

401 KAR 42:290. Ranking system.

RELATES TO: KRS 224.60-120, 224.60-130, 224.60-140

STATUTORY AUTHORITY: KRS 224.60-130(1)

NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.60-130(1) requires the cabinet to establish by administrative regulation the procedures to administer the financial responsibility and petroleum storage tank accounts of the Petroleum Storage Tank Environmental Assurance Fund. This administrative regulation establishes the criteria for ranking facilities according to the extent of damage to the environment, the potential threat to human health, and the financial ability of the petroleum storage tank owner or operator to perform corrective action, in order to address the completion of corrective action and the subsequent reimbursement of eligible costs in accordance with 401 KAR 42:250.

Section 1. Applicability. (1) In order to determine the sequence by which written directives shall be issued in order to address the completion of corrective action, and the subsequent reimbursement of those eligible costs in accordance with 401 KAR 42:250, a ranking system shall be established for the Financial Responsibility Account and the Petroleum Storage Tank Account, respectively, as set forth in Sections 2 and 3 of this administrative regulation.

(2)(a) Actions directed and documented by the Environmental Response Team, upon the cabinet's declaration of an environmental emergency, shall take priority over the ranking system in this administrative regulation. Once the Environmental Response Branch terminates the emergency phase, subsequent actions at the UST facility shall be prioritized in accordance with this administrative regulation;

(b) Actions contracted by the Division of Waste Management shall take priority over the ranking system in this administrative regulation. Once the Division of Waste Management completes or terminates contracted work, subsequent actions at the UST facility shall be prioritized in accordance with this administrative regulation.

(3) Facilities performing site checks or initial abatement at the written direction of the cabinet in accordance with the Site Check Outline or the Release Response and Initial Abatement Outline, incorporated by reference in 401 KAR 42:060, shall not be subject to the ranking system.

(4)(a) Those facilities for which the owner or operator has verified, through submittal of an Affidavit of Waiver for PSTEAF Reimbursement, DEP 6092, that reimbursement from the PSTEAF will not be sought shall not be subject to the ranking system.

(b) The affidavit shall be notarized.

(5) A facility that has been ranked based upon accurate classification of the UST system, in accordance with 401 KAR 42:080 and this administrative regulation, shall not thereafter receive a lower priority ranking as a result of the performance of directed corrective actions.

(6) All UST facilities, required to classify in accordance with the Classification Outline incorporated by reference in 401 KAR 42:080, shall be ranked in accordance with this administrative regulation regardless of previous ranking determinations made under the administrative regulations effective September 13, 2006.

(7) Facilities conducting corrective action under the provisions of 401 KAR Chapter 42 in effect prior to April 18, 1994 shall not be required to classify in accordance with 401 KAR 42:080, but shall be ranked in accordance with this administrative regulation.

Section 2. Ranking System for the Financial Responsibility Account. Facilities eligible to participate in the Financial Responsibility Account shall be ranked as follows:

(1) For purposes of addressing the completion of corrective action:

(a) Rank 1. Those facilities, with releases for which the division has not issued a No Further Ac-

tion Letter, that are a source of confirmed contamination within domestic-use wells, domestic-use springs, or domestic-use cisterns exceeding the maximum contaminant levels specified in 401 KAR Chapter 8. This ranking shall also include facilities with releases, for which the division has not issued a No Further Action Letter, that are a source of confirmed vapor intrusion, as defined in 401 KAR 42:005, in occupied residential and commercial buildings.

(b) Rank 2. Those facilities, with releases for which the division has not issued a No Further Action Letter, that are required to use the screening levels listed in Groundwater Table 1 of the Classification Outline, incorporated by reference in 401 KAR 42:080, within the point of compliance, where:

1. Groundwater contamination, exceeding the screening levels listed in Groundwater Table 1, has been confirmed within the point of compliance; or
2. Groundwater contamination exceeding the screening levels listed in Groundwater Table 1 has been confirmed beyond the point of compliance.

(c) Rank 3. Those facilities, with releases for which the division has not issued a No Further Action Letter, that are required to use the screening levels listed in Groundwater Table 2 of the Classification Outline, incorporated by reference in 401 KAR 42:080, within the point of compliance, where:

1. Groundwater contamination, exceeding the screening levels listed in Groundwater Table 2, has been confirmed within the point of compliance; or
2. Groundwater contamination exceeding the screening levels listed in Groundwater Table 1 has been confirmed beyond the point of compliance.

(d) Rank 4.

1. Those facilities, with releases for which the division has not issued a No Further Action Letter, that are required to use the screening levels listed in Groundwater Table 3 of the Classification Outline, incorporated by reference in 401 KAR 42:080, within the point of compliance, where:

- a. Groundwater contamination, exceeding the screening levels listed in Groundwater Table 3, has been confirmed within the point of compliance; or
- b. Groundwater contamination exceeding the screening levels listed in Groundwater Table 1 has been confirmed beyond the point of compliance.

2. Facilities subject to the provisions of 401 KAR 42:070, Section 1(3), and subject to the requirements in place prior to April 18, 1994 shall be placed into this ranking.

(e) Rank 5. Those facilities, with releases for which the division has not issued a No Further Action Letter, for which:

1. Soil contamination above applicable screening levels has been confirmed; and
2. Groundwater contamination above applicable screening levels has not been confirmed.

(2) Facilities shall be further categorized within their respective Rank as determined in subsection (1) of this section, based on the financial ability of the owner or operator as follows:

(a) Facilities shall be placed in Category 1 within their respective rank if:

1. The owner's or operator's average total income for the last five (5) years is less than or equal to \$50,000; or
2. The owner or operator is registered and recognized by the federal government as a tax-exempt nonprofit organization.

(b) Facilities shall be placed in Category 2 within their respective rank if the owner's or operator's average total income for the last five (5) years is more than \$50,000 but less than or equal to \$100,000.

(c) Facilities shall be placed in Category 3 within their respective rank if the owner's or operator's average total income for the last five (5) years is more than \$100,000.

(d) Facilities within each category shall be further prioritized based on the cabinet's evaluation of the threat posed to human health and the environment by the release from a petroleum storage

tank.

(e) The cabinet shall utilize the information provided in an owner's or operator's Application for Assistance, incorporated by reference in 401 KAR 42:250, for purposes of determining financial ability to perform corrective action.

(3) Cabinet inspectors shall be provided access to a facility for the purpose of verifying classification. Refusal by an owner or operator to allow access requested by cabinet inspectors shall render the facility ineligible for reimbursement from the cabinet.

(4) If the cabinet receives misrepresentations, or otherwise inaccurate information, or receives new information related to specific facilities, it shall amend facility rankings and categories in accordance with subsections (1) and (2) of this section.

Section 3. Facilities eligible to participate in the Petroleum Storage Tank Account shall be ranked as follows:

(1) For purposes of addressing the completing of corrective action:

(a) Rank 1. Those facilities with releases that are a source of confirmed contamination to domestic-use wells, domestic-use springs, or domestic-use cisterns exceeding the levels specified in Groundwater Table 1 of the Classification Outline, incorporated by reference in 401 KAR 42:080. This ranking shall also include facilities with releases that are a source of confirmed vapor intrusion, as defined in 401 KAR 42:005, in occupied residential and commercial buildings.

(b) Rank 2. Those facilities, with releases for which the division has not issued a No Further Action Letter, that are required to use the screening levels listed in Groundwater Table 1 of the Classification Outline, incorporated by reference in 401 KAR 42:080, within the point of compliance, where:

1. Groundwater contamination, exceeding the screening levels listed in Groundwater Table 1, has been confirmed within the point of compliance; or
2. Groundwater contamination exceeding the screening levels listed in Groundwater Table 1 has been confirmed beyond the point of compliance.

(c) Rank 3. Those facilities, with releases for which the division has not issued a No Further Action Letter, that are required to use the screening levels listed in Groundwater Table 2 of the Classification Outline, incorporated by reference in 401 KAR 42:080, within the point of compliance, where:

1. Groundwater contamination, exceeding the screening levels listed in Groundwater Table 2, has been confirmed within the point of compliance; or
2. Groundwater contamination exceeding the screening levels listed in Groundwater Table 1 has been confirmed beyond the point of compliance.

(d) Rank 4.

1. Those facilities, with releases for which the division has not issued a No Further Action Letter, that are required to use the screening levels listed in Groundwater Table 3 of the Classification Outline, incorporated by reference in 401 KAR 42:080, within the point of compliance, where:

- a. Groundwater contamination, exceeding the screening levels listed in Groundwater Table 3, has been confirmed within the point of compliance; or
- b. Groundwater contamination exceeding the screening levels listed in Groundwater Table 1 has been confirmed beyond the point of compliance.

2. Facilities subject to the provisions of 401 KAR 42:070, Section 1(3) and subject to the requirements in place prior to April 18, 1994 shall be placed into this ranking.

(e) Rank 5. Those facilities, with releases for which the division has not issued a No Further Action Letter, for which:

1. Soil contamination above applicable screening levels has been confirmed; and
2. Groundwater contamination above applicable screening levels has not been confirmed.

(2) Facilities shall be further categorized within their respective Rank as determined in subsection (1) of this section, based on the financial ability of the owner or operator (applicant) as follows:

(a) Facilities shall be placed in Category 1 within their respective rank if:

1. The owner's or operator's average total income for the last five (5) years is less than or equal to \$50,000; or

2. The owner or operator is registered and recognized by the federal government as a tax-exempt nonprofit organization.

(b) Facilities shall be placed in Category 2 within their respective rank if the owner's or operator's average total income for the last five (5) years is more than \$50,000 but less than or equal to \$100,000.

(c) Facilities shall be placed in Category 3 within their respective rank if the owner's or operator's average total income for the last five (5) years is more than \$100,000:

(d) Facilities within each category shall be further prioritized based on the cabinet's evaluation of the threat posed to human health and the environment by the release from a petroleum storage tank.

(e) The cabinet shall utilize the information provided in an owner's or operator's Application for Assistance for purposes of determining financial ability to perform corrective action.

(3) Cabinet inspectors shall be provided access to a facility for the purpose of verifying classification. Refusal by an owner or operator to allow access requested by cabinet inspectors shall render the facility ineligible for reimbursement from the cabinet.

(4) If the cabinet receives misrepresentations, or otherwise inaccurate information, or receives new information related to specific facilities, it shall amend facility rankings and categories in accordance with subsections (1) and (2) of this section.

Section 4. Ranking Allocations. (1) Issuance of written directives shall be prioritized for facilities within the Financial Responsibility Account and the Petroleum Storage Tank Account, respectively, according to rank and category, in the following order:

(a) Rank 1, Category 1;

(b) Rank 1, Category 2;

(c) Rank 1, Category 3;

(d) Rank 2, Category 1;

(e) Rank 2, Category 2;

(f) Rank 2, Category 3;

(g) Rank 3, Category 1;

(h) Rank 3, Category 2;

(i) Rank 3, Category 3;

(j) Rank 4, Category 1;

(k) Rank 4, Category 2;

(l) Rank 4, Category 3;

(m) Rank 5, Category 1;

(n) Rank 5, Category 2; and

(o) Rank 5, Category 3.

(2) The cabinet shall consider the current legislatively-enacted budget and available funding in making the allocations described in subsection (1) of this section.

(3) The cabinet shall notify owners or operators of the decision to suspend written directives for specified rankings within either the Petroleum Storage Tank Account or the Financial Responsibility Account, respectively, upon a determination of insufficient funding being available to initiate corrective action in all rankings.

Section 5. Incorporation by reference. (1) "Affidavit of Waiver for PSTEAF Reimbursement", DEP 6092, November 2016, is incorporated by reference.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Division of Waste Management, 300 Sower Boulevard, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m. This material is available on the Division of Waste Management's Web site at <http://waste.ky.gov/ust>. (19 Ky.R. 1482; 1799; eff. 3-12-1993; 21 Ky.R. 1181; 1508; eff. 1-9-1995; 23 Ky.R. 2230; eff. 4-9-1997; 25 Ky.R. 1110; 1917; 2863; eff. 6-9-1999; Recodified from 415 KAR 1:090, 2-17-2005; 32 Ky.R. 2130; 33 Ky.R. 476; 749; eff. 9-13-2006; 37 Ky.R. 2726; 38 Ky.R. 540; eff. 10-6-2011; TAm eff. 7-8-2016; TAm eff. 12-21-2016; Crt eff. 10-9-2018.)