

## MEMORANDUM

To: John Talberth  
From: Richard Mietz  
Re: Amendments to Washington state laws governing financial responsibility for oil spills  
Date: December 27, 2022

### Introduction

In 2022, the Washington legislature passed House Bill 1691 which amended the state's existing statutes governing financial responsibilities for oil spills. This memorandum outlines the changes to the existing state requirements and identifies the actions which the state's Department of Ecology is required to take in order to implement and enforce the new statutory provisions. Importantly, the provisions of the new law which require mandatory rule making by DOJ are areas where CSE and other interested organizations can request information from DOE in order to monitor and assess the DOE's actions to implement the law's new provisions, and to assure industry compliance with the new statutory requirements.

### Discussion

The 2022 amendments to Washington's existing oil spill financial responsibility laws require the owners or operators of any covered vessel or facility to obtain a "certificate of financial responsibility" from the Department of Ecology. The certificate of financial responsibility is defined as "an official written acknowledgement" by the DOE that the owner or operator has demonstrated that the relevant entity has the financial ability to pay for costs and damages caused by an oil spill. RCW 88.40.011(21). The certificate of financial responsibility is conclusive evidence that the entity holding the certificate is the party responsible for the specified vessel, facility, or oil for purposes of financial liability. The amendments require DOE to adopt rules governing the effective date for owners and operators of covered vessels or facilities to obtain the required certificates of financial responsibility. RCW 88.40.020(5).

The 2022 amendments set out the specific ways that owners and operators of covered vessels and facilities can demonstrate financial responsibility in order to obtain a certificate from DOE. The methods allowed include evidence of insurance, surety bonds, guaranty, letter of credit, certificate of deposit, protection and indemnity club membership, or a certificate from another state evidencing compliance with financial assurance requirements the same or greater than Washington's requirements. RCW 88.40.030(1).

The amendments also allow owners and operators of covered vessels and facilities to demonstrate financial responsibility by qualification as a "self-insurer." Under the new provisions, DOE may adopt rules that provide a self-insurance option provided that such rules "must require the applicant to thoroughly demonstrate the security of the applicant's financial position." RCW 88.40.030(2). The amendments allow DOE to require the applicant to demonstrate a greater monetary amount of financial responsibility than that required for applicants relying on the other methods set out in the statute. The amendments also require DOE to establish standards for self-insurance that are no less protective than the standards established in other jurisdictions with similar programs, and with which Washington either imports or exports significant volumes of oil and petroleum products.

The amendments contain additional provisions which require the holder of a certificate of financial responsibility to notify the DOE of an oil spill or discharge into the state's waters. RCW

88.40.040(3). The new provisions also require any certificate holder with more than one covered vessel or facility to notify DOE of an oil spill or from vessel or facility in another jurisdiction for which it may be liable and may incur damages that exceed 15% of the financial resources reflected in the certificate. The amendments also set out requirements under which DOE may or must reevaluate the validity of a certificate of financial responsibility upon being notified of an oil spill or discharge or other potential liability. The DOE is allowed to suspend or revoke a certificate of financial responsibility if the agency determines that, because of a spill, discharge or other potential liability, the holder of the certificate is likely to no longer have the financial resources to both pay damages for the potential liability and still have resources remaining in an amount sufficient to meet the state's financial responsibility requirements. RCW 88.40.040(3)(b). The amendments direct DOE to adopt rules to implement these new requirements in a manner that does not create or contribute to delays in commerce for vessels and facilities subject to the financial responsibility requirements.

The 2022 amendments also modify the state's existing requirements for evaluating the damages that might occur during a reasonable worst case spill of oil from any covered onshore or offshore facility. RCW 88.40.025. In addition to the existing requirement that requires any covered onshore or offshore facility to demonstrate financial responsibility to compensate the state and other governmental entities for damages that might occur during such a worst case scenario, the new provisions now specifically require DOE to adopt a rule that considers such matters as the worst case amount spilled, 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. The new provisions specifically require the owner or operator of a covered facility to demonstrate financial responsibility for worst case spills as part of the process of obtaining a certificate of financial responsibility from DOE.

Finally, the 2022 amendments also include a provision stating that the DOE "may" engage in rule making to update the hazardous substances subject to the state's existing financial responsibility requirements to maintain consistency with any changes to federal regulations under CERCLA. RCW 88.40.020(7).

## **Conclusion**

The 2022 amendments to Washington's existing statutes governing financial responsibility for oil spills creates a new system which now requires DOE to issue certificates of financial responsibility for all operators of vessels and facilities covered by the law. The new provisions specifically require DOE to conduct rule making to implement the new statutory requirements and to insure compliance by the owners and operators of vessels and facilities required to demonstrate financial responsibility for oil spills under existing state law. The issues assigned to DOE for required rule making include:

- 1) DOE must adopt rules governing the effective date for owners and operators of covered vessels or facilities to obtain the required certificates of financial responsibility. RCW 88.40.020(5).
- 2) DOE may adopt rules that provide a self-insurance option provided that such rules must require the applicant to thoroughly demonstrate the security of the applicant's financial position. RCW 88.40.030(2).
- 3) DOE must adopt rules governing the suspension, revocation, and re-issuance of certificates of financial responsibility in light of potential liabilities incurred by a covered entity after an

oil spill or other incident which may affect the entity's ability to maintain sufficient financial resources to meet the state's financial responsibility requirements. RCW 88.40.040(3).

- 4) DOE is required to adopt a rule to evaluate whether an applicant for a financial responsibility certificate for an onshore or offshore facility has demonstrated an ability to compensate the state and other governmental entities for damages that might occur during a worst case oil spill. RCW 88.40.025.
- 5) DOE may engage in rule making to update the hazardous substances currently covered by the state's existing financial responsibility requirements to maintain consistence with CERCLA. RCW 88.40.020(7).

In conclusion, the DOE rule making processes required to implement the 2022 amendments to Washington's financial responsibility laws related to oil spills appear to present the best opportunities for CSE and other interested organizations to request information from DOE in order to monitor, assess, and participate in the agency's process to implement the new statutory provisions, and to assure industry compliance with those requirements.