursuant to this chapter, as well as the financial ability to pay all reasonably estimated anticipated damages that arise or have arisen from the spill or spills that have occurred. The department must expeditiously review any applications from owners or operators whose certificates have been suspended or revoked by the department under this section. The department may issue a temporary certificate of financial responsibility to an owner or operator whose certificate has previously been revoked or suspended in order to allow the owner or operator to continue to operate a facility or vessel while the department evaluates a pending application from the owner or operator for a new certificate. It is in the interest of the state to issue and manage certificates of financial responsibility in a manner that does not create or contribute to delays in commerce for vessels and facilities subject to the requirements of this chapter. The department is directed to adopt rules to implement this chapter accordingly.

(4) An owner or operator of more than one vessel subject to the requirements of this chapter, more than one facility subject to the requirements of this chapter, or more than one vessel and facility subject to the requirements of this chapter, may:

(a) Obtain a single certificate of financial responsibility that applies to all of the owner's or operator's vessels and facilities. The department must base the terms of such a certificate upon the vessel or facility that represents the greatest financial risk in the event of a spill; or

(b) Obtain separate certificates that each apply to a subset of the owner's or operator's vessels or facilities, provided that each vessel or facility of the owner or operator is covered by at least one valid certificate. [2022 c 202 § 5; 2003 c 56 § 4; 2000 c 69 § 33; 1992 c 73 § 14; 1991 c 200 § 706; 1989 1st ex.s. c 2 § 5.]

Finding—Intent—2003 c 56: See note following RCW 88.40.011.

Effective dates—1992 c 73: See RCW 82.23B.902.

Effective dates—1991 c 200: See RCW 90.56.901.

RCW 88.40.060 Violations—Appealable certificate. (1)

Violations of the requirements of this chapter are subject to criminal penalties as provided in RCW 90.56.300 and civil penalties as provided in RCW 90.56.310.

(2) A determination by the department to issue, modify, suspend, revoke, or terminate a certificate issued under this chapter is appealable to the pollution control hearings board, as provided in RCW 43.21B.110(1)(c). [2022 c 202 § 6.]