Chapter 70A.325 RCW
UNDERGROUND PETROLEUM STORAGE TANKS

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RCW 70A.325.005 Finding—Intent. ***(Expires July 1, 2030.)*** (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 temporary 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. In the event that private insurance is not available in the state, this chapter provides an emergency program to address the need of owners and operators of underground petroleum storage tanks to demonstrate financial responsibility so that businesses may continue to operate.

(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 and within the tax revenue limits provided, to make pollution liability insurance reasonably affordable and available to owners and operators who meet the requirements of this chapter, particularly to those owners and operators whose underground storage tanks meet a vital economic need within the affected community. [2020 c 156 s 1; 1990 c 64 s 1; 1989 c 383 s 1. Formerly RCW 70.148.005.]

RCW 70A.325.010 Definitions. ***(Expires July 1, 2030.)*** 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) "Director" means the Washington pollution liability insurance program director.

(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 insurance program" or "program" means the 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 director to provide insurance coverage in accordance with this chapter.

(9) "Loss reserve" means the amount traditionally set aside by commercial liability insurers for costs and expenses related to claims that have been made. "Loss reserve" does not include losses that have been incurred but not reported to the insurer.

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

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

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

(13) "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.

(14) "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.

(15) "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.

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

(17) "Surplus reserve" means the amount traditionally set aside by commercial property and casualty insurance companies to provide financial protection from unexpected losses and to serve, in part, as a measure of an insurance company's net worth.

(18) "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.

(19) "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. [1990 c 64 s 2; 1989 c 383 s 2. Formerly RCW 70.148.010.]

RCW 70A.325.020 Pollution liability insurance program trust account. ***(Expires July 1, 2030.)*** (1) The pollution liability insurance program trust account is established in the custody of the state treasurer.

(a) The following moneys must be deposited in the account:

(i) All moneys specified in RCW 82.23A.020 for deposit into the account;

(ii) All moneys appropriated to carry out the purposes of this chapter and all premiums collected for reinsurance under this chapter; and

(iii) All moneys specified in RCW 70A.545.080.

(b) Except as provided in chapter 70A.345 RCW, expenditures from the account must be used exclusively for:

(i) The purposes of this chapter, including payment of costs of administering the pollution liability insurance program and emergency program; and

(ii) The purposes of chapter 70A.545 RCW, including, but not limited to, establishing and administering the state financial assurance program for petroleum underground storage tanks authorized by chapter 70A.545 RCW.

(c) Expenditures for payment of administrative and operating costs of the agency are subject to the allotment procedures under chapter 43.88 RCW and may be made only after appropriation by statute. No appropriation is required for other expenditures from the account.

(2) Each calendar quarter, the director shall report to the insurance commissioner the loss and surplus reserves required for the calendar quarter. The director shall notify the department of revenue of this amount by the 15th day of each calendar quarter. [2023 c 170 s 18. Prior: 2020 c 156 s 4; 2020 c 20 s 1383; 2019 c 413 s 7034; prior: 2016 sp.s. c 35 s 6013; 2016 c 161 s 15; 2013 2nd sp.s. c 4 s 993; 2012 1st sp.s. c 3 s 1; 2006 c 276 s 1; 2005 c 518 s 942; 1999 c 73 s 1; 1998 c 245 s 114; 1991 sp.s. c 13 s 90; 1991 c 4 s 7; 1990 c 64 s 3; 1989 c 383 s 3. Formerly RCW 70.148.020.]

Effective date—2019 c 413: See note following RCW 28B.15.210.

Effective date—2016 sp.s. c 35: See note following RCW 28B.10.027.

Effective dates—2013 2nd sp.s. c 4: See note following RCW 2.68.020.

Effective date—2005 c 518: See note following RCW 28A.600.110.

Effective dates—1991 sp.s. c 13: See note following RCW 18.04.105.

RCW 70A.325.030 Reinsurance for heating oil pollution liability protection program. *(Expires July 1, 2030.)* The director shall provide reinsurance through the pollution liability insurance program trust account to the heating oil pollution liability protection program under chapter 70A.330 RCW. [2020 c 20 s 1384; 1995 c 20 s 12. Formerly RCW 70.148.025.]

RCW 70A.325.040 Pollution liability insurance program—Generally—Ad hoc committees. *(Expires July 1, 2030.)* (1) The Washington pollution liability insurance program is created as an independent agency of the state. The administrative head and appointing authority of the program shall be the director 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 director shall appoint a deputy director. The director, deputy director, and up to three other employees are exempt from the civil service law, chapter 41.06 RCW.

(2) The director shall employ such other staff as are necessary to fulfill the responsibilities and duties of the director. The staff is subject to the civil service law, chapter 41.06 RCW. In addition, the director 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. To the extent necessary to protect the state from unintended liability and ensure quality program and contract design, the director shall contract with an organization or organizations with demonstrated experience and ability in managing and designing pollution liability insurance and with an organization or organizations with demonstrated experience and ability in managing and designing pollution liability reinsurance. The director shall enter into such contracts after competitive bid but need not select the lowest bid. 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 director. The director may call upon other agencies of the state to provide technical support and available information as necessary to assist the director in meeting the director's responsibilities under this chapter. Agencies shall supply this support and information as promptly as circumstances permit.

(3) The director may appoint ad hoc technical advisory committees to obtain expertise necessary to fulfill the purposes of this chapter. [1994 sp.s. c 9 s 805; 1990 c 64 s 4; 1989 c 383 s 4. Formerly RCW 70.148.030.]

Severability—Headings and captions not law—Effective date—1994 sp.s. c 9: See RCW 18.79.900 through 18.79.902.

RCW 70A.325.050 Program design—Cost coverage. ***(Expires July 1, 2030.)*** The director may design the program to cover the costs incurred in determining whether a proposed applicant for pollution insurance under the program meets the underwriting standards of the insurer. In covering such costs the director shall consider the financial resources of the applicant, shall take into consideration the economic impact of the discontinued use of the applicant's storage tank upon the affected community, shall provide coverage within the revenue limits provided under this chapter, and shall limit coverage of such costs to the extent that coverage would be detrimental to providing affordable insurance under the program. [1990 c 64 s 11. Formerly RCW 70.148.035.]

RCW 70A.325.060 Rules. ***(Expires July 1, 2030.)*** The director 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. [1990 c 64 s 5; 1989 c 383 s 5. Formerly RCW 70.148.040.]

RCW 70A.325.070 Powers and duties of director. ***(Expires July 1, 2030.)*** The director has the following powers and duties:

(1) To design and from time to time revise a reinsurance contract providing coverage to an insurer meeting the requirements of this chapter. Before initially entering into a reinsurance contract, the director shall prepare an actuarial report describing the various reinsurance methods considered by the director and describing each method's costs. In designing the reinsurance contract the director shall consider common insurance industry 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 insurance program shall be settled through arbitration.

(2) To design and implement a structure of periodic premiums due the director 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 director deems appropriate, and to annually publish a financial report on the pollution liability insurance program trust account showing, among other things, administrative and other expenses paid from the fund.

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

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

(10) To design, in consultation with the office of financial management, an emergency program to assist owners and operators of underground storage tanks in meeting the federal financial responsibility requirements in the event that a private insurer withdraws from the Washington pollution liability insurance program.

(11) To determine, assess, and collect moneys sufficient to cover the direct and indirect costs of implementing the emergency program, including initial program development costs. The moneys may be collected from underground storage tank owners and operators who are using the emergency program. All moneys collected under this section must be deposited in the pollution liability insurance program trust account created in RCW 70A.325.020. [2021 c 65 s 72; 2020 c 156 s 2; 2006 c 276 s 2; 1998 c 245 s 115; 1995 c 12 s 1; 1990 c 64 s 6; 1989 c 383 s 6. Formerly RCW 70.148.050.]

Explanatory statement—2021 c 65: See note following RCW 53.54.030.

Effective date—1995 c 12: "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 [April 12, 1995]." [1995 c 12 s 3.]

RCW 70A.325.080 Disclosure of reports or information—Penalty. ***(Expires July 1, 2030.)*** (1) All information except for proprietary reports or information obtained by the director and the director's staff in soliciting bids from insurers and in monitoring the insurer selected by the director shall 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 director may furnish all or part of examination reports prepared by the director or by any person, firm, corporation, association, or other entity preparing the reports on behalf of the director 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 director.

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

(a) The Washington state insurance commissioner; and

(b) A person, firm, corporation, association, governmental body, or other entity with whom the director has contracted for services necessary to perform his or her official duties.

(4) Proprietary information obtained by the director and the director's staff is not subject to public disclosure under chapter 42.56 RCW.

(5) A person who violates any provision of this section is guilty of a gross misdemeanor. [2015 c 224 s 5; 2005 c 274 s 341; 1990 c 64 s 7; 1989 c 383 s 7. Formerly RCW 70.148.060.]

RCW 70A.325.090 Insurer selection process and criteria. *(Expires July 1, 2030.)* (1) In selecting an insurer to provide pollution liability insurance coverage to owners and operators of underground storage tanks, the director shall evaluate bids based upon criteria established by the director 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 director 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 director 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 director.

(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 director by rule; and

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

(e) The insurer may exclude coverage for losses arising before the effective date of coverage, and the director 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 director by rule.

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

(3) The director 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 director shall balance the owner and operator's need for coverage with the need to maintain the actuarial integrity of the program, shall take into consideration the economic impact of the discontinued use of a storage tank upon the affected community, and shall consult with the *standing technical advisory committee established under RCW 70A.325.040(3). In developing and adopting rules governing coverage exclusions affecting corrective action, the director shall consult with the Washington state department of ecology.

(4) Notwithstanding the definitions contained in RCW 70A.325.010, the director 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 RCW 70A.325.010, the director 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 director that corrective action has been completed.

(6) When a reinsurance contract has been entered into by the agency and insurance companies, the director shall notify the department of ecology of the letting of the contract. Within thirty days of that notification, the department of ecology shall notify all known owners and operators of petroleum underground storage tanks that appropriate levels of financial responsibility must be established by October 26, 1990, in accordance with federal environmental protection agency requirements, and that insurance under the program is

available. All owners and operators of petroleum underground storage tanks must also be notified that declaration of method of financial responsibility or intent to seek to be insured under the program must be made to the state by November 1, 1990. If the declaration of method of financial responsibility is not made by November 1, 1990, the department of ecology shall, pursuant to chapter 70A.355 RCW, prohibit the owner or operator of an underground storage tank from obtaining a tank tag or receiving petroleum products until such time as financial responsibility has been established. [2020 c 20 s 1385; 1990 c 64 s 8; 1989 c 383 s 8. Formerly RCW 70.148.070.]

***Reviser's note:** The "standing technical advisory committee" was abolished by 1994 sp.s. c 9 s 805 and in its place the director was given authority to appoint ad hoc technical advisory committees.

RCW 70A.325.100 Cancellation or refusal by insurer—Appeal. ***(Expires July 1, 2030.)*** 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 director. The director shall conduct a brief adjudicative proceeding under chapter 34.05 RCW. [1990 c 64 s 9; 1989 c 383 s 9. Formerly RCW 70.148.080.]

RCW 70A.325.110 Exemptions from Title 48 RCW—Exceptions. ***(Expires July 1, 2030.)*** (1) The activities and operations of the program are exempt from the provisions and requirements of Title 48 RCW.

(2) To the extent of their participation in the program, the activities and operations of the insurer selected by the director 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.

(3) To the extent of their participation in the program, the insurer selected by the director 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. [2020 c 156 s 5; 1990 c 64 s 10; 1989 c 383 s 10. Formerly RCW 70.148.090.]

RCW 70A.325.120 Reservation of legislative power. ***(Expires July 1, 2030.)*** 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. [1989 c 383 s 12. Formerly RCW 70.148.110.]

RCW 70A.325.130 Director may implement an emergency program—Report to the legislature. ***(Expires July 1, 2030.)*** (1) The director may implement an emergency program, as designed under RCW 70A.325.070.

(2) At the legislative session following implementation of an emergency program, the director must provide to the legislature a report on the options available to assist owners and operators in using one or a combination of mechanisms to demonstrate financial responsibility for underground storage tanks. The report must include, but is not limited to: Discussion of a state-run insurance program; alternative options to a state-run insurance program; an evaluation and recommendation of the finances required to develop and implement a new financial responsibility model that complies with the federal financial responsibility requirements in 40 C.F.R. Part 280, subpart H; and recommendations for legislation necessary to implement actions needed to meet federal financial responsibility requirements in 40 C.F.R. Part 280, subpart H. [2021 c 65 s 73; 2020 c 156 s 3.]

Explanatory statement—2021 c 65: See note following RCW 53.54.030.

RCW 70A.325.900 Expiration of chapter. This chapter expires July 1, 2030. [2016 c 161 s 16; 2012 1st sp.s. c 3 s 2; 2006 c 276 s 3; 2000 c 16 s 1; 1995 c 12 s 2; 1989 c 383 s 13. Formerly RCW 70.148.900.]

Effective date—1995 c 12: See note following RCW 70A.325.070.