



RULE-MAKING ORDER PERMANENT RULE ONLY

CR-103P (December 2017) (Implements RCW 34.05.360)

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STATE OF WASHINGTON
FILED

DATE: August 23, 2023

TIME: 8:50 AM

WSR 23-17-159

Agency: Department of Ecology AO #18-09

Effective date of rule:

Permanent Rules

- 31 days after filing.
- Other (specify) January 1, 2024 (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

- Yes
 - No
- If Yes, explain:

Purpose: The Department of Ecology (Ecology) is adopting amendments to chapter 173-340 WAC, the Model Toxics Control Act (MTCA) Cleanup Regulations, which governs the investigation and cleanup of sites in Washington state contaminated by the release of hazardous substances. As part of this rulemaking, Ecology is not changing the cleanup standards in Parts 7 and 9 of the chapter. The purpose of the amendments is to:

- Strengthen environmental justice principles when prioritizing and cleaning up contaminated sites.
- Improve the site hazard assessment and ranking process.
- Require comprehensive program plans and performance assessments.
- Improve initial response to releases from regulated underground storage tanks.
- Update and clarify remedial investigation and remedy selection requirements.
- Clarify which requirements apply to independent remedial actions.
- Strengthen public participation and tribal engagement requirements for Ecology-conducted or supervised cleanups.
- Make the rule easier to use and understand.

Citation of rules affected by this order:

New:
 Repealed:
 Amended: Chapter 173-340 WAC
 Suspended:

Statutory authority for adoption:

Chapter 70A.305 RCW, Model Toxics Control Act.
 Chapter 70A.355 RCW, Underground Storage Tanks

Other authority: N/A

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR 23-05-092 on February 15, 2023 (date).

Describe any changes other than editing from proposed to adopted version: The Department of Ecology made the following changes, including editing, to Chapter 173-340 WAC:

- **Throughout rule, except WAC 173-340-100:** Added word “likely” in front of each usage of the defined terms “vulnerable population” and “overburdened community.”
- **WAC 173-340-200, definition of “conceptual site model”:** Clarified that “sensitive environments” are one of the “physical and habitat features” that must be included as part of a conceptual site model. The term “sensitive environment” is currently defined in WAC 173-340-200, and such environments must be identified during initial site characterizations of UST releases under WAC 173-340-450 and remedial investigations of all releases under WAC 173-340-350.
- **WAC 173-340-200, definition of “practicable”:** Corrected rule cross-reference.
- **WAC 173-340-320(1)(b):** Edited text to help clarify the purpose of site hazard assessments and rankings in relation to program planning and assessment in WAC 173-340-340.

- **WAC 173-340-320(2)(a)(iii):** Edited text to clarify the populations referenced are those that are “potentially exposed” to a release.
- **WAC 173-340-320(2)(a)(iv):** Added as a functional requirement of the site hazard assessment and ranking process to “identify the environmental health disparity ranking of the potentially exposed population using the environmental health disparities map developed pursuant to RCW 43.70.815 or other readily available information.”
- **WAC 173-340-340(1):** Edited text to clarify that the strategic plan must prioritize contaminated sites that threaten likely vulnerable populations and overburdened communities.
- **WAC 173-340-350(3)(a) and (b):** Deleted duplicate timing and phasing requirement for feasibility studies. The timing and phasing requirements for feasibility studies are specified separately in WAC 173-340-351(3).
- **WAC 173-340-350(3)(c):** Edited text to clarify that a remedial investigation and a feasibility study may be conducted as a single step or as separate steps in the cleanup process.
- **WAC 173-340-350(5)(g)(iii):** Clarified that the remedial investigation report must separately include information on threats to likely vulnerable populations and overburdened communities. Also moved provision from (g)(vii) of this subsection to make the list of what must be included in the remedial investigation report consistent with the steps for a remedial investigation.
- **WAC 173-340-350(6)(a):** Clarified that one must identify only the “estimated” quantity of “releases,” consistent with other regulatory requirements.
- **WAC 173-340-350(6)(g)(iii) and (iv):** Added as a remedial investigation requirement that one must collect sufficient information on any “sensitive environments at the site” and “any habitat restoration or resource recovery goals for the site.” The term “sensitive environment” is currently defined in WAC 173-340-200.
- **WAC 173-340-350(6)(h)(iii):** Clarified that one must collect sufficient information during a remedial investigation to determine “whether the receptors include likely vulnerable populations or overburdened communities.”
- **WAC 173-340-350(6)(j):** Edited text to further clarify that sufficient information must be collected during the remedial investigation to determine whether a feasibility study is necessary.
- **WAC 173-340-350(6)(k):** Edited text to further clarify that, if a feasibility study is necessary, then sufficient information must be collected during the remedial investigation to develop and evaluate cleanup action alternatives in the feasibility study.
- **WAC 173-340-351(2)(a)(i) and (ii):** Corrected rule cross-references to WAC 173-340-350(6)(g)(vii).
- **WAC 173-340-351(3)(a) and (b):** Deleted duplicate timing and phasing requirement for remedial investigations. The timing and phasing requirements for remedial investigations are specified separately in WAC 173-340-350(3).
- **WAC 173-340-351(3)(c):** Edited text to clarify that a remedial investigation and a feasibility study may be conducted as a single step or as separate steps in the cleanup process.
- **WAC 173-340-351(6)(a):** Emphasized that, when identifying goals for the cleanup action in the feasibility study, one must include “any habitat restoration or resource recovery goals for the site.”
- **WAC 173-340-351(6)(f)(v)(D) and (E):** Clarified that the feasibility study report must include for each alternative studied the estimated “mass” of each hazardous substance to be removed or treated versus the “mass” remaining behind above proposed cleanup levels. Specifically, clarified that “amount” means “mass.” Also clarified that Ecology may require or allow “estimates of the volume of contaminated material in place of, or in addition to, estimates of mass of hazardous substances.”
- **WAC 173-340-355(2):** Edited text to clarify that remediation levels are specific to a hazardous substance.
- **WAC 173-340-355(5):** Repeated current requirement in WAC 173-340-380 to emphasize that “the remediation levels selected as part of a cleanup action must be specified in the cleanup action plan.”

- **WAC 173-340-360(3)(c)(ii):** Eliminated proposed rule requirement that a nonpermanent groundwater cleanup action must “provide an alternative water supply or treatment if the cleanup action does not protect an existing use of the groundwater.”
- **WAC 173-340-360(5)(c)(iii)(C):** Corrected rule cross-reference to WAC 173-340-351(6)(c).
- **WAC 173-340-360(5)(c)(iv)(A)(I):** Edited text to clarify that, in the disproportionate cost analysis, the baseline cleanup action alternative is only compared against the next most permanent alternative, not any of the other cleanup action alternatives.
- **WAC 173-340-360(5)(d)(ii):** Eliminated proposed rule amendment that defined the “permanence” criterion for a disproportionate cost analysis to include the degree to which the alternative permanently reduces the “exposure to” hazardous substances.
- **WAC 173-340-360(5)(d)(vi)(B)(II):** Eliminated proposed rule amendment that made discounting of post-construction costs optional instead of mandatory. Also changed how post-construction costs must be discounted. Specifically, compared to the proposed rule, Ecology changed the inflation rate. Instead of using a construction cost index, the rule uses the U.S. Treasury nominal interest rate. This is accounted for by using constant dollars for future costs and discounting those costs using the U.S Treasury real interest rate.
- **WAC 173-340-370(8):** Eliminated the clarifying edit in the proposed rule, which had replaced the term “overall” with the term “long-term.”
- **WAC 173-340-380(5)(c):** Added as required part of the cleanup action plan “a summary of how impacts on likely vulnerable populations and overburdened communities were considered when selecting the cleanup action and developing the plan.”
- **WAC 173-340-380(5)(I):** Clarified that the cleanup action plan for a containment remedy must include the “estimated mass” of hazardous substances remaining on site. In particular, clarified that “amount” means “mass” and that only an “estimate” is needed. Also clarified that Ecology may require or allow “estimates of the volume of contaminated material in place of, or in addition to, estimates of mass of hazardous substances.”
- **WAC 173-340-390(4):** Repeated the requirement in WAC 173-340-351(2)(a)(ii) to emphasize that one must collect and document sufficient information during the remedial investigation to demonstrate that that the contaminated site meets the conditions identified by Ecology for using the model remedy.
- **WAC 173-340-440(5):** Restored guidance eliminated in the proposed rule amendments advising that demonstrations of the ability of institutional controls to reduce risks “should be based on a quantitative, scientific analysis.”
- **WAC 173-340-450(5)(c)(iv):** Changed proposed rule amendment to allow Ecology to reduce the frequency of free product monitoring over time by UST owners and operators. Unless otherwise directed by Ecology, free product must be monitored quarterly.
- **WAC 173-340-450(6)(c)(vi):** For interim action report, restored current requirement to include “sensitive environments” when describing the physical characteristics of the site. The proposed rule amendments mistakenly eliminated the requirement. The current rule defines the term “sensitive environments.”
- **WAC 173-340-600(5)(a):** Added requirement for Ecology to include on its webpage for each contaminated site “the date ecology or PLIA discovered or received notice of the release or, if this date is not known, the earliest date of administrative activity in ecology’s site database.” This information is already tracked in Ecology’s site database.
- **WAC 173-340-600(9)(e):** Edited text to clarify that the plan referred to is the “public participation plan.”
- **WAC 173-340-620(3)(b):** Clarified that Ecology will not only seek to initiate, but also maintain meaningful engagement with Indian tribes throughout the cleanup process.
- **WAC 173-340-702(12)(a), (b), and (c):** Updated the regulatory requirements governing the applicability of new cleanup levels to reflect the removal from the rule of Ecology-approved analytical methods in WAC 173-340-830. As under the current rule, the cleanup level that applies to a release will be based on the rules **and analytical methods** in effect at the times specified in this subsection. A release will not be subject to further cleanup action due solely to subsequent amendments to the rules governing cleanup levels **or the subsequent availability of more sensitive analytical methods.**

- **WAC 173-340-815(3)(b):** Edited text to clarify the applicability of the consultation and inadvertent discovery plan requirements.

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

Name: Clint Stanovsky

Address: Department of Ecology

PO Box 47600

Olympia, WA 98504-7600

Phone: 360-742-9703

Fax: N/A

TTY: People with speech disability may call 877-833-6341. People with impaired hearing may call Washington Relay Service at 711.

Email: MTCARule@ecy.wa.gov

Web site: <https://apps.ecology.wa.gov/publications/SummaryPages/2309075.html>

Other: N/A

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	___	Amended	___	Repealed	___
Federal rules or standards:	New	___	Amended	<u>1</u>	Repealed	___
Recently enacted state statutes:	New	<u>1</u>	Amended	<u>7</u>	Repealed	<u>1</u>

The number of sections adopted at the request of a nongovernmental entity:

New	<u>2</u>	Amended	<u>12</u>	Repealed	___
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The number of sections adopted on the agency's own initiative:

New	<u>4</u>	Amended	<u>49</u>	Repealed	<u>2</u>
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The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New	<u>4</u>	Amended	<u>49</u>	Repealed	<u>2</u>
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The number of sections adopted using:

Negotiated rule making:	New	___	Amended	___	Repealed	___
Pilot rule making:	New	___	Amended	___	Repealed	___
Other alternative rule making:	New	___	Amended	___	Repealed	___

Signature:

Date Adopted: August 23, 2023

Name: Laura Watson

Title: Director

A handwritten signature in black ink, appearing to read 'L. Watson', written in a cursive style.