



## Toxics Cleanup Program

### Policy 560B: Granting Mixed Funding For LUST Cleanups

*Established:* [Cataloged in Ecology's Publications database October 2017]

*Contact:* Policy and Technical Support Unit, Headquarters

*Purpose:* This policy addresses the granting of mixed funding for the investigation and straightforward cleanup of petroleum contaminated Leaking Underground Storage Tank (LUST) sites. It applies only to small business owners or operators responsible for these LUST sites who request mixed funding to prevent or mitigate unfair economic hardship. The cleanup must also be substantially more expeditious or enhanced than would occur without the use of public funds, and it must be a regional priority.

*Attachment:* Mixed Funding Case Examples

*Disclaimer:* This Policy is intended solely for the guidance of Ecology staff. It is not intended, and cannot be relied on, to create rights, substantive or procedural, enforceable by any party in litigation with the state of Washington. Ecology may act at variance with this Policy depending on site-specific circumstances, or modify or withdraw this Policy at any time.

*Approved by:* \_\_\_\_\_

**Accommodation Requests:** To request ADA accommodation, including materials in a format for the visually impaired, call Ecology's Toxics Cleanup Program at 360-407-7170. Persons with impaired hearing may call Washington Relay Service at 711. Persons with speech disability may call TTY at 877-833-6341.

## **Purpose and Applicability**

This policy addresses the granting of mixed funding for the investigation and straightforward cleanup of petroleum contaminated Leaking Underground Storage Tank (LUST) sites. It applies only to small business owners or operators responsible for these LUST sites who request mixed funding to prevent or mitigate unfair economic hardship. The cleanup must also be substantially more expeditious or enhanced than would occur without the use of public funds, and it must be a regional priority.

### **1. Mixed Funding Decisions Shall Be Based On Financial Analysis Of The Potentially Liable Person.**

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All mixed funding decisions at LUST sites will be based on a financial analysis of the potentially liable person making the request for mixed funding.

### **2. Financial Analysis Shall Be Conducted With ABELPRO.**

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The LUST Coordinator will use the EPA computer program, ABELPRO, to analyze whether an owner or operator can afford to pay remedial action costs. The ABELPRO program uses three years of tax records to make this determination.

### **3. Ecology Will Consider ABELPRO Results Even If The Facility Will Be Closed Or Sold.**

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Ecology will use ABELPRO to estimate the ability of an owner or operator to pay for cleanup costs, whether or not the person intends to stay in business. However, Ecology will also take into consideration the value of the property and the person's dependence on proceeds from its sale.

### **4. Mixed Funding Candidates Shall Request A Consent Decree And Submit Tax Records For The Past 3 Years.**

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Owners or operators requesting mixed funding shall submit information required by WAC 173-340-520 for consent decrees, including acceptance of potentially liable person status. Candidates must also submit financial information, including federal income tax records for the past three years.

### **5. Ecology Shall Not Pay For Independent Cleanups.**

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Small business owners and operators cannot be reimbursed for the cost of cleanup actions conducted prior to entering into a consent decree agreement with Ecology, or for cleanup actions which are outside the scope of a consent decree. Small business owners and operators who are granted mixed funding must enter into a consent decree with Ecology specifying the terms of the mixed funding agreement.

**6. Ecology May Pay For Expenses Commissioned By An Owner Or Operator As Stipulated In A Consent Decree.**

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If necessary remedial actions at a site are well-defined, Ecology may agree to pay for specific expenses commissioned by the owner or operator. The consent decree must stipulate that selection of contractors and materials are subject to department approval.

**7. Remedial Action Costs Shall Only Include Investigation And Cleanup Costs.**

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Ecology shall not pay for underground storage tank upgrades, repairs, replacements, leak detection systems, or for routine closures. Only those costs necessary to investigate or clean up LUST sites can be considered for mixed funding.

**8. The Program Manager Of The Toxics Cleanup Program Shall Make Funding Decisions For LUST Sites.**

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The Program Manager shall decide which sites to spend public funds on, what portion the owner or operator must pay, and what funding mechanism to use.

**9. Recovered LUST Trust Funds Will Only Be Spent On LUST Program Activities.**

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When federal dollars are spent on a site, the amount recovered will be tracked and made available for future federally-eligible LUST activities.

## **Attachment**

### **Mixed Funding Case Examples**

Under WAC 173-340-560, mixed funding can be provided in the form of a loan or a contribution, in cash or in kind. The particular terms of the mixed funding agreement must be addressed in a consent decree. Mixed funding may be provided for all, or just a portion, of the cleanup actions at a specific site.

The regulation gives Ecology the authority to provide mixed funding to a PLP on the condition that it will be repaid under the terms of a consent decree. If the analysis of a PLP's financial status indicates that mixed funding could be repaid in a lump sum at a future date or with installments over a period of time, this approach should be selected.

Ecology also has the authority to enter into a consent decree with a potentially liable person (PLP) which allows the department to actually pay for, or conduct, specified cleanup actions. This means that Ecology does not have to seek cost recovery from the PLP with whom an agreement was reached. However, since the statute [RCW 70.105D.050(3)] requires the attorney general to seek the recovery of funds spent by the department for cleanup actions, this approach should only be used when a PLP is truly unable to pay for the cleanup actions, either on a long-term or short-term basis.

In summary, the following options are available in the granting of mixed funding:

1. Ecology pays for all, or a portion, of the cleanup actions;
2. Ecology conducts all, or a portion, of the cleanup actions; or
3. Ecology does either 1 or 2, and the PLP repays the department for all, or a portion of, the costs incurred. Repayment could be in lump sum or installments.

Option #3 is preferable and should be given full consideration before either options 1 or 2 are selected.

The following examples are intended to present a range of situations in which mixed funding may be requested by a PLP, and indicate possible appropriate responses to such situations. An underlying assumption in all these examples is that there has been verification of the financial status of the owner, and the site is enough of a priority for Ecology to become involved in the cleanup action.

#### **Example 1**

A site owner has been conducting a cleanup of a LUST site that has included tank and piping system replacement, removal and disposal of contaminated soils, and installation of a free product recovery system. Several wells have also been installed and testing has shown offsite groundwater contamination. The work is going well, but the owner does not have enough money to keep the free product recovery system going or to follow-up on the offsite contamination. In

responding to the PLP's request for mixed funding, Ecology determines that the PLP is unable to pay for the remaining cleanup costs. Ecology could enter into a consent decree with the PLP and agree to pay for the continued operation of the free product recovery system for a finite period of time, say two years. Ecology could also agree to conduct further offsite investigations and install a pump and treat system, if deemed necessary. This example incorporates Options 1 and 2.

### **Example 2**

An owner of a closed gas station decides to remove the tanks and sell the property. As part of a property audit, test borings indicate there is limited soil contamination that will require cleanup when the tanks are removed. The owner appears to be technically capable of doing the cleanup but has insufficient funds to perform the work. In this case, the owner could enter into a consent decree with Ecology to obtain mixed funding to pay for all or a part of the work. The consent decree would require the owner to repay Ecology an agreed upon sum once the property is sold. This example incorporates Option 3.

### **Example 3**

A property owner has decided to replace his/her tanks to meet new EPA and state requirements. During tank removal, it is discovered one of the tanks has leaked. Some contaminated soil has been excavated and stockpiled on site, but it is evident from observations during excavation that the contamination is extensive. The owner claims to be financially unable to complete the work and requests mixed funding. Ecology conducts a financial analysis and determines that the owner has insufficient funds to pay for the entire cleanup. However, it is determined that the owner is capable of funding cleanup actions in the vicinity of the tanks. This will also enable the owner to continue business operations with minimal time delays. Ecology signs a consent decree, agreeing to conduct the remaining cleanup actions. The owner allows Ecology access to the property to conduct the cleanup actions with the understanding that business operations may be temporarily interrupted. This example incorporates Option 2.