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PRATT'S

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Energy Developments in Washington

*By Sarah Wightman**

This article discusses new greenhouse gas and underground storage tank regulations in the State of Washington.

WASHINGTON BREAKS NEW GROUND WITH GREENHOUSE GAS REGULATION

The Washington State Department of Ecology (“Ecology”) adopted its final Clean Air Rule (“Rule”) after months of stakeholder meetings and public comment and over a decade of climate policy discussion. This rule limits greenhouse gas emissions from the largest producers in the state and represents a unique approach at the state level. The rulemaking is a compromise after comprehensive cap-and-trade legislation failed to gain traction in the legislature. When coupled with a possible state carbon tax, Washington’s approach could become a model for other states hoping to address climate change in lieu of federal action.

WASHINGTON CLEAN AIR RULE

Overview

The Clean Air Rule applies only to covered parties, which the Rule defines as: 1) the owners or operators of stationary sources located in Washington; 2) petroleum product producers in Washington or importers to Washington; and 3) natural gas distributors in Washington.¹ Once a covered party exceeds a threshold level of greenhouse gas emissions, it is regulated under the Rule and must reduce its emissions.

The greenhouse gas (“GHG”) emissions regulated under the Rule are:

- carbon dioxide (“CO₂”);
- nitrous oxide (“N₂O”);
- methane (“CH₄”);
- hydro fluorocarbons (“HFCs”);
- perfluorinated compounds (“PFCs”);
- sulfur hexafluoride (“SF₆”); and

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¹ WAC 173-442-020(1)(k).

- nitrogen trifluoride (“NF₃”).²

The GHGs are measured in metric tons of CO₂ or its equivalent, and reductions are measured in emission reduction units (“ERUs”). One ERU equates to one metric ton of CO₂ equivalent.³

There are two categories of covered parties under the Rule: Category 1 and Category 2. All covered parties with GHG emissions averaging at least 70,000 metric tons per year between 2012 and 2016 are Category 1 parties under the Rule⁴ were required to notify Ecology of their status as Category 1 parties by January 1, 2017.⁵ Category 1 parties that emitted a three calendar year rolling average of at least 100,000 metric tons of GHG emissions beginning in 2012 must achieve an annual average GHG reduction of 1.7 percent of their baseline level of emissions between 2017 and 2019.⁶ This compliance threshold of 100,000 metric tons of GHG emissions lowers by 5,000 metric tons CO₂ every three years, eventually requiring reductions from all Category 1 parties by 2035.⁷ Reductions are based on each party’s baseline. The baseline for Category 1 parties is calculated by using the average emissions between 2012 and 2016, but may be based on an average calculated with as few as three years if a particular calendar year’s emissions were calculated with a different methodology.⁸

Category 2 parties include: covered parties that emitted on average less than 70,000 metric tons of GHGs per year between 2012 and 2016; covered parties that did not operate between 2012 and 2016; voluntary participants; and petroleum product importers.⁹ Once a Category 2 party emits an average of at least 70,000 metric tons of GHGs per year for three consecutive years after 2012 or requests to become a voluntary participant under the Rule, Ecology must calculate a baseline emissions value using the average of three years of emissions from the party’s required annual GHG reports.¹⁰ If the operation is modified or new, the baseline is set using a benchmarking process that entails studying the facility and its operating processes, as well as using recent

² WAC 173-441-020(1)(g).

³ WAC 173-442-020(1)(n).

⁴ WAC 173-442-050(1)(a).

⁵ WAC 173-442-020(1)(m)(ii)(A).

⁶ WAC 173-442-030(1); WAC 173-442-060(1)(b)(i).

⁷ WAC 173-442-030(3).

⁸ WAC 173-442-050(2) and (3).

⁹ WAC 173-442-050(1)(b).

¹⁰ WAC 173-44-050(4).

emissions data from similar operations.¹¹

Businesses and organizations that emit 10,000 metric tons of GHGs per year have been required to report to Ecology annually since 2012.¹² Consequently, Ecology knows the parties likely to be regulated by the Rule and has compiled a list of potentially eligible parties based on that data.¹³ This list includes nearly 70 potentially eligible parties, including natural gas distributors; petroleum product producers (i.e. refineries and importers); metal, cement, pulp and paper, and glass manufacturers; power plants; and waste facilities.

While many operations will be required to reduce their GHG emissions under this Rule, especially as the threshold for required reductions lowers, there are many exemptions from regulation, including GHG emissions from: suppliers of coal-based liquid fuels; the industrial combustion of fuel wood; coal-fired baseload electric generation facilities in Washington that emitted more than 1 million metric tons of GHGs in any year prior to 2008; and the combustion of certain products by petroleum producers, petroleum importers, and natural gas distributors.¹⁴ Stationary sources included in EPA's Clean Power Plan will be considered compliant with the Rule for the first compliance period (2017–2019) provided that EPA approves Washington's implementation plan and the approved plan requires greater GHG emissions than otherwise required under the Clean Power Plan.¹⁵

In addition to these exemptions, covered parties identified in the Rule as energy intensive and trade exposed (“EITE”) are not considered Category 1 parties, even if otherwise qualified, until 2020, with GHG reductions first due in 2023.¹⁶ In addition, EITE parties go through a different baseline and reduction calculation process.¹⁷ Examples of EITE parties include:

- frozen fruit, juice, and vegetable manufacturers;
- animal (except poultry) slaughterers;
- pulp mills;
- nitrogenous fertilizer manufacturers;

¹¹ WAC 173-442-050(5).

¹² See WAC 173-441.

¹³ Washington Dep't of Ecology, Clean Air Rule: Potentially Eligible Parties (June 2016), available at <http://www.ecy.wa.gov/climatechange/docs/CARcoveredparties0516.pdf>.

¹⁴ WAC 173-442-040.

¹⁵ WAC 173-442-040(4).

¹⁶ WAC 173-442-030(2).

¹⁷ See WAC 173-442-070.

- lime manufacturers;
- iron and steel mills;
- aircraft manufacturers; and
- petroleum product importers, among several others.¹⁸

Achieving Compliance

The covered parties that emit GHGs above the threshold for regulation must achieve an annual average GHG reduction of 1.7 percent of their baseline level of emissions and submit a compliance report demonstrating reductions every three years. There are several ways covered parties can make the required reductions. First, a party could simply reduce its GHG emissions. While this may be possible for some, the Rule gives covered parties the option to use emission reduction units (“ERUs”) instead of requiring GHG reduction. ERUs work as currency under the Rule and can be generated, recorded, banked, and exchanged by covered parties.

ERUs are generated by a covered party, including a voluntary party under the Rule, when that party emits fewer GHGs than allowed.¹⁹ ERUs can also be generated by emission reduction projects, programs, or activities.²⁰ The emission reductions from these projects must be real, specific, identifiable, quantifiable, permanent, and located in Washington.²¹ The programs must also be enforceable and verifiable, and not double-counting emission reductions with other legal requirements (except the EPA Clean Power Plan and two Washington GHG standards).²² Emission reduction projects include increasing transportation efficiency, implementing energy efficiency measures and demand side management (including renewable energy credits), reducing the use of nitrogen fertilizer in agricultural operations, and reducing GHG emissions from industrial processes.²³ To qualify, each of these programs must meet specific requirements detailed in the Rule.

Finally, ERUs can be generated through GHG markets outside of Washington if 1) the allowances are issued by an established multisector GHG reduction market; 2) the covered party may purchase allowances from that market; and 3) the allowances are calculated with similar methodologies to those used under

¹⁸ WAC 173-442-020(1)(m).

¹⁹ WAC 173-442-110(1).

²⁰ WAC 173-442-110(2).

²¹ WAC 173-442-150(1).

²² WAC 173-442-150(1).

²³ See WAC 173-442-160.

Washington rules.²⁴ Initially covered parties may use out-of-state allowances to account for 100 percent of their required reduction; however, by 2023 this reduces to 50 percent and by 2035 the maximum amount of reduction that can be achieved through out-of-state allowances is five percent.²⁵ There are also requirements related to the “vintage year” of out-of-state allowances, meaning that all allowances used for compliance in a particular year cannot have that same vintage year (generally the year the allowance was recorded, assigned by the program supplying the allowance).²⁶

Once ERUs are generated, they must be recorded in Ecology’s registry, which tracks each ERU from generation, transfer between parties, and ultimately, once used for compliance, retirement.²⁷ Each covered party must also keep a record of all ERUs generated or obtained for ten years.²⁸ A covered party may bank ERUs for up to ten years, and when withdrawing an ERU, it must withdraw the oldest vintage year first.²⁹ Once an ERU is generated and registered, it may be transferred between covered parties. While only covered parties, voluntary parties, and Ecology can hold ERUs, other entities such as brokers can facilitate ERU transactions.³⁰

To demonstrate compliance, covered parties over the reduction threshold must submit a compliance report every three years demonstrating the party met the required reduction. This report includes the amount of GHG emitted as well as ERUs generated, ERUs banked, and ERU transactions.³¹ The report must also include documentation that a third party verified that the actions described in the report were permanent, enforceable, and sufficient to meet the Rule’s obligations.³² If the report shows that the reduction requirement was not met, the covered party will be required to purchase ERUs equal to the required reduction amount.³³

Finally, if a covered party operating over the threshold level and complying with reduction and reporting requirements emits less than 50,000 metric tons

²⁴ WAC 173-442-170(1).

²⁵ WAC 173-442-170(2)(a).

²⁶ WAC 173-442-170(2)(b).

²⁷ WAC 173-442-230.

²⁸ WAC 173-442-120(2).

²⁹ WAC 173-442-130.

³⁰ WAC 173-442-140(3).

³¹ WAC 173-442-210.

³² WAC 173-442-210(3)(d) and WAC 173-442-220.

³³ WAC 173-442-200(3).

of GHGs per year for three consecutive years it does not have to continue complying with the Rule.³⁴

Ecology's Management Role

To effectively manage the ERU market, Ecology must establish an account of reserve ERUs. Ecology may retire ERUs from the reserve: a) to ensure consistency with the aggregate cap limit, b) to account for GHG emissions by covered parties that do not yet have to make reductions, and c) to promote the viability of voluntary renewable energy programs.³⁵ Ecology may also withdraw the ERUs from reserve, assigning them to a stationary source restarting operations or to programs that reduce GHG emissions and are consistent with environmental justice principles.³⁶

CARBON TAX BALLOT INITIATIVE

This rulemaking is a compromise for Washington Governor Jay Inslee after his comprehensive cap-and-trade legislation failed to gain traction in the legislature in 2015. That legislation would have created a market-based system that limited carbon emissions and charged fees on GHG emissions, raising approximately \$1 billion in revenue for the state.³⁷ The final Clean Air Rule does not charge fees on emissions or generate revenue for the state. If voters had passed Initiative Measure No. 732 ("Initiative") in November, 2016, Washington would have implemented the nation's first carbon tax.

The Initiative proposed a carbon tax applicable to fossil fuels sold or used within the state and electricity consumed in the state, including imported electricity and that purchased from Bonneville Power Administration. The Initiative excluded from taxation fossil fuel brought into Washington in vehicle tanks. The Department of Revenue would have had to develop through rulemaking the "carbon calculation" for both fossil fuels and electricity, which involves calculating the amount of CO₂ emissions in the taxed fossil fuels and electricity. The Initiative set the tax rate at \$15 per metric ton of CO₂ starting July 1, 2017, increasing to \$25 per metric ton on July 1, 2018. Thereafter, the tax would have increased 3.5 percent plus inflation every year, not to exceed a rate of \$100/metric ton in 2016 dollars.

Some fossil fuel usage was phased into the taxation scheme, including fossil

³⁴ WAC 173-442-210(7).

³⁵ WAC 173-442-240(2).

³⁶ WAC 173-442-240(3).

³⁷ See Carbon Pollution Accountability Act, *available at* <http://www.governor.wa.gov/issues/issues/energy-and-climate/2015-carbon-pollution-reduction-legislative-proposals> (last visited October 13, 2016).

fuels for agricultural uses, public transportation, nonprofit transportation providers, the Washington state ferry system, and school buses. Fossil fuels for these uses would have been initially taxed at five percent of the normal rate, which is equal to \$0.75 per metric ton of CO₂. In 2018 the rate would have increased to 10 percent of the normal rate, which is equal to \$2.50 per metric ton of CO₂. The rate for these phased-in fossil fuel uses would have increased five percent every two years until it reaches the regular tax rate in 2055.

The Initiative was a revenue-neutral proposal, meaning that all revenue obtained from taxing CO₂ would have been used to reduce taxes such that the Initiative resulted in no net change in the state's revenue stream. In addition to implementing the tax on carbon, the Initiative would have reduced the state sales tax by one percent by July 1, 2018; significantly reduced business and occupation taxes on manufacturing; and funded the working families' sales tax exemption for qualifying low income people.

IMPLICATIONS

The outcomes of both the greenhouse gas reduction rule and the carbon tax are uncertain. Although the Rule is final and took effect October 17, 2016, industry groups have already filed lawsuits challenging the Rule. A group of natural gas utilities filed a lawsuit in the U.S. District Court for the Eastern District of Washington alleging that Ecology unduly burdened interstate commerce and regulated extraterritorially in violation of the interstate commerce clause by restricting how emissions credits and offsets can be transferred to and from other states.³⁸ That same group of natural gas utilities and eight other industry groups—including pulp and paper mills, truckers, and food processors—filed two separate suits in Thurston County Superior Court, challenging Ecology's authority to impose the Rule without the approval of the legislature, in addition to procedural claims.³⁹

The fate of a Washington carbon tax is unknown. Although the Initiative failed at the ballot box, over 1.2 million votes were cast in its favor, winning nearly 41 percent of the vote, showing popular support for at least one version of a state carbon tax.⁴⁰ In addition, progressive and environmental groups that

³⁸ Tom Banse, *Industry Lawsuits Mount Against Washington State's New Carbon Cap*, Northwest News Network (September 30, 2016), *available at* <http://nwnewsnetwork.org/post/industry-lawsuits-mount-against-washington-states-new-carbon-cap>.

³⁹ *Id.*

⁴⁰ Washington Secretary of State, November 8, 2016 General Election Results, Measures, Initiative Measure No. 732 concerns taxes, <http://results.vote.wa.gov/results/current/State-Measures-Initiative-Measure-No-732-concerns-taxes.html> (last visited December 13, 2016).

opposed the revenue-neutral nature of the Initiative⁴¹ have announced a campaign for an alternative carbon tax.⁴² The policy proposal, written by the Alliance for Jobs and Clean Energy, suggests that revenue from the carbon tax should be reinvested in alternative energy projects, water infrastructure, and forest conservation and management projects, in addition to funding the working families' sales tax exemption and easing the burden on EITE industries and workers.⁴³ The group plans to pursue this carbon tax agenda in the state Legislature, where success is unlikely at this point, as Republicans control the state Senate, and legislators are struggling to find funding for other key programs, like education.⁴⁴ If a carbon tax fails to gain traction in the Legislature, Washington voters may see another carbon tax initiative on the ballot in 2018.⁴⁵

Finally, if a carbon tax were to pass in the Legislature or through a future ballot initiative, it is unclear how it would interact with the greenhouse gas regulation rule. As Chris Best, lead climate policy adviser to Governor Inslee said, "No one started this process thinking about how to design these things to interact with each other,"⁴⁶ and industry groups may view the combination of mandated reductions and a tax without additional incentives as overly burdensome. After the Rule was finalized in September 2016, Sarah Rees, Ecology's special assistant on climate change policy said, "Right now, [the carbon tax] isn't on the books . . . In the event it would pass, we would evaluate where we are in the rule. Theoretically our rule could continue in parallel, but I think we would want to take a look to see how it would interact and what would make sense for Washington State in terms of impacts on folks

⁴¹ Ashley Ahearn, *Should Carbon Emissions Be Taxed? Washington Voters Will Decide*, Oregon Public Broadcasting (October 7, 2016), *available at* <http://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/should-carbon-emissions-be-taxed-washington/>.

⁴² Hal Bernton, *Washington state alliance to push a reworked carbon-tax proposal*, The Seattle Times (November 12, 2016), *available at* <http://www.seattletimes.com/seattle-news/environment/washington-state-alliance-to-push-a-reworked-carbon-tax-initiative/>.

⁴³ Alliance for Jobs and Clean Energy, *Fund the Solutions, Price the Pollution: An Equitable Climate Action Policy* (2016), *available at* http://jobs-clean-energy-wa.com/wp-content/uploads/2015/06/Alliance-Policy_full.pdf.

⁴⁴ Bernton, *supra* note 42.

⁴⁵ *Id.*

⁴⁶ Ashley Ahearn, *Should Carbon Emissions Be Taxed? Washington Voters Will Decide*, Oregon Public Broadcasting (October 7, 2016), *available at* <http://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/should-carbon-emissions-be-taxed-washington/>.

and getting emissions reductions.”⁴⁷ If a carbon tax materializes, the outlook for the Rule may look very different.

Ultimately, both the greenhouse gas reduction rule and the proposed carbon tax are unique policies to address climate change. If Washington passes a carbon tax, it would be the only one of its kind in the nation, and the Rule represents a distinctive policy for requiring greenhouse gas reduction for the highest emitters without a complete cap-and-trade program like California. This ad hoc strategy has emerged from Washington's own legislative failure to pass a comprehensive cap-and-trade program. Nevertheless, its implementation will certainly provide lessons for other states hoping to address climate change as federal regulation in the Clean Power Plan remains uncertain and federal climate legislation seems improbable.

* * *

WASHINGTON CREATES NEW FUNDING MECHANISM FOR UP-DATING AND CLEANING UP UNDERGROUND STORAGE TANKS

The Washington State Legislature established the Underground Storage Tank Revolving Loan and Grant Program. This program, jointly administered by the Washington State Pollution Liability Insurance Agency and the Washington State Department of Health, provides funding to current underground storage tank (“UST”) owners and operators to clean up contamination caused by underground storage tanks and replace or upgrade tank infrastructure, with a special emphasis on installing new alternative fuel infrastructure. Many landowners affected by legacy or migrating contamination are not eligible for this program, as only current UST owners or operators are eligible for funding. This program, although small in scope, may mark a trend of shifting some responsibility for cleaning up historical contamination away from the Washington State Department of Ecology to other agencies.

OVERVIEW

Program Administration

The Underground Storage Tank Revolving Loan and Grand Program (“UST Loan Program”) is jointly administered by the Pollution Liability Insurance Agency (“PLIA”) and the Washington Department of Health (“DOH”) (collectively “Agencies”), with PLIA providing technical expertise and project

⁴⁷ Samantha Larson, State unveils new rules to combat climate change, *Crosscut* (September 15, 2016), *available at* <http://crosscut.com/2016/09/state-unveils-new-rules-to-combat-climate-change/>.

management and DOH bringing its expertise in program administration and financial lending.⁴⁸

PLIA was established in 1989 with a mandate of implementing a reinsurance program that would allow underground storage tank owners and operators to obtain affordable UST insurance.⁴⁹ PLIA also implemented the UST Community Assistance Program in the early 1990s, which gave grants to UST owners in rural areas to fund upgrade and cleanup costs.⁵⁰ In the mid-1990s, PLIA began offering pollution liability coverage and technical assistance for heating oil tanks, which are not covered under the UST insurance program.⁵¹ PLIA brings its experience with UST insurance and cleanup to the administration of the new UST Loan Program.

DOH is a large agency that handles a wide range of public health programs, including:

- emergency preparedness and response to bioterrorism, infectious disease, and natural disasters;
- management of public records such as births, deaths, marriages, and hospitalizations;
- food and drinking water safety; and
- disease prevention.⁵²

DOH's experience with loan programs such as the Drinking Water State Revolving Loan Program⁵³ and program administration will be helpful in implementing the new UST Loan Program.

The UST Loan Program⁵⁴ took effect July 1, 2016, and the Legislature has

⁴⁸ Washington State Pollution Liability Insurance Agency, Underground Storage Tank Revolving Loan and Grant Program: 2016 Report to the Legislature, Publication No. 02-2016-06 at 3, *available at* <http://plia.wa.gov/LegislativeReport.pdf> (hereinafter "Report to the Legislature").

⁴⁹ Washington State Pollution Liability Insurance Agency, Background, <http://www.plia.wa.gov/#Background> (last visited November 15, 2016).

⁵⁰ Report to the Legislature at 3.

⁵¹ *Id.*

⁵² Washington State Department of Health, Department of Health Programs and Services, <http://www.doh.wa.gov/AboutUs/ProgramsandServices> (last visited November 15, 2016).

⁵³ Washington State Department of Health, Drinking Water State Revolving Fund ("DWSRF"), <http://www.doh.wa.gov/CommunityandEnvironment/DrinkingWater/WaterSystemAssistance/DrinkingWaterStateRevolvingFundDWSRF> (last visited November 15, 2016).

⁵⁴ <http://app.leg.wa.gov/RCW/default.aspx?cite=70.340>.

allocated \$2.5 million for startup activities and \$10 million for the operation of the program in fiscal year 2017.⁵⁵ The money is allocated from the Pollution Liability Insurance Program Trust Account, which is funded by the petroleum products tax. With the administration of this program in mind, PLIA has hired three new personnel, including a hydrogeologist, fiscal analyst, and community involvement coordinator.⁵⁶

The UST Loan Program will be governed by PLIA rules; however, official rulemaking is forthcoming with an estimated start date of spring 2017.⁵⁷ In the interim, the UST Loan Program rules have been established by a non-binding guidance document.⁵⁸

Program Goals and Project Eligibility

The UST Loan Program's goal is to provide UST owners and operators with access to capital to: 1) replace, remove, or upgrade aging USTs; 2) clean up historical or ongoing contamination caused by a UST release; and 3) transform old gas stations into the "gas stations of the future" by replacing old infrastructure with new infrastructure that can dispense renewable fuels or alternative energy sources for motor vehicles, including electric vehicle charging stations.⁵⁹

Grants and loans are only available to current owners and operators of petroleum USTs. A facility is not eligible if it is under a Model Toxics Control Act ("MTCA") order or decree.⁶⁰ Any asset acquired with program funding must have a useful life of 13 years.⁶¹ Costs of developing the application package, legal costs, costs incurred before admittance into the program, costs

⁵⁵ Report to the Legislature at 4.

⁵⁶ *Id.*

⁵⁷ *Id.* at 4–5.

⁵⁸ http://www.plia.wa.gov/LG_Guidance.pdf.

⁵⁹ RCW § 70.340.030(1).

⁶⁰ MTCA is the main mechanism for toxic waste cleanup in Washington. Funded by a tax on hazardous substances and administered by the Department of Ecology ("Ecology"), MTCA broadly defines potentially liable persons, including current or past facility owners and anyone who arranged for disposal or treatment of hazardous waste at the site. Many cleanups proceed voluntarily, with potentially liable persons working cooperatively with Ecology to clean up sites; however, Ecology can also order a cleanup if an agreement cannot be reached. If a facility is governed by a MTCA consent decree, agreed order, or enforcement order, it is not eligible for funding from the UST Loan Program. Generally, Ecology does not offer financial assistance for cleanups through MTCA, so potentially liable persons must finance the cleanup themselves.

⁶¹ Washington State Pollution Liability Insurance Agency, Revolving Loan and Grant Program Guidance, Publication No. 02-2016-04 at 21, *available at* http://www.plia.wa.gov/LG_Guidance.pdf (hereinafter "Guidance").

outside the PLIA-approved scope of work, and advance payments for services or equipment that have not been received are ineligible for funding.⁶²

PLIA considers certain criteria when awarding grants and loans, including (in order of importance):

- age of the tanks;
- threat to drinking water, surface water, and groundwater;
- extent of contamination;
- insurance need;
- financial need;
- whether the current insurance policy is exceeded;
- environmental justice factors; and
- the need of and benefit to the surrounding community.⁶³

Projects that include electric vehicle charging stations may be awarded an interest rate reduction in the final loan.⁶⁴

Process

- (1) *Eligible UST owners and operators apply to PLIA for preliminary planning assessment (“PPA”) funds.*

The PPA includes data assessments, soil borings, laboratory analysis of samples, development of conceptual site models, development of cleanup scope of work, and design specifications for alternative fuel infrastructure.⁶⁵ The maximum PPA award is \$150,000, and the cost of the PPA is subtracted from the final lending limit.⁶⁶

- (2) *PLIA awards PPA funding to qualified applicants.*

PLIA sorts applicants into four categories: small-mid-size business; portfolio; retrofit and upgrade; and abandoned properties.⁶⁷ Using the criteria discussed above, PLIA ranks applicants, presumably awarding PPA funding to the top applicants in each category.⁶⁸

⁶² *Id.* at 23–24.

⁶³ *Id.* at 16.

⁶⁴ *Id.* at 17.

⁶⁵ *Id.* at 14–15.

⁶⁶ *Id.* at 11.

⁶⁷ *Id.* at 10.

⁶⁸ *Id.*

- (3) *PLIA completes the PPA and then considers project eligibility for loans.*

If an applicant is awarded a PPA, PLIA will choose an environmental consultant and pay up to \$150,000 for the PPA, the ultimate purpose of which is to determine a scope of work for cleanup and infrastructure replacement.⁶⁹ PPA recipients must cooperate with PLIA to ensure a successful PPA, by allowing access to property and records and responding to any other PLIA requests promptly.⁷⁰

- (4) *PLIA awards loans and/or grants for cleanup and new infrastructure to qualified applicants.*

In September of each year, PLIA and DOH rank sites with completed PPAs based on the criteria discussed above.⁷¹ The Agencies also consider the cost to implement the proposed scope of work and the applicant's ability to pay.⁷² If the expected cost to complete the scope of work exceeds the loan amount for which the recipient qualifies, a grant may be awarded in addition to a loan.⁷³ PLIA will only award a grant if it will achieve 1) more expeditious or enhanced cleanup than would otherwise occur; 2) prevention or mitigation of unfair economic hardship; and 3) a public benefit.⁷⁴ The maximum funding amount per UST facility, including grants and loans, is \$2 million minus the PPA cost.⁷⁵

- (5) *Loan and grant recipients complete remediation and infrastructure work in coordination with the Agencies.*

After a loan or grant has been awarded, PLIA and the recipient enter into a Participant Agreement, which gives the terms of the loan, the scope of work, and the terms of loan repayment.⁷⁶ DOH distributes the loan funds only after the Participant Agreement has been signed, the recipient has contracted with a consultant to implement the scope of work, and activity has begun at the facility.⁷⁷ Payments are made

⁶⁹ *Id.* at 14–15.

⁷⁰ *Id.*

⁷¹ *Id.* at 15.

⁷² Legislative Report at 5–6.

⁷³ Guidance at 18.

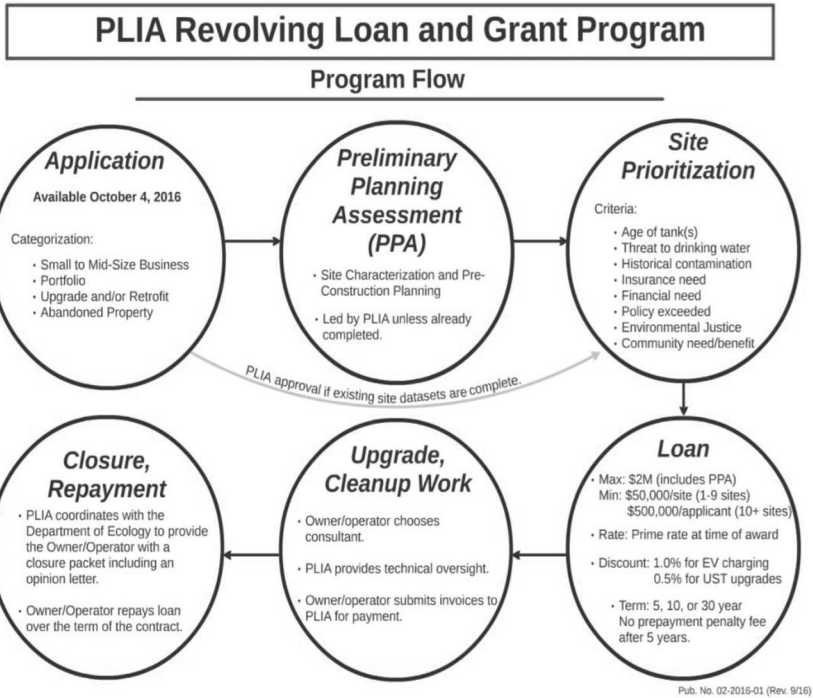
⁷⁴ *Id.*

⁷⁵ *Id.* at 17.

⁷⁶ *Id.* at 22.

⁷⁷ *Id.*

directly from DOH to the consultant who performs work at the site, after the recipient and PLIA approve the invoices.⁷⁸ Work must be started within 12 months of signing the loan agreement.⁷⁹



Source: Washington State Pollution Liability Insurance Agency⁸⁰

Program Implementation Timeline

PLIA began accepting applications for PPA funding on October 4, 2016 and will continue to accept PPA applications for funding in 2017 until March 1, 2017.⁸¹ Thereafter, applicants can submit applications at any time, but the deadline for funding each year will be March 1.⁸² The first PPA awards will be given in the spring and summer of 2017, and the first loan agreements are

⁷⁸ *Id.*

⁷⁹ *Id.* at 11.

⁸⁰ Publication No. 02-2016-01, available at http://www.plia.wa.gov/LGP_Flow.pdf.

⁸¹ Legislative Report at 7.

⁸² Guidance at 10.

projected to be finalized in September 2017.⁸³

PILOT PROJECT

Although actual cleanup and infrastructure replacement work under the UST Loan Program will not begin until late 2017, PLIA is currently overseeing work at three sites similar to those that the program hopes to encompass. In the 2015 budget, the Washington Legislature appropriated \$1.8 million for a pilot demonstration project, directing PLIA to choose three sites that involved aging tanks, demonstrated impacts to soil or groundwater, and serious financial hardship.⁸⁴ The money was to be used for removal, replacement, or upgrade of UST fuel systems; retrofitting existing systems to dispense renewable or alternative fuels; or cleanup of contamination caused by legacy petroleum releases.⁸⁵ PLIA received 21 applications for the pilot program grants and in August 2015 awarded three \$600,000 grants to Acme Fuel Company, Genesee Fuel and Heating Company, and Sharp Automotive.⁸⁶

Acme Fuel Company, of Olympia, obtained a grant that will pay to rebuild its gas station infrastructure after the company's insurance pays for cleanup of a catastrophic release that occurred when fuel was delivered to a discontinued UST.⁸⁷ Acme could not afford to clean up the contamination, even though it would be covered by insurance, because it could not obtain financing to rebuild its gas station after the cleanup.⁸⁸ The pilot project grant allows Acme to address severe contamination at the site, which it could not do without the promise of rebuilding.

Genesee Fuel and Heating Company's grant will pay for the installation of new USTs that store heating oil, including a form of biodiesel used for home heating.⁸⁹ Genesee's UST insurance was discontinued due to the age of its USTs, and the company could not obtain financing for new USTs.⁹⁰ Without insurance, Genesee could not operate legally.⁹¹ This grant allows Genesee to

⁸³ Legislative Report at 7.

⁸⁴ HB 1115, Chapter 3 § 3085 (2015), *available at* <http://lawfilesexternal.wa.gov/biennium/2015-16/Pdf/Bills/Session%20Laws/House/1115.SL.pdf>.

⁸⁵ *Id.*

⁸⁶ Legislative Report at 11.

⁸⁷ *Id.* at 12.

⁸⁸ *Id.*

⁸⁹ *Id.* at 13.

⁹⁰ *Id.*

⁹¹ *Id.*

continue its Seattle operations by installing new tanks that the company will be able to insure.

Sharp Automotive, of Moxee, will use its PLIA grant to pay for site assessment and vapor monitoring of a site contaminated by petroleum.⁹² When the station's USTs were upgraded in 1994, soil contamination was discovered but not remediated due to costs.⁹³ This fuel and service station provides essential services to the surrounding agricultural community, and the PLIA grant allows it conduct site investigation and vapor monitoring activities for which it could not obtain private financing.⁹⁴

The characteristics of these three sites in the pilot program demonstrate the characteristics that PLIA finds attractive for UST Loan Program grant and loan recipients: threats to human health and safety, lack of insurance funds or private financing, and businesses that are important to their surrounding communities.

CONCLUSION

The UST Loan Program is relatively limited in scope, as it only provides funding to a small group (current UST owners and operators) for certain costs (UST replacement/removal, site cleanup, and alternative fuel infrastructure installation). The size of the program may also be inherently limited, as its funding is limited to \$10 million in 2017 with no explicit promise of future funding; however, if the program is successful, funding may be increased, as the legislature indicates future costs up to \$80,000,000.⁹⁵ Although a relatively limited program, it may foreshadow the Legislature's desire to shift responsibility for toxics cleanup away from the Washington State Department of Ecology ("Ecology") to other agencies.

Despite work on USTs for decades, Washington still has more than 2,900 leaking underground storage tank ("LUST") sites awaiting remediation.⁹⁶ In addition, UST manufacturers generally only warranty UST systems for 30 years, and nearly 70 percent of Washington's UST infrastructure will be 30 years or older by 2021.⁹⁷ Traditionally, many LUST and gas station sites have been cleaned up through Ecology's Voluntary Cleanup Program ("VCP"), which allows liable parties to cleanup sites independently and receive Ecology

⁹² *Id.* at 14.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ HB 2380, Part 3 § 3022, *available at* <http://lawfilesexst.leg.wa.gov/biennium/2015-16/Pdf/Bills/Session%20Laws/House/2380-S.SL.pdf>.

⁹⁶ *Id.* at 8.

⁹⁷ *Id.*

approval upon satisfactory completion.⁹⁸ In September 2016, Ecology established a wait list for participation in the VCP, citing increased workloads and diminishing staff and financial resources.⁹⁹ Unless Ecology is able to secure additional funding and hire more VCP site managers or can otherwise improve its efficiency and efficacy in dealing with contaminated sites, the State may turn to other programs such as this to address toxic contamination throughout the state.

⁹⁸ Washington State Department of Ecology, Voluntary Cleanup Program, <http://www.ecy.wa.gov/programs/tcp/vcp/Vcpmain.htm> (last visited October 31, 2016).

⁹⁹ Washington State Department of Ecology, Voluntary Cleanup Program, Wait List, <http://www.ecy.wa.gov/programs/tcp/vcp/vcp2008/waitlist.html> (last visited October 31, 2016).