



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Northwest Region Office
PO Box 330316, Shoreline, WA 98133-9716 • 206-594-0000

September 23, 2022

Steve Mitchell
USDOI National Park Service
333 Bush St, Ste 500
San Francisco, CA 94104
(steve_mitchell@nps.gov)

Re: Early Notice Letter Regarding a Release of Hazardous Substances:

- **Site Name:** Diablo Dry Dock
- **Site Address:** Diablo Dam Rd, Diablo, WA 98283
- **Cleanup Site ID:** 16632
- **Facility/Site ID:** 99997341

Dear Steve Mitchell:

The Department of Ecology (Ecology) received a report on July 21, 2021 about potential contamination from hazardous substances. We have investigated the release or threatened release of hazardous substances to identify impacts to human health and the environment, as required under the Revised Code Washington, [Chapter 70A.305 RCW](#).¹

Ecology maintains a database of known or suspected contaminated sites that will need remedial actions to meet requirements established under the [Model Toxics Control Act \(MTCA\)](#),² Chapters 70A.305 RCW, the Washington Administrative Code [173-340 WAC](#),³ and the [Sediment Management Standards \(SMS\) Chapter 173-204 WAC](#).⁴ This state law sets the requirements necessary to clean up contaminated sites that can threaten human health and the environment.

During the investigation, Ecology determined that contamination exists. As a result, we added this property to our database as a state cleanup site that will need to be cleaned up pursuant to MTCA.

Ecology assigned Cleanup Site ID (CSID) 16632. You can find site information and electronic records at Ecology's [Cleanup and Tank Search](#) webpage.⁵

¹ <https://app.leg.wa.gov/RCW/default.aspx?cite=70A.305>

² <https://ecology.wa.gov/Spills-Cleanup/Contamination-cleanup/Rules-directing-our-cleanup-work/Model-Toxics-Control-Act>

³ <https://apps.leg.wa.gov/WAC/default.aspx?cite=173-340>

⁴ <https://apps.ecology.wa.gov/publications/documents/1309055.pdf>

⁵ <https://apps.ecology.wa.gov/cleanupsearch/>

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This letter or inclusion in our database of state cleanup sites does not mean that Ecology has made a determination about potential liability for cleanup under MTCA. Ecology's policy is to work cooperatively with individuals to accomplish prompt and effective cleanups.

Your cooperation in planning or conducting independent remedial actions is not an admission of guilt or liability. Please note, all remedial actions must follow the requirements of state laws. Completing a remedial action without meeting MTCA requirements may lead to additional cleanup work or formal oversight by Ecology.

If a remedial action does not occur, Ecology will likely require a more detailed investigation in the future. Investigation typically consists of additional testing for contamination, including soil and groundwater sampling.

Enclosed is a Cleanup Site Details Report and the [Model Toxics Control Act Cleanup Regulation Focus Sheet](#).⁶ For questions regarding this letter or copies of the Model Toxics Control Act regulations and statute, or the Sediment Management Standards, please contact Donna Musa by phone at (425) 301-6080 or by email at donna.musa@ecy.wa.gov.

Sincerely,



Kim Wooten
Acting Unit Supervisor, VCP Unit
Toxics Cleanup Program, NWRO

Enclosures (2):

1. Cleanup Site Details Report
2. [Model Toxics Control Act Cleanup Regulation Focus Sheet](#)

cc: Donna Musa, Ecology (donna.musa@ecy.wa.gov)

⁶ <https://apps.ecology.wa.gov/publications/documents/ftc94129.pdf>



Cleanup Site Details

Cleanup Site ID: 16632

Cleanup Site ID: 16632 **Facility/Site ID:** 99997341 **UST ID:** N/A [Site Page](#) [Site Documents](#) [View Map](#)
Cleanup Site Name: Diablo Dry Dock [Glossary](#)
Alternate Names: Diablo Dry Dock

LOCATION

Address: Diablo Dam Rd **City:** Diablo **Zip Code:** 98283 **County:** Whatcom
Latitude: 48.71759 **Longitude:** -121.11724 **WRIA:** 4 **Legislative District:** 42 **Congressional District:** 1 **TRS:** 37N 13E 4

DETAIL

Status: Cleanup Started **NFA Received?** No **Is PSI site?** No
Statute: MTCA **NFA Date:** N/A **Current VCP?** No **Past VCP?** No
Site Rank: N/A **NFA Reason:** N/A **Brownfield?** No
Site Manager: Northwest Region **Responsible Unit:** Northwest **Active Institutional Control?** No

CLEANUP UNITS

Cleanup Unit Name	Unit Type	Unit Status	Resp Unit	Unit Manager	Current Process
Diablo Dry Dock	Upland	Cleanup Started	NW	Northwest Region	Independent Action
Diablo Dry Dock Sediments	Sediment	Cleanup Started	NW	Northwest Region	Independent Action

ACTIVE INSTITUTIONAL CONTROLS

Instrument Type	Restriction Media	Restrictions/Requirements	Date	Recording Number	Recording County	Tax Parcel
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There are no current Institutional Controls in effect for this site.

AFFECTED MEDIA & CONTAMINANTS

MEDIA

Contaminant	Soil	Groundwater	Surface Water	Sediment	Air	Bedrock
Lead	C			C		
Mercury	C					
Metals - Other	C			C		
Petroleum-Diesel	C					
Polycyclic Aromatic Hydrocarbons	C					

Key:

B - Below Cleanup Level C - Confirmed Above Cleanup Level RA - Remediated-Above
S - Suspected R - Remediated RB - Remediated-Below

SITE ACTIVITIES

Activity	Status	Start Date	End Date/ Completion Date
Site Discovery/Release Report Received	Completed		7/21/2021
Initial Investigation / Federal Preliminary Assessment	Completed		11/3/2021
Early Notice Letter(s)	Completed		9/23/2022



Focus

Model Toxics Control Act Cleanup Regulation: Process for Cleanup of Hazardous Waste Sites

In March of 1989, an innovative, citizen-mandated toxic waste cleanup law went into effect in Washington, changing the way hazardous waste sites in this state are cleaned up. Passed by voters as Initiative 97, this law is known as the Model Toxics Control Act, chapter 70.105D RCW. This fact sheet provides a brief overview of the process for the cleanup of contaminated sites under the rules Ecology adopted to implement that Act (chapter 173-340 WAC).

How the Law Works

The cleanup of hazardous waste sites is complex and expensive. In an effort to avoid the confusion and delays associated with the federal Superfund program, the Model Toxics Control Act is designed to be as streamlined as possible. It sets strict cleanup standards to ensure that the quality of cleanup and protection of human health and the environment are not compromised. At the same time, the rules that guide cleanup under the Act have built-in flexibility to allow cleanups to be addressed on a site-specific basis.

The Model Toxics Control Act funds hazardous waste cleanup through a tax on the wholesale value of hazardous substances. The tax is imposed on the first in-state possessor of hazardous substances at the rate of 0.7 percent, or \$7 per \$1,000. Since its passage in 1988, the Act has guided the cleanup of thousands of hazardous waste sites that dot the Washington landscape. The Washington State Department of Ecology's Toxic Cleanup Program ensures that these sites are investigated and cleaned up.

What Constitutes a Hazardous Waste Site?

Any owner or operator who has information that a hazardous substance has been released to the environment at the owner or operator's facility and may be a threat to human health or the environment must report this information to the Department of Ecology (Ecology). If an "initial investigation" by Ecology confirms further action (such as testing or cleanup) may be necessary, the facility is entered onto either Ecology's "Integrated Site Information System" database or "Leaking Underground Storage Tank" database. These are computerized databases used to track progress on all confirmed or suspected contaminated sites in Washington State. All confirmed sites that have not been already voluntarily cleaned up are ranked and placed on the state "Hazardous Sites List." Owners, operators, and other persons known to be potentially liable for the cleanup of the site will receive an "Early Notice Letter" from Ecology notifying them that their site is suspected of needing cleanup, and that it is Ecology's policy to work cooperatively with them to accomplish prompt and effective cleanup.

Who is Responsible for Cleanup?

Any past or present relationship with a contaminated site may result in liability. Under the Model Toxics Control Act a potentially liable person can be:

- A current or past facility owner or operator.
- Anyone who arranged for disposal or treatment of hazardous substances at the site.
- Anyone who transported hazardous substances for disposal or treatment at a contaminated site, unless the facility could legally receive the hazardous materials at the time of transport.
- Anyone who sells a hazardous substance with written instructions for its use, and abiding by the instructions results in contamination.

In situations where there is more than one potentially liable person, each person is jointly and severally liable for cleanup at the site. That means each person can be held liable for the entire cost of cleanup. In cases where there is more than one potentially liable person at a site, Ecology encourages these persons to get together to negotiate how the cost of cleanup will be shared among all potentially liable persons.

Ecology must notify anyone it knows may be a “potentially liable person” and allow an opportunity for comment before making any further determination on that person’s liability. The comment period may be waived at the potentially liable person’s request or if Ecology has to conduct emergency cleanup at the site.

Achieving Cleanups through Cooperation

Although Ecology has the legal authority to order a liable party to clean up, the department prefers to achieve cleanups cooperatively. Ecology believes that a non-adversarial relationship with potentially liable persons improves the prospect for prompt and efficient cleanup. The rules implementing the Model Toxics Control Act, which were developed by Ecology in consultation with the Science Advisory Board (created by the Act), and representatives from citizen, environmental and business groups, and government agencies, are designed to:

- Encourage independent cleanups initiated by potentially liable persons, thus providing for quicker cleanups with less legal complexity.
- Encourage an open process for the public, local government and liable parties to discuss cleanup options and community concerns.
- Facilitate cooperative cleanup agreements rather than Ecology-initiated orders. *Ecology can, and does, however use enforcement tools in emergencies or with recalcitrant potentially liable persons.*

What is the Potentially Liable Person’s Role in Cleanup?

The Model Toxics Control Act requires potentially liable persons to assume responsibility for cleaning up contaminated sites. For this reason, Ecology does not usually conduct the actual cleanup when a potentially liable person can be identified. Rather, Ecology oversees the cleanup of sites to ensure that investigations, public involvement and actual cleanup and monitoring are done appropriately. Ecology’s costs of this oversight are required to be paid by the liable party.

When contamination is confirmed at the site, the owner or operator may decide to proceed with cleanup without Ecology assistance or approval. Such “independent cleanups” are

allowed under the Model Toxics Control Act under most circumstances, but must be reported to Ecology, and are done at the owner's or operator's own risk. Ecology may require additional cleanup work at these sites to bring them into compliance with the state cleanup standards. Most cleanups in Washington are done independently.

Other than local governments, potentially liable persons conducting independent cleanups do not have access to financial assistance from Ecology. Those who plan to seek contributions from other persons to help pay for cleanup costs need to be sure their cleanup is "the substantial equivalent of a department-conducted or department-supervised remedial action." Ecology has provided guidance on how to meet this requirement in WAC 173-340-545. Persons interested in pursuing a private contribution action on an independent cleanup should carefully review this guidance prior to conducting site work.

Working with Ecology to Achieve Cleanup

Ecology and potentially liable persons often work cooperatively to reach cleanup solutions. Options for working with Ecology include formal agreements such as consent decrees and agreed orders, and seeking technical assistance through the Voluntary Cleanup Program. These mechanisms allow Ecology to take an active role in cleanup, providing help to potentially liable persons and minimizing costs by ensuring the job meets state standards the first time. This also minimizes the possibility that additional cleanup will be required in the future – providing significant assurances to investors and lenders.

Here is a summary of the most common mechanisms used by Ecology:

- **Voluntary Cleanup Program:** Many property owners choose to cleanup their sites independent of Ecology oversight. This allows many smaller or less complex sites to be cleaned up quickly without having to go through a formal process. A disadvantage to property owners is that Ecology does not approve the cleanup. This can present a problem to property owners who need state approval of the cleanup to satisfy a buyer or lender.

One option to the property owner wanting to conduct an independent cleanup yet still receive some feedback from Ecology is to request a technical consultation through Ecology's Voluntary Cleanup Program. Under this voluntary program, the property owner submits a cleanup report with a fee to cover Ecology's review costs. Based on the review, Ecology either issues a letter stating that the site needs "No Further Action" or identifies what additional work is needed. Since Ecology is not directly involved in the site cleanup work, the level of certainty in Ecology's response is less than in a consent decree or agreed order. However, many persons have found a "No Further Action" letter to be sufficient for their needs, making the Voluntary Cleanup Program a popular option.
- **Consent Decrees:** A consent decree is a formal legal agreement filed in court. The work requirements in the decree and the terms under which it must be done are negotiated and agreed to by the potentially liable person, Ecology and the state Attorney General's office. Before consent decrees can become final, they must undergo a public review and comment period that typically includes a public hearing. Consent decrees protect the potentially liable person from being sued for "contribution" by other persons that incur cleanup expenses at the site while facilitating any contribution claims against the other persons when they are responsible for part of the cleanup costs. Sites cleaned up under a consent decree are also exempt from having to obtain certain state and local permits that could delay the cleanup.

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- **De Minimus Consent Decree:** Landowners whose contribution to site contamination is “insignificant in amount and toxicity” may be eligible for a de minimus consent decree. In these decrees, landowner typically settle their liability by paying for some of the cleanup instead of actually conducting the cleanup work. Ecology usually accepts a de minimus settlement proposal only if the landowner is affiliated with a larger site cleanup that Ecology is currently working on.
 - **Prospective Purchaser Consent Decree:** A consent decree may also be available for a “prospective purchaser” of contaminated property. In this situation, a person who is not already liable for cleanup and wishes to purchase a cleanup site for redevelopment or reuse may apply to negotiate a prospective purchaser consent decree. The applicant must show, among other things, that they will contribute substantial new resources towards the cleanup. Cleanups that also have a substantial public benefit will receive a higher priority for prospective purchaser agreements. If the application is accepted, the requirements for cleanup are negotiated and specified in a consent decree so that the purchaser can better estimate the cost of cleanup before buying the land.
 - **Agreed Orders:** Unlike a consent decree, an agreed order is not filed in court and is not a settlement. Rather, it is a legally binding administrative order issued by Ecology and agreed to by the potentially liable person. Agreed orders are available for remedial investigations, feasibility studies, and final cleanups. An agreed order describes the site activities that must occur for Ecology to agree not to take enforcement action for that phase of work. As with consent decrees, agreed orders are subject to public review and offer the advantage of facilitating contribution claims against other persons and exempting cleanup work from obtaining certain state and local permits.

Ecology-Initiated Cleanup Orders

Administrative orders requiring cleanup activities without an agreement with a potentially liable person are known as **enforcement orders**. These orders are usually issued to a potentially liable person when Ecology believes a cleanup solution cannot be achieved expeditiously through negotiation or if an emergency exists. If the responsible party fails to comply with an enforcement order, Ecology can clean up the site and later recover costs from the responsible person(s) at up to three times the amount spent. The state Attorney General’s Office may also seek a fine of up to \$25,000 a day for violating an order. Enforcement orders are subject to public notification.

Financial Assistance

Each year, Ecology provides millions of dollars in grants to local governments to help pay for the cost of site cleanup. In general, such grants are available only for sites where the cleanup work is being done under an order or decree. Ecology can also provide grants to local governments to help defray the cost of replacing a public water supply well contaminated by a hazardous waste site. Grants are also available for local citizen groups and neighborhoods affected by contaminated sites to facilitate public review of the cleanup. See Chapter 173-322 WAC for additional information on grants to local governments and Chapter 173-321 WAC for additional information on public participation grants.

Public Involvement

Public notices are required on all agreed orders, consent decrees, and enforcement orders. Public notification is also required for all Ecology-conducted remedial actions.

Ecology's Site Register is a widely used means of providing information about cleanup efforts to the public and is one way of assisting community involvement. The Site Register is published every two weeks to inform citizens of public meetings and comment periods, discussions or negotiations of legal agreements, and other cleanup activities. The Site Register can be accessed on the Internet at: www.ecy.wa.gov/programs/tcp/pub_inv/pub_inv2.html.

How Sites are Cleaned Up

The rules describing the cleanup process at a hazardous waste site are in chapter 173-340 WAC. The following is a general description of the steps taken during the cleanup of an average hazardous waste site. Consult the rules for the specific requirements for each step in the cleanup process.



