



DEPARTMENT OF
ECOLOGY
State of Washington

Concise Explanatory Statement
Chapters 173-322 and 173-322A WAC
Remedial Action Grants and Loans

Summary of rule making and response to comments

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Ecology publishes this document to meet the requirements of the Washington State Administrative Procedure Act (RCW 34.05.325)

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Concise Explanatory Statement

Chapters 173-322 and 173-322A WAC Remedial Action Grants and Loans

Toxics Cleanup Program
Washington State Department of Ecology
Olympia, Washington 98504-7600

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Acronyms and Abbreviations

APA	Administrative Procedure Act
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
Ecology	Washington State Department of Ecology
HST	Hazardous Substance Tax
MTCA	Model Toxics Control Act
PLP	Potentially liable person
RAG	Remedial action grant
RCW	Revised Code of Washington
WAC	Washington Administrative Code

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Chapter 1: Introduction

1.1 Purpose of this Document

The purpose of a Concise Explanatory Statement is to:

- Provide reasons for adopting a rule.
- Describe any differences between the proposed and adopted rule.
- Provide Ecology’s response to public comments on the proposed rule.

The documentation is required by the Administrative Procedure Act (RCW 34.05.325).

This Concise Explanatory Statement is for the Washington State Department of Ecology’s repeal and adoption of the following rules:

Title: Remedial Action Grants and Loans
WAC Chapter: Repeal of Chapter 173-322 WAC and adoption of Chapter 173-322A WAC
Adopted date: August 29, 2014
Effective date: September 29, 2014

To see more information related to this rule making or other Ecology rule makings please visit our web site: www.ecy.wa.gov/laws-rules/index.html.

1.2 Statutory Authority and Regulatory History

In November 1988, the Model Toxics Control Act, Chapter 70.105D RCW, was passed by the voters of the State of Washington as Initiative 97. The law became effective on March 1, 1989. MTCA establishes the basic authorities and requirements for cleaning up contaminated sites in a manner that will protect human health and the environment.

As a declaration of policy, MTCA states that:

Each person has a fundamental and inalienable right to a healthful environment, and each person has a responsibility to preserve and enhance that right. The beneficial stewardship of the land, air, and waters of the state is a solemn obligation of the present generation for the benefit of future generations (RCW 70.105D.010(1)).

MTCA further declares that:

A healthful environment is now threatened by the irresponsible use and disposal of hazardous substances. There are hundreds of hazardous waste sites in this state, and more will be created if current waste practices continue. Hazardous waste sites threaten the state’s water resources, including those used for public drinking water. Many of our municipal landfills are current or potential hazardous waste sites and present serious threats to human health and the environment. The costs of eliminating these threats in many cases are beyond the financial means of our local governments and ratepayers” (RCW 70.105D.010(2)).

For these reasons, MTCA declares that its main purpose is “to raise sufficient funds to clean up all hazardous waste sites and to prevent the creation of future hazards due to improper disposal of toxic wastes into the state’s lands and waters” (RCW 70.105D.010(2)).

To do this work, voters authorized under Initiative 97 a tax on hazardous substances, including petroleum products, pesticides, and other specified chemicals. The substances are taxed at the rate of 0.70 percent of the wholesale value (\$7 tax per \$1,000 product value). The tax is promulgated in Chapter 82.21 RCW, Hazardous Substance Tax (HST).

MTCA directs the revenue raised by the HST into three different accounts in the state treasury. The revenue is dedicated by MTCA to a broad range of toxic pollution prevention, hazardous and solid waste management, water and environmental health protection and monitoring, and toxic cleanup purposes (RCW 70.105D.070).¹

One of those purposes is to provide remedial action grants and loans to local governments to expedite the cleanup and redevelopment of contaminated publically-owned lands and to lessen the impact of the cleanups on local taxpayers and ratepayers (RCW 70.105D.070(4)(a)(i) and (ii) and (4)(e)). The remedial action grants and loans are intended to supplement local government funding and funding from other sources. For the 2013-15 fiscal biennium, the Legislature appropriated \$62.5 million for remedial action grants and loans.

MTCA specifically directs Ecology to “adopt rules for grant or loan issuance and performance” (RCW 70.105D.070(8)). MTCA also authorizes Ecology to adopt any other rules “necessary to carry out the provisions of this chapter” (RCW 70.105D.030(1)(1)).

Regulatory History

In 1990, Ecology adopted Chapter 173-322 WAC, Remedial Action Grants and Loans,² to implement the program of remedial action grants and loans established by MTCA.

The rule was subsequently amended by Ecology in:

- 1993 (WSR 93-24-047);
- 2001 ([WSR 01-05-024](#));
- 2005 ([WSR 05-07-104](#)); and
- 2007 ([WSR 07-08-010](#)).

Legislative Changes in 2007

In 2007, the Washington State Legislature passed Substitute House Bill 1761 (Laws of 2007, Chapter 446), which amended Chapter 70.105D RCW. Among other things, the legislation:

¹ For more information about the expenditure of HST revenue, see the “Model Toxics Control Accounts Biennial Report: 2011-2013 Biennium” (Ecology, 2013).

² The rule was originally adopted by Ecology on May 1, 1990, and became effective on June 1, 1990 (WSR 90-10-057).

- Directed Ecology to develop ten-year financing plans and create financing tools to clean up large-scale hazardous waste sites requiring multi-year commitments (RCW 70.105D.030(3) and (5)).
- Authorized Ecology to use additional strategies to expedite cleanups throughout the state, including altering match requirements for remedial action grants (RCW 70.105D.070(4)(e)).

These directives were modified and expanded by the Washington State Legislature in 2013.

For more information about the legislation, go to:

<http://dlr.leg.wa.gov/billsummary/default.aspx?year=2007&bill=1761>

For a copy of the session law, see: <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/Session%20Laws/House/1761-S.SL.pdf>

Legislative Changes in 2013

In 2013, the Legislature passed Second Engrossed Second Substitute Senate Bill 5296 (Chapter 1, Laws of 2013 2nd Special Session), which amended Chapter 70.105D RCW. One of the most significant changes to MTCA is to the remedial action grant and loan program.

The legislation establishes new funding priorities for the program and directs Ecology to make several changes to the program, including:

- Enter into extended grant agreements with local governments for projects exceeding \$20 million and occurring over multiple budget cycles. Such projects would receive priority for grant funds (RCW 70.105D.070(4)(a)(i) and (e)(i)).
- Provide integrated planning grants to local governments for studies that facilitate the cleanup and reuse of contaminated sites (RCW 70.105D.070(4)(a)(ii) and (e)(iv)).
- Eliminate methamphetamine lab site assessment and cleanup grants and derelict vessel remedial action grants as separate types of grants (RCW 70.105D.070(4)(a)).
- Provide area-wide groundwater remedial action grants without requiring local governments to be a potentially liable person or seek reimbursement of grant funds from such persons (RCW 70.105D.070(4)(e)(v)).
- Enter into grant agreements with local governments before they acquire or secure access to a property, provided they include a schedule (RCW 70.105D.070(4)(e)(iii)).
- Provide periodic reimbursement of the costs of independent remedial actions (RCW 70.105D.070(4)(e)(ii)).
- Implement cash management principles to ensure budgeted funds are put to work (RCW 70.105D.030(3)).

To accelerate both remedial action and economic recovery, the Legislature directed that:

[T]he department may expedite the adoption of rules necessary to implement [the legislation] using the expedited procedures in RCW 34.05.353. The department shall initiate the award of financial assistance by August 1, 2013. To ensure the adoption of rules will not delay financial assistance, the department may administer the award of financial assistance through interpretative guidance pending the adoption of rules through July 1, 2014 (RCW 70.105D.070(8)).

Ecology declined to use the expedited rule-making procedures in RCW 34.05.353 to provide an opportunity for local governments and other interested persons to be involved in the development of and provide comment on the proposed rule.

For more information about the legislation, go to:

<http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5296&year=2013>

For a copy of the session law, see:

<http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bills/Session%20Laws/Senate/5296-S2.SL.pdf>

1.3 Scope and Purpose of Rule Making

Ecology is repealing Chapter 173-322 WAC and adopting new Chapter 173-322A WAC, Remedial Action Grants and Loans. The new chapter replaces the repealed chapter. This rule making modifies the existing program of grants and loans to local governments for investigating and cleaning up hazardous waste sites. The purpose of the rule making is to:

1. Implement changes to MTCA passed by the Washington State Legislature in 2013 affecting the remedial action grant and loan program. The legislation establishes new funding priorities for the program and directs Ecology to make several changes to the program, including:
 - Enter into extended grant agreements with local governments for projects exceeding \$20 million and occurring over multiple budget cycles. Such projects would receive priority for grant funds.
 - Provide integrated planning grants to local governments for studies that facilitate the cleanup and reuse of contaminated sites.
 - Eliminate methamphetamine lab site assessment and cleanup grants and derelict vessel remedial action grants as separate types of grants.
 - Provide area-wide groundwater remedial action grants without requiring local governments to be a potentially liable person or seek reimbursement of grant funds from such persons.
 - Enter into grant agreements with local governments before they acquire or secure access to a property, provided they include a schedule.
 - Provide periodic reimbursement of the costs of independent remedial actions.
 - Implement cash management principles to ensure budgeted funds are put to work.
2. Make other appropriate changes to the requirements governing remedial action grants and loans (such as updating funding limits and recipient match requirements).
3. Streamline existing requirements, improve rule clarity, and improve consistency with other requirements in this chapter or with other state and federal laws and rules (such as coordinating with agency-wide efforts to streamline and standardize grant processes).

1.4 Reasons for Adopting Rule

This rule making is necessary to:

1. Comply with changes to the Model Toxics Control Act, Chapter 70.105D RCW, passed by the Washington State Legislature in 2013, and continue to implement those changes after June 30, 2014.
2. Encourage and expedite the cleanup and reuse of contaminated sites by local governments.
3. Make the rule easier to use and understand.

The replacement of existing Chapter 173-322 WAC with new Chapter 173-322A WAC is necessary to streamline and clarify the rule.

1.5 Public Involvement during Rule Development

Ecology consulted with local governments throughout the rule-making process and provided opportunities for the business community and other interested persons to get involved.

Public Notice of Rule Making

At the start of the rule making, Ecology:

1. Sent letters to tribal chairs (with copies to the natural resource directors) inviting Government-to-Government consultations. No consultations were requested.
2. Sent emails to the following persons inviting them to participate in the rule-making process:
 - Local governments who have received remedial action grants or loans.
 - Persons who had joined our MTCA-SMS listserv.
 - Persons who had joined our Remedial Action Grants listserv.
 - Persons who had joined the agency WAC Track listserv.
3. Posted information on the agency's rule-making web site:
www.ecy.wa.gov/programs/tcp/regs/wac173322/1309.html.

Public Outreach during Rule Development

During the development of the rule proposal, Ecology:

1. Consulted with local governments and other interested parties.
 - a. Ecology established a rule work group to advise us. We selected group members to represent the experiences and views of those impacted by the remedial action grants and loans program. We held two work group meetings, which were also open to the public:

- Meeting #1 – December 5, 2013.

The purpose of this first meeting was to seek advice from the work group and other interested persons on how to implement the legislative changes and to determine whether any other changes should be made to the existing rules and guidelines.

- Meeting #2 – February 18, 2014.

The purpose of this second meeting was to brief the work group on the draft proposal and provide an opportunity for the work group and other interested persons to provide us with feedback on the proposed changes.

- b. Ecology submitted a preliminary draft of the rule proposal to work group members and to local governments and other interested persons on our RAG listserv. The comment period was from February 13, 2014 to March 5, 2014. We also posted the draft on our rule web page.
 - c. Ecology also talked with representatives from local governments individually to answer questions and listen to concerns. Input was considered when developing the proposed rule.
2. Consulted with local health departments to determine whether any changes should be made to site assessment grants. These grants provide funding to local health departments and districts for conducting initial investigations and site hazard assessments on behalf of Ecology. A preliminary draft of the rule proposal was distributed to local health departments and districts for their review and comment.

Public Access to Information during Rule Making

Local governments and other interested persons could access information on the rule making and public involvement opportunities by:

1. Accessing the following Ecology web site:
www.ecy.wa.gov/programs/tcp/regs/wac173322/1309.html.
2. Signing up to receive e-mail notices at: listserv.wa.gov/cgi-bin/wa?A0=ECY-REMEDIAL-ACTION-GRANTS.
3. Contacting the Rule Coordinator.

1.6 Public Comment on Proposed Rule

On April 15, 2014, Ecology filed the rule proposal with the Office of the Code Reviser. On May 7, 2014, the rule proposal was published in the *Washington State Register* (WSR 14-09-052).

Public Notice

Notice of the rule proposal and opportunity to comment was:

1. Published in the *Washington State Register* (WSR 14-09-052) on May 7, 2014.
2. Published in the Toxics Cleanup Program's *Site Register*, which was emailed to about 650 subscribers on May 1, May 15, and May 29, 2014. The publications are available at: www.ecy.wa.gov/programs/tcp/pub_inv/pub_inv2.html.
3. Issued in a news release on April 23, 2014. The news release is available at: www.ecy.wa.gov/programs/tcp/regs/wac173322/1309-proposal.html.
4. Sent by letter to tribal chairs with copies to the natural resource directors. The notice included an invitation for Government-to-Government consultations. Ecology received a query from one tribe, but no consultations were requested.
5. Sent by email to:
 - About 1,400 people who subscribe to the agency's WAC Track listserv, which updates subscriber's of all agency rule-making activities: listserv.wa.gov/cgi-bin/wa?A0=ECOLOGY-WAC-TRACK.
 - About 700 people specifically interested in MTCA or remedial action grants, including:
 - Subscribers to the Remedial-Action-Grants listserv: listserv.wa.gov/cgi-bin/wa?A0=ECY-REMEDIAL-ACTION-GRANTS
 - Subscribers to the MTCA-SMS listserv: listserv.wa.gov/cgi-bin/wa?A0=MTCA-SMS-RULE-UPDATE.
 - Work group members or invitees.
 - Grant recipients.
6. Posted on Ecology's public involvement calendar: apps.ecy.wa.gov/pubcalendar/calendar.asp.
7. Posted on Ecology's rule-making web sites:
 - <http://www.ecy.wa.gov/laws-rules/wac173322/1309.html>.
 - www.ecy.wa.gov/programs/tcp/regs/wac173322/1309.html.

Public Hearing

Ecology held one public hearing on the rule proposal, during which the public could ask questions and provide oral testimony. The hearing was held at:

Department of Ecology
Headquarters Office
300 Desmond Drive SE
Lacey, WA 98503
May 29, 2014 at 10:00 a.m.

Those unable to attend the hearing in person could participate through a webinar, including asking questions or providing comments.

In total, seven people attended the hearing, three in person and four via webinar. One person provided oral testimony.

Public Comment

Ecology accepted public comment on the rule proposal for 53 days between April 15 and June 6, 2014. Comments were received in writing and transcribed from oral testimony provided at the public hearing. In total, three individuals or organizations submitted comments on the proposal. Ecology identified a total of 25 separate comments.

1.7 Differences between Proposed and Adopted Rule

The Administrative Procedure Act requires Ecology to describe the differences between the text of the proposed rule as published in the *Washington State Register* and the text of the rule as adopted, other than editing changes, stating the reasons for the differences (RCW 34.05.325(6)(a)(ii)).

There are some differences between the proposed rule filed on April 15, 2014, and the adopted rule filed on August 29, 2014. Ecology made these changes for all or some of the following reasons:

- In response to comments we received.
- To ensure clarity and consistency.
- To meet the intent of the authorizing statute.

The changes Ecology made to the text of the proposed rule, including all deletions and additions, are identified in Appendix D to this document. The changes (other than editing) and Ecology's reasons for making them are summarized in Chapters 2 through 13, as applicable.

1.8 Organization and Format of this Document

This Concise Explanatory Statement is organized into thirteen chapters. Chapter 1 provides information on the rule making and public participation.

Chapters 2 through 13 address the adopted rule, organized by rule section. Each of these chapters is broken into three sections:

- Section 1 – Summary of Proposed Rule
- Section 2 – Differences between Proposed and Adopted Rules
- Section 3 – Responses to Comments

This document responds to the identified comments in a question and answer format. Ecology reviewed the public comments and grouped them into a series of questions (the “issues”). Each of the questions reflects a particular issue or set of issues raised by one or more individuals or organizations. Following each question, Ecology identifies the commenter who raised the issue, the number assigned to the relevant comments, and the rule sections to which the question applies. Ecology then provides a response. Copies of written comments and transcripts of oral testimony are included, respectively, in Appendix B and C of this document. To find specific comments, use the name of the commenter and the comment number.

This document includes the following four appendices:

- Appendix A – Commenter Index

This appendix includes a complete list of the individuals or organizations who provided comments on the rule proposal and where in this document you can find Ecology’s response to the comments.

- Appendix B – Copy of Written Comments

This appendix includes a copy of all written comments received by Ecology on the rule proposal.

- Appendix C – Transcripts of Public Hearings

This appendix includes a complete transcript of the public hearing, including testimony provided during the hearing.

- Appendix D – Differences between Proposed and Adopted Rule Language

This appendix includes a complete text of the adopted rule that tracks differences with the proposed rule. The changes are tracked using strikeouts and underlines. The changes are also highlighted.

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Chapter 2: Purpose and Authority (WAC 173-322A-010) and Relation to Other Laws and Rules (WAC 173-322A-020)

This chapter provides a concise explanatory statement of the changes to the purpose and authority for the rule and the relation of the rule or other laws and rule. This chapter provides a summary of the proposed rule (Section 2.1), describes any differences between the proposed and adopted rule (Section 2.2), and responds to any public comments on the proposed rule (Section 2.3).

2.1 Summary of Proposed Rule

WAC 173-322A-010 specifies the purpose and authority for the rule. The section modifies and replaces WAC 173-322-010. Differences between the sections are tracked in “Rule Proposal with Tracked Changes” (Ecology, 2014). The proposed rule:

- Modified the description of the threat posed by hazardous waste sites to human health and the environment.
- Added as a purpose the redevelopment of brownfield properties, where economic development and other community reuse objectives are hindered by the presence of contamination. The addition of this purpose is intended to reflect legislative changes to MTCA in 2013.

WAC 173-322A-020 specifies the relationship between the rule and other laws and rules. The section modifies and replaces WAC 173-322-030. Differences between the sections are tracked in “Rule Proposal with Tracked Changes” (Ecology, 2014). The proposed rule clarifies that it does not modify orders or decrees the department has secured with prospective purchasers.

2.2 Differences between Proposed and Adopted Rules

Ecology did not make any changes to these sections of the proposed rule.

2.3 Response to Comments

No comments were received on these sections of the proposed rule.

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Chapter 3: Definitions (WAC 173-322A-100)

This chapter provides a concise explanatory statement for WAC 173-322A-100, which governs the definition of terms used in the rule. This chapter provides a summary of the proposed rule (Section 3.1), describes any differences between the proposed and adopted rule (Section 3.2), and responds to any public comments on the proposed rule (Section 3.3).

3.1 Summary of Proposed Rule

WAC 173-322A-100 defines terms used in the rule. The section modifies and replaces WAC 173-322-020. Differences between the sections are tracked in “Rule Proposal with Tracked Changes” (Ecology, 2014).

The proposed rule added definitions of the following terms:

- Agreement signature date
- Applicant
- Average market rate
- Biennium
- Brownfield property
- Budget
- Construction completion
- Department share
- Economically disadvantaged city or town
- Eligible cost
- Extended grant agreement
- Feasibility study
- Highly impacted community
- Initial investigation
- In-kind contributions
- Property
- Prospective purchaser
- Recipient
- Recipient share
- Remedial investigation
- Scope of work
- Voluntary cleanup program

The proposed rule changed definitions of the following terms:

- Area-wide groundwater contamination
- Cleanup action
- Economically disadvantaged county
- Innovative technology
- Local government

- No further action determination
- Partial funding
- Public water system
- Retroactive costs

The proposed rule eliminated definitions of the following terms because they are no longer used:

- Abandoned or derelict vessels
- Hazard ranking
- Initial containment of methamphetamine lab sites
- Methamphetamine lab site assessment
- Model Toxics Control Act
- National Priorities List
- Oversight costs
- Pilot study
- Recycling
- Remedial design
- Remedial investigation/feasibility study
- Safe drinking water action
- Treatment

3.2 Differences between Proposed and Adopted Rules

The changes Ecology made to the text of the proposed rule, including all deletions and additions, are identified in Appendix D to this document. The changes (other than editing) and Ecology’s reasons for making them are summarized below.

- WAC 173-322A-100(11): Changed definition of the term “decree” or “consent decree.”

Reason: To clarify that the term includes any consent decree issued under the authorizing statute, Chapter 70.105D RCW.

- WAC 173-322A-100(15): Changed definition of the term “economically disadvantaged county.”

Reason: To clarify that the per capita income of a county is compared against the median per capita income of counties in Washington state.

- WAC 173-322A-100(16): Changed definition of the term “economically disadvantaged city or town.”

Reason: To clarify that the per capita income of a city or town is compared against the median per capita income of cities and towns in Washington state.

- WAC 173-322A-100(44): Added definition of the term “redevelopment opportunity zone.”

Reason: To define a term that was not used in the proposed rule. The term is defined to mean the same as the term in the authorizing statute, Chapter 70.105D RCW. The change is based on public comment on other sections of the rule.

3.3 Response to Comments

No comments were received on this section of the proposed rule.

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Chapter 4: Funding Cycle (WAC 173-322A-200)

This chapter provides a concise explanatory statement for WAC 173-322A-200, which governs the funding cycle for remedial action grants and loans. This chapter provides a summary of the proposed rule (Section 4.1), describes any differences between the proposed and adopted rule (Section 4.2), and responds to any public comments on the proposed rule (Section 4.3).

4.1 Summary of Proposed Rule

WAC 173-322A-200 governs the funding cycle for remedial action grants and loans. These provisions are replicated, as applicable, under each grant and loan category. This section completely replaces WAC 173-322-040. The proposed rule provided for:

- Project solicitation.
- Application submittal.
- Project evaluation and ranking.
- Updating the ten-year financing plan.
- Development of legislative budget requests.
- Allocation of appropriated funds based on funding priority.
- Development of grant agreements based on completed applications.

4.2 Differences between Proposed and Adopted Rules

The changes Ecology made to the text of the proposed rule, including all deletions and additions, are identified in Appendix D to this document. The changes (other than editing) and Ecology's reasons for making them are summarized below.

- WAC 173-322A-200(1): Changed how frequently Ecology will solicit project proposals from annually to biennially.

Reason: To reflect the fact that budgets and ten-year financing plans are developed on a biennial basis. Applications may still be submitted at other times.

- WAC 173-322A-200(1): Added authority for Ecology to update its ten-year financing plan as needed during a biennium.

Reason: To clarify Ecology's authority and ensure that Ecology can fund additional eligible projects during a biennium should funds become available. Some projects are not eligible for funding unless they are included in the ten-year financing plan (WAC 173-322A-320(2)(e) and 173-322A-340(2)(e)).

- WAC 173-322A-200(1): Added requirement that, for multibiennial oversight remedial action grant projects, proposals must be updated biennially.

Reason: To clarify whether and for which types of multibiennial projects proposals must be updated biennially. For oversight remedial action grants, Ecology may not

allocate more funds for a project each biennium than are estimated to be necessary to complete the scope of work for that biennium (WAC 173-322A-220(5)(a)). Ecology needs the information included in the project proposals to develop its biennial budget and update its ten-year financing plan. This change was based on public comment.

- WAC 173-322A-200(2): Added requirement that, for multibiennial oversight remedial action grant projects, an application must be submitted before each biennium for which additional funds are requested.

Reason: To clarify whether and for which types of multibiennial projects applications must be submitted before each biennium for which additional funds are requested. For oversight remedial action grants, Ecology may not allocate more funds for a project each biennium than are estimated to be necessary to complete the scope of work for that biennium (WAC 173-322A-220(5)(a)). Ecology needs the information included in the application to prepare grant agreements. This change was based on public comment.

- WAC 173-322A-200(5): Added authority for Ecology to adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

Reason: To clarify Ecology's authority and to reflect the fact that additional funds may become available during a biennium in a supplemental budget or if funds granted for other projects are not spent.

4.3 Response to Comments

Issue 4-1: For multibiennial oversight remedial action grant projects, do grant recipients need to update project proposals and applications each biennium?

- Commenter: Seattle Public Utilities and Seattle City Light (11, 13)
- Rule Sections: WAC 173-322A-200(1) and (2); 173-322A-320(4)(a) and (b); 173-322A-325(5)(a) and (b)

Response: YES

Ecology has revised the proposed rule to clarify that, for multibiennial oversight remedial action grant projects, the grant recipient must:

- Update project proposals each biennium (WAC 173-322A-200(1); 173-322A-320(4)(a); 173-322A-325(5)(a)).
- Submit an application before each biennium for which additional funds are requested (WAC 173-322A-200(2); 173-322A-320(4)(b); 173-322A-325(5)(b)).

The provisions are necessary as part of a cash management approach for multibiennial projects, as directed by the Legislature in 2013 (RCW 70.105D.030(3), as revised by Chapter 1, Laws of 2013 2nd spec. sess.). To implement this directive, the rule was revised to prohibit:

- The allocation of more funds each biennium than are estimated to be necessary to complete the scope of work for that biennium (WAC 173-322A-220(5)(a) and 173-322A-320(8)(a)).
- The allocation of more funds for a project if the funds awarded during a previous biennium have not been substantially expended or contracts have not been entered into to substantially expend the funds (WAC 173-322A-220(5)(b) and 173-322A-320(8)(b)).

This ensures that budgeted funds are put to work in the biennium in which they are appropriated instead of being set aside for work in future biennia.

Ecology needs the information in updated project proposals to update its long-term financing plan for the projects and make legislative budget requests for the next biennium. Ecology needs the information in the application, including a detailed scope of work and budget for the next biennium, to prepare new grant agreements. Ecology issues new grants instead of amending existing grants so that it can track the use of each legislative appropriation.

Issue 4-2: Does Ecology have the authority to update its ten-year financing plan for remedial action grant projects during a biennium?

- Commenter: Maul Foster & Alongi, Inc. (5)
- Rule Sections: WAC 173-322A-200(1), 173-322A-300(4)(a), 173-322A-310(4)(a), 173-322A-320(4)(a), 173-322A-325(5)(a), 173-322A-330(5)(a), 173-322A-340(4)(a), and 173-322A-350(4)(a)

Response: YES

Under MTCA, Ecology is required to develop and submit a ten-year financing plan to the governor and appropriate legislative committees each biennium (RCW 70.015D.030(5)). The plan is used to develop biennial budgets, including for remedial action grants and loans, and determine long-term funding needs.

Ecology has revised the proposed rule to provide that Ecology will solicit project proposals biennially instead of annually to reflect the fact that budgets and ten-year financing plans are developed on a biennial basis. However, applications may still be submitted at other times and Ecology retains the authority to update the plan as needed or to fund additional projects on the plan during a biennium, should funds become available.

Ecology has revised the proposed rule to clarify that it has the authority to update its ten-year financing plan as needed during a biennium. This authority will enable Ecology to fund a new project during a biennium that was not previously included on the ten-year financing plan. That is because some projects, specifically oversight remedial actions and area-wide groundwater investigations, must be included on the ten-year financing plan to be eligible for a grant (WAC 173-322A-320(2)(e) and 173-322A-340(2)(e)). However, just because a new project is eligible

for funding does not mean that it can or will be funded during that biennium. That is because funding is still contingent on availability of additional funds and relative project priority.

For additional discussion of whether Ecology has the authority to fund additional projects during a biennium, see the response to Issue 4-3.

Ecology will provide a more detailed description of the budget and grant award process in the updated program guidelines that will be published after the rule becomes effective.

Issue 4-3: Does Ecology have the authority to adjust funding levels or fund additional projects during a biennium if additional funding should become available?

- Commenter: Maul Foster & Alongi, Inc. (5)
- Rule Sections: WAC 173-322A-200(5), 173-322A-300(4)(e), 173-322A-310(4)(e), 173-322A-320(4)(e), 173-322A-325(5)(e), 173-322A-330(5)(e), 173-322A-340(4)(e), and 173-322A-350(4)(e)

Response: YES

Ecology has revised the proposed rule to clarify that Ecology has the authority to adjust funding levels or fund additional projects during a biennium if additional funding should become available. Funding may become available if, for example:

- A funded project is completed during the biennium without expending all of the allocated funds.
- The expenditure rate for a project during the biennium is slower than anticipated when the funds were allocated.
- The Legislature appropriates additional funds in a supplemental budget for remedial action grants and loans.

This authority will enable Ecology to fund a new project during a biennium. However, just because additional funding is available does not necessarily mean that the new project will be funded during that biennium. That is because funding is still contingent on the relative priority of the project.

Chapter 5: Funding Priorities (WAC 173-322A-210)

This chapter provides a concise explanatory statement for WAC 173-322A-210, which governs funding priorities for remedial action grants and loans. This chapter provides a summary of the proposed rule (Section 5.1), describes any differences between the proposed and adopted rule (Section 5.2), and responds to any public comments on the proposed rule (Section 5.3).

5.1 Summary of Proposed Rule

WAC 173-322A-210 governs the funding priorities for remedial action grants and loans. This is a new section. The proposed rule:

- Established an overall funding hierarchy that prioritizes currently funded projects over new projects. Among currently funded projects, the proposed rule prioritizes oversight remedial action projects under an extended grant agreement.
- Required Ecology to further prioritize projects for funding or limit funding for projects based on the factors specified for each type of grant or loan.
- Provided that oversight remedial action loans will be given the same priority as the associated grant.

5.2 Differences between Proposed and Adopted Rules

No changes were made to this section of the proposed rule.

5.3 Response to Comments

Issue 5-1: For the purpose of determining whether to maintain the priority of a previously funded project, what constitutes “substantial progress”? Should Ecology consider factors beyond the recipient’s control?

- Commenter: Seattle Public Utilities and Seattle City Light (12)
- Rule Sections: WAC 173-322A-210(1)(b) and 173-322A-320(10)(b)

Response:

Ecology is adopting the proposed rule language. For the purposes of determining whether to maintain the priority of a previously funded project or whether to extend the duration of a project funded under an extended grant agreement, Ecology will consider whether substantial progress has been made in remedial actions at the site.

For projects funded under an extended grant agreement, the provision reflects a specific statutory requirement (RCW 70.105D.070(4)(e)(i)(A)). For other previously funded projects, the provision reflects the statutory directive to more aggressively manage the MTCA accounts to put funds to work (RCW 70.105D.030(3) and 70.105D.070(4)(e)(i)(C)).

With respect to what constitutes substantial progress, Ecology will make determinations on a case-by-case basis. Ecology will consider whether any lack of progress or under expenditure of

granted funds was due to factors beyond the recipient's control, such as permitting delays. Ecology does not believe a recipient needs to expend every penny of the granted funds in the biennium in which they are awarded. However, the recipient should be aware that unexpended funds are not automatically carried over to the next biennium. Rather, they are subject to re-appropriation by the Legislature and, as such, must compete with other budget needs.

Issue 5-2: Will Ecology provide the public an opportunity to review and comment on any proposal to add prioritization factors?

- Commenter: Seattle Public Utilities and Seattle City Light (20)
- Rule Sections: WAC 173-322A-210(2), 173-322A-310(3)(i), 173-322A-320(3)(i), 173-322A-330(4)(i), 173-322A-340(3)(i), and 173-322A-340(3)(g)

Response: YES

Ecology is adopting the proposed rule language. While we believe the principal factors have already been captured in the rule, we wanted to retain the ability to consider additional factors should they later be identified.

Ecology will provide the public an opportunity to review and comment on any proposal to add prioritization factors. Ecology will publish the prioritization factors, including any proposed additions, in the program guidelines, which will be subject to public review and comment.

Chapter 6: Fiscal Controls (WAC 173-322A-220)

This chapter provides a concise explanatory statement for WAC 173-322A-220, which governs fiscal controls for remedial action grants and loans. This chapter provides a summary of the proposed rule (Section 6.1), describes any differences between the proposed and adopted rule (Section 6.2), and responds to any public comments on the proposed rule (Section 6.3).

6.1 Summary of Proposed Rule

WAC 173-322A-220 governs the fiscal controls for remedial action grants and loans. This section almost completely replaces WAC 173-322-050. Differences between the sections are tracked in “Rule Proposal with Tracked Changes” (Ecology, 2014). The proposed rule:

- Clarified Ecology’s authority to not provide a grant or loan for an eligible project or to provide less funding for an eligible project than the maximum allowed.
- Limited funding to the amount specified for each type of grant in later sections, some of which have changed.
- Limited retroactive funding to that specified for each type of grant in later sections, some of which have changed.
- For oversight remedial action grants, limited funding to the amount that can be expended in a biennium and conditions future funding on whether substantial progress has been made under previous grants.
- Allowed proceeds from contribution and cost recovery claims to be used as match under certain conditions, just like proceeds from insurance claims. Modified notice and repayment conditions.
- Established deadlines for requesting reimbursement of eligible costs, including retroactive costs, and requirements for documenting those costs.
- Authorized Ecology to require recipients to provide and periodically update a spending plan for the grant or loan.
- Prohibited funding of projects designed to address the restoration of Puget Sound that are in conflict with the action agenda developed by the Puget Sound Partnership under RCW 90.71.310.

6.2 Differences between Proposed and Adopted Rules

The changes Ecology made to the text of the proposed rule, including all deletions and additions, are identified in Appendix D to this document. The changes (other than editing) and Ecology’s reasons for making them are summarized below.

- WAC 173-322A-220(6): Clarified that the subsection applies only to claims for remedial action costs at a hazardous waste site, not other types of claims, such as for natural resource damages.

Reason: To clarify the applicability of the subsection.

- WAC 173-322A-220(6)(a): Added a provision making the subsection applicable retroactively to projects that are currently funded as of July 1, 2014.

Reason: To clarify the applicability of the subsection to currently funded projects and to avoid applying different and potentially conflicting rules to the same project. The change is based on public comment.

- WAC 173-322A-220(6)(b): Changed the provision to specify and limit the circumstances under which a recipient must notify Ecology of a claim. Recipients only need to notify Ecology when filing a lawsuit or an insurance claim, not when initiating settlement negotiations.

Reason: To clarify under what circumstances notice of a claim is required. Also to avoid undermining the confidentiality of the recipient's legal strategy that is exempt from public disclosure and placing the recipient at a strategic disadvantage compared to other potentially liable persons, which would make it more difficult to recover funds. The change is based on public comment.

- WAC 173-322A-220(6)(c): Added a provision requiring recipients upon application to notify Ecology of the total amount of proceeds received on any claims for remedial action costs at the hazardous waste site. The provision also authorizes Ecology to require the recipient to periodically update the total amount of proceeds received and provide documentation of the proceeds.

Reason: To reflect the fact that there may be partial resolutions of claims and to ensure that Ecology has sufficient information to make funding decisions and repayment determinations.

- WAC 173-322A-220(6)(d): Clarified that recipient must notify Ecology of any resolution of a claim (not just final resolution of a claim) for remedial action costs at the hazardous waste site. Also clarified when the recipient must notify Ecology.

Reason: To clarify notice requirement and to reflect the fact that there may be partial resolutions of claims.

- WAC 173-322A-220(6)(e): Clarified that the total proceeds from all claims (not just proceeds from any one claim) for remedial action costs at a hazardous waste site are considered when determining whether any repayment of grants funds is required.

Reason: To clarify repayment requirement and to reflect the fact that there may be more than one claim for remedial action costs at a hazardous waste site.

- WAC 173-322A-220(6)(e)(ii): Clarified that claim proceeds may be applied against remedial action costs incurred before the resolution of the claim.

Reason: To clarify repayment requirement. The change is based on public comment.

- WAC 173-322A-220(6)(e)(ii) and (iii): Clarified that claim proceeds may be applied only against remedial action costs incurred by the grant or loan recipient.

Reason: To clarify repayment requirement.

- WAC 173-322A-220(7)(c): Changed the deadline for requesting reimbursement of eligible costs from 90 to 120 days after incurring the costs.

Reason: To reflect the fact that local governments sometimes need more time to process bills. The change is based on public comment.

6.3 Response to Comments

Issue 6-1: For oversight remedial action grants, may Ecology allocate more funds for a project each biennium than are estimated to be necessary to complete the scope of work for that biennium?

- Commenter: Seattle Public Utilities and Seattle City Light (11)
- Rule Section: WAC 173-322A- 220(5)(a) and 173-322A-320(8)(a)

Response: NO

Ecology has adopted the proposed rule language in WAC 173-322A-320(8)(a) and 173-322A-220(5)(a). The provision is necessary as part of a cash management approach for multibiennial projects, which is required by the Legislature (RCW 70.105D.030(3), as revised by Chapter 1, Laws of 2013 2nd spec. sess.). To implement this directive, the rule prohibits:

- The allocation of more funds each biennium than are estimated to be necessary to complete the scope of work for that biennium (WAC 173-322A-220(5)(a) and 173-322A-320(8)(a)).
- The allocation of more funds for a project if the funds awarded during a previous biennium have not been substantially expended or contracts have not been entered into to substantially expend the funds (WAC 173-322A-220(5)(b) and 173-322A-320(8)(b)).

This ensures that budgeted funds are put to work in the biennium in which they are appropriated instead of being set aside for work in future biennia.

Issue 6-2: Should WAC 173-322A-220(6) apply retroactively to projects that are currently funded on July 1, 2014?

- Commenter: Port of Everett (7, 8)
- Rule Sections: WAC 173-322A-220(6)(a)

Response: YES

Ecology has added language to the proposed rule in WAC 173-322A-220(6)(a) to clarify the applicability of the provision and to make it apply retroactively to projects currently funded on

July 1, 2014. The provision governs whether and under what conditions proceeds from an insurance, contribution, or cost recovery claim for remedial action costs may be used as match for a grant. Ecology is making this change to avoid applying different and potentially conflicting rules to the same project. The change is based on public comment.

In summary, the applicability of WAC 173-322A-220(6) depends on when the project is funded by a grant.

- Closed Projects

The provision does not apply to projects funded only before July 1, 2014. These projects are subject to the rules in effect when the grant was awarded. Under the old rules, proceeds from contribution and cost recovery claims could not be used as match for grants. Proceeds from insurance claims could not be used as match for grants awarded before 2005.

- Ongoing Projects

The provision applies to ongoing projects funded both before and after July 1, 2014. This means that proceeds from contribution and cost recovery claims, in addition to proceeds from insurance claims, may be used as match for grants, including those awarded before the effective date of the new rule.

- Future Projects

The provision applies to projects funded only after the July 1, 2014. This means that proceeds from contribution and cost recovery claims, in addition to proceeds from insurance claims, may be used as match for grants.

The applicability of the provision does not depend on when the claim is resolved or when claim proceeds are received. For additional discussion, see Issue 6-3.

Issue 6-3: Does the applicability of WAC 173-322A-220(6) depend on the date a claim is resolved or claim proceeds are received?

- Commenter: Port of Everett (7, 8)
- Rule Section: WAC 173-322A-220(6)(a)

Response: NO

Ecology has added language to the proposed rule in WAC 173-322A-220(6)(a) to clarify the applicability of the provision and to make it apply retroactively to projects currently funded on July 1, 2014. The applicability of the provision depends on when the project is funded, not when the claim is resolved or claim proceeds are received. To illustrate, consider the following examples:

- Closed Projects

If a project was funded only before July 1, 2014, and the contribution claim was not resolved until after the effective date of the new rule, the provision would not apply. That is because the project was not funded on or after July 1, 2014. This means the proceeds from the contribution claim could not be used as match for grants.

- Ongoing Projects

If a project was funded both before and after July 1, 2014, and the contribution claim was resolved before the effective date of the new rule, the provision would apply. That is because the project was funded on or after July 1, 2014. This means the proceeds from the claim could be used as match for grants, including those awarded before the effective date of the new rule.

- Future Projects

If a project was funded only after July 1, 2014, and the contribution claim was resolved before the effective date of the new rule, the provision would apply. That is because the project was funded after July 1, 2014. This means the proceeds from the claim could be used as match for grants.

For additional discussion of the applicability of the provision, see Issue 6-2.

Issue 6-4: May claim proceeds be used to meet match requirements for eligible remedial action costs incurred before resolution of the claim?

- Commenter: Port of Everett (6, 8)
- Rule Sections: WAC 173-322A-220(6)(a) and (e)(ii)

Response: YES

Ecology has revised the proposed rule language in WAC 173-322A-220(6)(e)(ii) to clarify that claim proceeds may be used to meet match requirements for eligible remedial action costs incurred before the resolution of the claim.

As discussed under Issue 6-2, the provision applies only to projects that are currently funded on or will be funded after July 1, 2014, under a grant agreement (WAC 173-322A-220(6)(c)). The provision does not apply to projects closed before July 1, 2014.

Issue 6-5: Should Ecology be notified of the initiation of settlement negotiations to recover remedial action costs?

- Commenter: Port of Everett (9)
- Rule Section: WAC 173-322A-220(6)(b)

Response: NO

Ecology has revised the proposed rule language in WAC 173-322A-220(6)(b) to specify and limit the circumstances under which a grant recipient must notify Ecology of taking an action to recover a claim. A grant recipient only needs to notify Ecology when filing a lawsuit or an insurance claim, not when initiating settlement negotiations.

The proposed rule required a grant recipient to notify Ecology when taking an action to recover a claim for remedial action costs. The commenter noted that this could be interpreted to require grant recipients to notify Ecology when initiating settlement negotiations. The commenter expressed concern that disclosure of such matters would conflict with the executive session provisions of the Open Public Meetings Act, RCW 42.30.110, and place the grant recipient at a strategic disadvantage in settlement negotiations with other potentially liable persons, making it more difficult to recover funds. Ecology concurs that this could be a problem and has revised the proposed rule language as stated above.

Issue 6-6: Should Ecology be notified of the filing of a lawsuit or insurance claim to recover remedial action costs? Should Ecology be notified of the receipt of proceeds from a claim for remedial action costs?

- Commenter: Port of Everett (9)
- Rule Section: WAC 173-322A-220(6)(b) and (c)

Response: YES

Ecology has revised the proposed rule language in WAC 173-322A-220(6)(b) to specify and limit the circumstances under which a grant recipient must notify Ecology of taking an action to recover a claim. A grant recipient only needs to notify Ecology when filing a lawsuit or an insurance claim, not when initiating settlement negotiations.

The proposed rule required a grant recipient to notify Ecology when taking an action to recover a claim for remedial action costs. As discussed in Issue 6-5, Ecology concurs with the commenter that disclosure of settlement negotiations could conflict with the executive session provisions of the Open Public Meetings Act, RCW 42.30.110, and place the grant recipient at a strategic disadvantage in settlement negotiations.

However, the act of filing a lawsuit or an insurance claim are public information and would typically require the local governing body to take action in a public meeting. Also, given that such actions are public information subject to disclosure, the notice requirement should not place the grant recipient at a strategic disadvantage in settlement negotiations. Therefore, as noted above, Ecology is still requiring notice of a lawsuit or an insurance claim.

Ecology has also added a provision in WAC 173-322A-220(6)(c) requiring, upon application, notice of the total amount of proceeds received on any claims for remedial action costs at the site. The provision also authorizes Ecology to require the recipient to periodically update the total amount of proceeds received and provide documentation of the proceeds. The receipt of such proceeds is also public information subject to disclosure. Ecology added this provision to reflect the fact that there may be partial resolutions of claims and to ensure that Ecology has sufficient information to make funding decisions and repayment determinations.

Issue 6-7: For the purposes of determining whether recipients must repay any grant funds, which remedial action costs are claim proceeds compared against?

- Commenter: Port of Everett (6, 7, 8)
- Rule Sections: WAC 173-322A-220(6)(e)

Response:

In response to requests made by the commenter, Ecology has revised the proposed rule language in WAC 173-322A-220(6)(e) to clarify when grant funds must be repaid.

With respect to what claim proceeds are considered, Ecology clarified that:

- The total proceeds from all claims are considered when making the calculation, not just from each claim individually (WAC 173-322A-220(6)(e)).
- Only proceeds from claims for remedial action costs are considered, not other costs associated with the site, such as natural resource damages (WAC 173-322A-220(6)(e)).

With respect to what costs the total claim proceeds are compared against, Ecology clarified that:

- They may be applied against remedial action costs incurred before the resolution of the claim (WAC 173-322A-220(6)(e)(ii)).
- They may be applied only against remedial action costs incurred by the grant or loan recipient, not costs incurred by other persons (WAC 173-322A-220(6)(e)(ii) and (iii)).

In summary, Ecology compares the total proceeds from all claims for remedial action costs at a site against the following costs:

- The costs incurred by the recipient to pursue the claims.
- The recipient's share of eligible remedial action costs at the site.
- Ineligible remedial action costs incurred by the recipient at the site, such as long-term operation and maintenance costs.
- If approved by Ecology, the cost of remedial actions incurred by the recipient for an eligible project at a site that is not the basis for the claims.

If the total proceeds from the claims exceed these costs, then Ecology may reduce its share of eligible costs or require repayment of eligible costs it has already reimbursed by up to the amount of the exceedance.

Issue 6-8: Within how many days after costs are incurred should reimbursement requests be submitted to Ecology?

- Commenter: Seattle Public Utilities and Seattle City Light (19)
- Rule Section: WAC 173-322A-220(7)(c)

Response:

Ecology has revised the proposed rule language in WAC 173-322A-220(7)(c) to address some of the concerns by the commenter by changing the deadline for requesting reimbursement of eligible costs from 90 to 120 days after incurring the costs.

The commenter expressed concern the 90 days may not be sufficient time, especially in the case where one local government is paying another potentially liable person to conduct the work (such as another local government). In this case it could be years between paying off a contribution settlement and when the work actually is accomplished.

First, Ecology understands that with quarterly billing, the 90-day timeframe may not always work, as the costs incurred in the first month of the quarter would be more than 90 days old at the time of the quarterly billing. Therefore, as noted above, Ecology has changed the provision to provide 120 days to request reimbursement.

Second, with regard to settlements for future work, while Ecology understands there could be a cash flow issue, we do not believe extending this timeframe is appropriate given the requirement from the Legislature to put the grant money to work. Consequently, no change has been made to the provision to address this scenario. In cases where cash flow is an issue, we recommend the settlement obligations be structured to provide payment upon completion of the work.

Issue 6-9: Should Ecology have the authority to provide and periodically update a spending plan for a grant or loan?

- Commenter: Seattle Public Utilities and Seattle City Light (16)
- Rule Section: WAC 173-322A-220(8)

Response: YES

Ecology has adopted the proposed rule language in WAC 173-322A-220(8). The provision authorizes Ecology to require grant recipients provide and periodically update a spending plan for the grant.

The commenter stated that the provision requires monthly updates of spending plans and expressed concern that such frequent updates would be burdensome. The provision does not require monthly updates. The provision only authorizes Ecology to require periodic updates. Ecology currently requires spending plans be updated quarterly. The spending plans are used to manage cash flow in local toxics control account, from which grants are funded. While the new rule authorizes Ecology to require more frequent updates, we anticipate continuing the current practice of quarterly updates. Ecology would only require more frequent updates if needed to better manage cash flow or respond to directives from the Office of Financial Management.

Chapter 7: Site Assessment Grants (WAC 173-322A-300)

This chapter provides a concise explanatory statement for WAC 173-322A-300, which governs site assessment grants. This chapter provides a summary of the proposed rule (Section 7.1), describes any differences between the proposed and adopted rule (Section 7.2), and responds to any public comments on the proposed rule (Section 7.3).

7.1 Summary of Proposed Rule

WAC 173-322A-300 governs site assessment grants. These grants provide funding to local health districts or departments that conduct initial investigations and site hazard assessments on behalf of Ecology. This section modifies and replaces WAC 173-322-060. Differences between the sections are tracked in “Rule Proposal with Tracked Changes” (Ecology, 2014). The proposed rule:

- Allowed the grant to be used to perform initial investigations, not just site hazard assessments, on behalf of Ecology.
- Eliminated the project eligibility requirement that the site being assessed under the grant must be located within the jurisdiction of the local health district or department.
- Changed the list of factors Ecology will consider when prioritizing eligible projects for funding or limiting funding of eligible projects.
- Changed the application and funding process, consistent with WAC 173-322A-200.
- Added as an eligible cost the cost of conducting initial investigations.
- Changed what retroactive costs are eligible.
- Specified certain costs as ineligible.

7.2 Differences between Proposed and Adopted Rules

The changes Ecology made to the text of the proposed rule, including all deletions and additions, are identified in Appendix D to this document. The changes (other than editing) and Ecology’s reasons for making them are summarized below.

- WAC 173-322A-300(4)(a): Changed how frequently Ecology will solicit project proposals from annually to biennially.

Reason: Same as for parallel change to WAC 173-322A-200(1).

- WAC 173-322A-300(4)(a): Added authority for Ecology to update its ten-year financing plan as needed during a biennium.

Reason: Same as for parallel change to WAC 173-322A-200(1).

- WAC 173-322A-300(4)(e): Added authority for Ecology to adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

Reason: Same as for parallel change to WAC 173-322A-200(5).

- WAC 173-322A-300(5)(b)(vi): Added as an ineligible cost the cost of testing buildings or other structures for radon when such testing is not required as a remedial action.

Reason: To provide consistency with EPA and ASTM site assessment guidance.

7.3 Response to Comments

No comments were received specifically on this section of the proposed rule. Comments about the application process described in WAC 173-322A-300(4) are addressed in Chapter 4 of this document.

Chapter 8: Integrated Planning Grants (WAC 173-322A-310)

This chapter provides a concise explanatory statement for WAC 173-322A-310, which governs integrated planning grants. This chapter provides a summary of the proposed rule (Section 8.1), describes any differences between the proposed and adopted rule (Section 8.2), and responds to any public comments on the proposed rule (Section 8.3).

8.1 Summary of Proposed Rule

WAC 173-322A-310 governs integrated planning grants. These grants provide funding to local governments to conduct assessments of brownfield properties and develop integrated project plans for their cleanup and adaptive reuse. These grants were not included under Chapter 173-322 WAC. However, Ecology had created a pilot program based on legislative changes to MTCA in 2007 (Section 2, Chapter 446, Laws of 2007). The pilot program was implemented in accordance with guidelines established by Ecology. The proposed rule makes the program permanent based on further legislative changes to MTCA in 2013 (Section 9, Chapter 1, Laws of 2013 2nd sp. sess.). The proposed rule specifies:

- Purpose of the grants and project eligibility requirements.
- Factors for prioritizing projects for funding or limiting funding of projects.
- Application and funding process, consistent with WAC 173-322A-200.
- Eligible and ineligible costs for a project and which retroactive costs are eligible.
- Limits on eligible costs for a project (\$200,000 for a single site and \$300,000 for a study area involving multiple sites).
- Percent of eligible costs that may be funded (up to 100%).

8.2 Differences between Proposed and Adopted Rules

The changes Ecology made to the text of the proposed rule, including all deletions and additions, are identified in Appendix D to this document. The changes (other than editing) and Ecology's reasons for making them are summarized below.

- WAC 173-322A-310(2)(b): Changed project eligibility criteria from the hazardous waste site being located within the applicant's jurisdiction to the applicant having an ownership interest in property or a demonstrated interest in purchasing property affected by the hazardous waste site.

Reason: To make rule consistent with current Ecology practice.

- WAC 173-322A-310(3)(b): Added as a separate priority-setting factor whether the hazardous waste site is within a redevelopment opportunity zone.

Reason: To more explicitly reflect funding priorities in the authorizing statute, RCW 70.105D.070(4)(e)(vii). This change is based on public comment.

- WAC 173-322A-310(4)(a): Changed how frequently Ecology will solicit project proposals from annually to biennially.

Reason: Same as for parallel change to WAC 173-322A-200(1).

- WAC 173-322A-310(4)(a): Added authority for Ecology to update its ten-year financing plan as needed during a biennium.

Reason: Same as for parallel change to WAC 173-322A-200(1).

- WAC 173-322A-310(4)(e): Added authority for Ecology to adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

Reason: Same as for parallel change to WAC 173-322A-200(5).

8.3 Response to Comments

Issue 8-1: Should the pilot program of integrated planning grants be made permanent in the rule?

- Commenter: Maul Foster & Alongi, Inc. (3)
- Rule Section: WAC 173-322A-310

Response: YES

The commenter expressed support for making integrated planning grants a permanent program. Ecology appreciates the support for these grants.

In 2007, House Bill 1761 amended MTCA to authorize the use of additional strategies to expedite cleanups throughout the state (section 2, chapter 446, Laws of 2007). One of the strategies developed was to provide integrated planning grants to local governments to conduct assessments of brownfield properties and develop integrated project plans for their cleanup and adaptive reuse. The pilot program was implemented in accordance with guidelines established by Ecology.

In 2009, Ecology issued the first integrated planning grant. As of the end of 2013, Ecology had awarded 22 integrated planning grants, totaling approximately \$3.7 million. Considerable experience has been gained as this program has matured.

In 2013, Senate Bill 5296 further amended MTCA to explicitly recognize integrated planning grants and to clarify what types of activities may be funded under these grants (RCW 70.105D.070(4)(a)(ii) and (e)(iv)).

Ecology concurs that sufficient experience has been gained and legislative direction provided to adopt rule language governing integrated planning grants.

Issue 8-2: When prioritizing projects for funding, should the economic and community benefits of a project be considered in addition to the health and ecological risks posed by the contamination?

- Commenter: Maul Foster & Alongi, Inc. (1)
- Rule Section: WAC 173-322A-310(3)

Response: YES

The commenter expressed support for expanding the prioritization factors for integrated planning grants to include economic and community benefits, in addition to health and ecological risks of projects. Ecology appreciates this support and is adopting the proposed rule language.

In 2013, Senate Bill 5296 amended MTCA to specifically direct Ecology to consider both human and ecological risk and land reuse potential when allocating staffing and financial assistance. However, this does not preclude Ecology from allocating resources based solely on human or environmental risks (RCW 70.015D.030(1)(j)). Ecology believes the adopted rule reflects this statutory mandate.

Issue 8-3: When prioritizing projects for funding, should whether the hazardous waste site is located within a redevelopment opportunity zone be considered as a factor?

- Commenter: Maul Foster & Alongi, Inc. (4)
- Rule Section: WAC 173-322A-310(3)

Response: YES

Senate Bill 5296 authorizes local governments to establish “redevelopment opportunity zones” within their jurisdictions (RCW 70.105D.150). Within these zones, the legislation provides additional tools to facilitate the cleanup and redevelopment of brownfield properties. The commenter noted the legislation also talks about prioritizing grants for projects within these zones under certain conditions and that this should be recognized in the rule. Ecology concurs.

Ecology has revised the proposed rule to add as a separate priority-setting factor whether the contaminated site is within a redevelopment opportunity zone. Ecology is adding this factor to more explicitly reflect the funding priorities for integrated planning grants in the authorizing statute, RCW 70.105D.070(4)(e)(vii). Ecology has also revised WAC 173-322A-100 to define the term “redevelopment opportunity zone.” The definition is taken from the authorizing statute, RCW 70.105D.020(31).

However, because redevelopment opportunity zones are a new tool for local governments, and many other redevelopment authorities and tools exist, Ecology has decided to not make these zones a distinguishing criterion beyond that established in the statute. This may change over time as more experience is gained with these zones.

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Chapter 9: Oversight Remedial Action Grants and Loans (WAC 173-322A-320 and 173-322A-325)

This chapter provides a concise explanatory statement for WAC 173-322A-320 and 173-322A-325, which govern oversight remedial action grants and loans. This chapter provides a summary of the proposed rule (Section 9.1), describes any differences between the proposed and adopted rule (Section 9.2), and responds to any public comments on the proposed rule (Section 9.3).

9.1 Summary of Proposed Rule

WAC 173-322A-320 governs oversight remedial action grants. These grants provide funding to local governments that investigate and clean up hazardous waste sites under an order or decree. This section modifies and replaces WAC 173-322-070. Differences between the sections are tracked in “Rule Proposal with Tracked Changes” (Ecology, 2014). The proposed rule:

- Changed the project eligibility requirements. In particular: (1) the applicant may be a prospective purchaser; (2) the project may be conducted by a person other than the applicant; and (3) the project must be included in the ten-year financing plan.
- Changed the factors used to prioritize projects for funding or limit funding of projects.
- Changed the application and funding process, consistent with WAC 173-322A-200.
- Clarified which project costs are eligible and which project costs are ineligible for funding, including retroactive costs.
- Changed the criteria that define economically disadvantaged local governments, which are eligible to receive up to an additional 25% of eligible project costs.
- Added the authority to increase funding up to a total of 90% of the eligible project costs under certain conditions. This authority is limited to projects costing less than \$5 million.
- Added cash management requirements for multibiennial projects that limit funding to the amount that can be expended in a biennium and conditions future funding on whether substantial progress has been made under previous grants.
- Added the authority to enter into extended grants agreements with local governments for multibiennial projects exceeding \$20 million. Such projects would receive the highest priority for grant funds each biennium.
- Added the authority to provide grants for more than one project under a single grant agreement.

WAC 173-322A-325 governs oversight remedial action loans. These loans provide funding to local governments to meet the match requirement for oversight remedial action grants. This section modifies and replaces WAC 173-322-130. Differences between the sections are tracked in “Rule Proposal with Tracked Changes” (Ecology, 2014). The proposed rule:

- Eliminated some project eligibility requirements and simplifies others.
- Changed the application and funding process, consistent with WAC 173-322A-200.
- For standards loans, added terms and conditions for interest rates and interest accrual.

9.2 Differences between Proposed and Adopted Rules

The changes Ecology made to the text of the proposed rule, including all deletions and additions, are identified in Appendix D to this document. The changes (other than editing) and Ecology's reasons for making them are summarized below.

- WAC 173-322A-320(2): Clarified that a project may consist of remedial actions conducted under one or more orders or decrees at a single hazardous waste site.

Reason: To clarify the purpose and scope of the grant. A project may consist of more than one phase of remedial action. The phases are often conducted under separate orders or decrees. This change is based on public comment.

- WAC 173-322A-320(2)(c) and (d): Changed to also allow funding of projects where a person other than the applicant is required to conduct remedial actions under the federal cleanup law. Also edited for clarity.

Reason: To make consistent with eligibility requirements for projects where the applicant is conducting the remedial actions and to clarify eligibility requirements. This change is based in part on public comment.

- WAC 173-322A-320(3)(b): Added as a separate priority-setting factor whether the applicant is a prospective purchaser of a brownfield property within a redevelopment opportunity zone.

Reason: To more explicitly reflect funding priorities in the authorizing statute, RCW 70.105D.070(4)(a)(ii). This change is based on public comment.

- WAC 173-322A-320(4)(a) and 173-322A-325(5)(a): Changed how frequently Ecology will solicit project proposals from annually to biennially.

Reason: Same as for parallel change to WAC 173-322A-200(1).

- WAC 173-322A-320(4)(a) and 173-322A-325(5)(a): Added authority for Ecology to update its ten-year financing plan as needed during a biennium.

Reason: Same as for parallel change to WAC 173-322A-200(1).

- WAC 173-322A-320(4)(a) and 173-322A-325(5)(a): Added requirement that, for multibiennial projects, proposals must be updated biennially.

Reason: Same as for parallel change to WAC 173-322A-200(1).

- WAC 173-322A-320(4)(b) and 173-322A-325(5)(b): Added requirement that, for multibiennial projects, an application must be submitted before each biennium for which additional funds are requested.

Reason: Same as for parallel change to WAC 173-322A-200(2).

- WAC 173-322A-320(4)(e) and 173-322A-325(5)(e): Added authority for Ecology to adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

Reason: Same as for parallel change to WAC 173-322A-200(5).

- WAC 173-322A-320(6)(c): Changed the eligibility period of retroactive costs for negotiating an order or decree. The costs are eligible if they are incurred within 60 days after starting negotiations for an order or within 120 days after starting negotiations for a decree. Previously, the costs were eligible if they were incurred within 90 days before the effective date of the order or decree. Also reiterated that legal costs are not eligible.

Reason: To reflect the fact that most negotiating costs are incurred after the start of negotiations, not at the end of the process when drafts are submitted for public review and comment and for approval by governing bodies. The change is based on public comment.

- WAC 173-322A-320(6)(d)(i)(A): Changed the eligibility period of retroactive costs for conducting independent remedial actions. The costs are eligible if they are incurred within five years before the start of negotiations for the order or decree. Previously, the costs were eligible if they were incurred within five years before the effective date of the order or decree.

Reason: To distinguish between independent remedial action costs and negotiation costs, and to reflect the fact that, under WAC 173-340-515(2), Ecology must consent to any independent remedial actions conducted during the negotiation of an order or decree. The change is based in part on public comment.

- WAC 173-322A-320(6)(d)(ii): Established a \$600,000 limit on the eligible retroactive costs for independent remedial actions incurred before the start of negotiations for the order or decree.

Reason: To make consistent with funding limits for independent remedial action grants under WAC 173-322A-030(8).

9.3 Response to Comments

Issue 9-1: For the purposes of oversight remedial action grants, may a project include more than one phase of the cleanup process?

- Commenter: Seattle Public Utilities and Seattle City Light (10, 11, 13)
- Rule Sections: WAC 173-322A-320(2) and (10)

Response: YES

Ecology has revised the proposed rule in WAC 173-322A-320(2) to clarify that, for the purposes of an oversight remedial action grant, a project may consist of remedial actions conducted under one or more orders or decrees at a single hazardous waste site. The phases of a remedial action are often conducted under separate orders or decrees. For example, the remedial investigation and feasibility study could be conducted under an agreed order and the cleanup action could be conducted under a consent decree. All of these phases may be considered part of a single project. For a discussion of whether a project qualifies for an extended grant agreement under WAC 173-322A-320(10), see Issue 9-11.

Issue 9-2: Does a prospective purchaser have to sign an order or decree under MTCA to be eligible for oversight remedial action grants?

- Commenter: Seattle Public Utilities and Seattle City Light (21)
- Rule Sections: WAC 173-322A-320(2)(b)

Response: YES

Ecology has adopted the proposed rule language in WAC 173-322A-320(2)(b). The intent of the provision is to expand the availability of oversight remedial action grants to local governments that are prospective purchasers of contaminated property. A “prospective purchaser” is defined under MTCA to mean “a person who is not currently liable for remedial action at a facility and who proposes to purchase, redevelop, or reuse the facility” (RCW 70.105D.020(29)). Under MTCA, the attorney general is authorized to enter into consent decrees with such persons to settle their liability with the state (RCW 70.105D.040(5)). Ecology is also authorized to enter into agreed orders with such persons if the property is within a redevelopment opportunity zone (RCW 70.105D.040(6), as amended by Chapter 1, Laws of 2013 2nd spec. sess.).

Issue 9-3: Under what conditions may Ecology fund a project when a person other than the applicant is required to conduct the remedial actions?

- Commenter: Seattle Public Utilities and Seattle City Light (21, 22)
- Rule Sections: WAC 173-322A-320(2)(b), (c)(ii), and (d)

Response:

Ecology has revised the proposed rule language in WAC 173-322A-320(2) to allow funding of projects where a person other than the applicant is required to conduct remedial actions under the federal cleanup law (CERCLA), not just under MTCA. Ecology made this change to make the provision consistent with eligibility requirements for projects where the applicant is conducting the remedial actions.

Ecology has also edited WAC 173-322A-320(2) to help clarify more generally under what conditions Ecology may fund a project when a person other than the applicant is required to conduct the remedial actions under an order or decree. Ecology made these changes to address the concerns expressed by the commenter. In summary, the project must meet the following conditions:

- The applicant must be a potentially liable person, potentially responsible party, prospective purchaser at the site.
- The applicant must have signed the order or decree requiring a person other than the applicant to conduct remedial actions at the site.
- The applicant must have entered into a written agreement with the other person to reimburse the person for a portion of the remedial action costs incurred under the order or decree.
- If the order or decree is issued under the federal cleanup law (CERCLA), it must be signed or acknowledged in writing by Ecology as a sufficient basis for funding.

There are many sites where there are both public and private potentially liable persons (PLPs). At some of these sites, the private PLP is willing to conduct the required remedial actions if the public PLP is willing to pay for a portion of the remedial action costs. This provision is intended to recognize these situations and authorize local governments to apply for a grant to help pay for their portion of the costs.

Note that the old rule in WAC 173-322-070(2)(c)(iii) limited this provision to projects involving municipal solid waste landfill site. The new rule expands the provision to include all contaminated sites.

Issue 9-4: When prioritizing projects for funding, should the economic and community benefits of a project be considered in addition to the health and ecological risks posed by the contamination?

- Commenter: Maul Foster & Alongi, Inc. (1)
- Rule Sections: WAC 173-322A-320(3) and 173-322A-325(4)

Response: YES

The commenter expressed support for expanding the prioritization factors for oversight remedial action grants and loans to include economic and community benefits, in addition to health and ecological risks of projects. Ecology appreciates this support and is adopting the proposed rule language.

In 2013, Senate Bill 5296 amended MTCA to specifically direct Ecology to consider both human and ecological risk and land reuse potential when allocating staffing and financial assistance. However, this does not preclude Ecology from allocating resources based solely on human or environmental risks (RCW 70.015D.030(1)(j)). Ecology believes the adopted rule reflects this statutory mandate.

Issue 9-5: When prioritizing projects for funding, should whether the applicant is a prospective purchaser of a brownfield property within a redevelopment opportunity zone be considered as a factor?

- Commenter: Maul Foster & Alongi, Inc. (4)
- Rule Sections: WAC 173-322A-320(3) and 173-322A-325(4)

Response: YES

Senate Bill 5296 authorizes local governments to establish “redevelopment opportunity zones” within their jurisdictions (RCW 70.105D.150). Within these zones, the legislation provides additional tools to facilitate the cleanup and redevelopment of brownfield properties. The commenter noted the legislation also talks about prioritizing grants for projects within these zones under certain conditions and that this should be recognized in the rule. Ecology concurs.

Ecology has revised the proposed rule to add as a separate priority-setting factor whether the applicant is a prospective purchaser of a brownfield property within a redevelopment opportunity zone. Ecology is adding this factor to more explicitly reflect the funding priorities for oversight remedial action grants and loans in the authorizing statute, RCW 70.105D.070(4)(a)(ii). Ecology has also revised WAC 173-322A-100 to define the term “redevelopment opportunity zone.” The definition is taken from the authorizing statute, RCW 70.105D.020(31).

However, because redevelopment opportunity zones are a new tool for local governments, and many other redevelopment authorities and tools exist, Ecology has decided to not make these zones a distinguishing criterion beyond that established in the statute. This may change over time as more experience is gained with these zones.

Issue 9-6: For multiennial projects, must grant recipients update project proposals and applications each biennium?

- Commenter: Seattle Public Utilities and Seattle City Light (11, 13)
- Rule Sections: WAC 173-322A-200(1) and (2); 173-322A-320(4)(a) and (b); 173-322A-325(5)(a) and (b)

Response: YES

Ecology has revised the proposed rule to clarify that, for multiennial oversight remedial action grant projects, the grant recipient must:

- Update project proposals each biennium (WAC 173-322A-200(1); 173-322A-320(4)(a); 173-322A-325(5)(a)).
- Submit an application before each biennium for which additional funds are requested (WAC 173-322A-200(2); 173-322A-320(4)(b); 173-322A-325(5)(b)).

The provisions are necessary as part of a cash management approach for multiennial projects, as directed by the Legislature in 2013 (RCW 70.105D.030(3), as revised by Chapter 1, Laws of 2013 2nd spec. sess.). To implement this directive, the rule was revised to prohibit:

- The allocation of more funds each biennium than are estimated to be necessary to complete the scope of work for that biennium (WAC 173-322A-220(5)(a) and 173-322A-320(8)(a)).
- The allocation of more funds for a project if the funds awarded during a previous biennium have not been substantially expended or contracts have not been entered into to substantially expend the funds (WAC 173-322A-220(5)(b) and 173-322A-320(8)(b)).

This ensures that budgeted funds are put to work in the biennium in which they are appropriated instead of being set aside for work in future biennia.

Ecology needs the information in updated project proposals to update its long-term financing plan for the projects and make legislative budget requests for the next biennium. Ecology needs the information in the application, including a detailed scope of work and budget for the next biennium, to prepare new grant agreements. Ecology issues new grants instead of amending existing grants so that it can track the use of each legislative appropriation.

Issue 9-7: Should the limitation on funding negotiations of orders or decrees be modified?

- Commenter: Seattle Public Utilities and Seattle City Light (18)
- Rule Section: WAC 173-322A-320(6)(c)

Response: YES

Ecology has revised the proposed rule language in WAC 173-322A-320(6)(c) to change the eligibility period of retroactive costs for negotiating an order or decree. Under the proposed rule, the costs were eligible if they were incurred within 90 days before the effective date of the order or decree. Under the adopted rule, the costs are eligible if they are incurred within 60 days after starting negotiations for an order or within 120 days after starting negotiations for a decree. The time periods reflect the respective enforcement stay periods in the MTCA rule for negotiating agreed orders and consent decrees (WAC 173-340-530(6) and 173-340-520(1)(l)).

The commenter expressed concern that often negotiations can take much longer than 90 days and that, once agreement is reached, a governing body could take several additional months to approve the agreement. Ecology understands these concerns and has made the changes above to address the latter concern. However, Ecology believes a time limit for funding is necessary and appropriate to expedite negotiations and get to cleanup. One of the reasons the Legislature has transferred funds from the MTCA accounts has been the delay in expending funds on cleanups.

Ecology has also revised the proposed rule language to reiterate that legal costs are not eligible for funding, as provided under WAC 173-322A-320(5)(b)(viii). Costs for preparing and discussing the scope or work and schedule or other technical documents typically attached to an order or decree are eligible for funding.

Issue 9-8: What criteria will Ecology use to determine whether a project is eligible for more than 50% funding?

- Commenter: Seattle Public Utilities and Seattle City Light (14)
- Rule Section: WAC 173-322A- 320(7)(a)

Response:

Ecology has adopted the proposed rule language in WAC 173-322A-320(7)(a).

The commenter expressed concern that the criteria for determining whether to fund more than 50% of the eligible costs are subjective and will lead to a less than clear path for these determinations. The criteria are explained below.

- Economic disadvantage

The criteria used are entirely objective. The terms “economically disadvantaged county” and “economically disadvantaged city or town” are defined in the adopted rule (WAC 173-322A-100(15) and (16)). The definitions specify both the data set and criteria used to make the determination.

- Innovative technology

The criteria used are partly subjective. The term “innovative technology” is defined in the adopted rule (WAC 173-322A-100(28)), and is based on a definition that has been in place in the old rule for many years (WAC 173-322-020). To date, Ecology has issued only one innovative technology grant.

- Director’s discretion

The criteria used are partly subjective. The criteria reflect those specified in the authorizing statute (RCW 70.105D.070(4)(e)(vi)). Because this statutory authority is relatively new, Ecology has made a policy choice to not expand on these criteria in rule to provide flexibility in their implementation. Ecology does plan to provide additional explanation of these criteria in guidance. As experience is gained, Ecology anticipates the rule will be amended to reflect this experience. To date, Ecology has issued only seven such grants.

Issue 9-9: Should the economic disadvantage of neighborhoods within a city that is not disadvantaged be considered when determining whether to fund a higher share of eligible costs?

- Commenter: Seattle Public Utilities and Seattle City Light (15, 17)
- Rule Sections: WAC 173-322A-320(7)(a)(i) and 173-322A-100(16)

Response: NO

Ecology has adopted the proposed rule language. The concept of economic disadvantage is used in the rule to authorize additional funding if a city is economically distressed and has difficulty paying for the cleanup of a contaminated site. It is a measure of the economic health of the overall city, since the wealth of the entire city is leveraged when paying for the cleanup. It would be inappropriate to measure this wealth on a neighborhood level, even if the data existed to allow this.

The adopted rule does include as a prioritization factor whether the contaminated site is located within a highly impacted community (WAC 173-322A-320(3)(d)). This environmental justice/ equity factor will be applied on a neighborhood level when prioritizing grants, provided adequate data is available.

Issue 9-10: May Ecology allocate more funds for a project each biennium than are estimated to be necessary to complete the scope of work for that biennium?

- Commenter: Seattle Public Utilities and Seattle City Light (11)
- Rule Section: WAC 173-322A- 320(8)(a) and 173-322A-220(5)(a)

Response: NO

Ecology has adopted the proposed rule language in WAC 173-322A-320(8)(a) and 173-322A-220(5)(a). The provision is necessary as part of a cash management approach for multibiennial projects, which is required by the Legislature (RCW 70.105D.030(3), as revised by Chapter 1, Laws of 2013 2nd spec. sess.). To implement this directive, the rule prohibits:

- The allocation of more funds each biennium than are estimated to be necessary to complete the scope of work for that biennium (WAC 173-322A-220(5)(a) and 173-322A-320(8)(a)).
- The allocation of more funds for a project if the funds awarded during a previous biennium have not been substantially expended or contracts have not been entered into to substantially expend the funds (WAC 173-322A-220(5)(b) and 173-322A-320(8)(b)).

This ensures that budgeted funds are put to work in the biennium in which they are appropriated instead of being set aside for work in future biennia.

Issue 9-11: May Ecology provide an extended grant agreement for a project if the eligible costs are less than \$20 million?

- Commenter: Seattle Public Utilities and Seattle City Light (10)
- Rule Section: WAC 173-322A-320(10)(a)

Response: NO

Ecology has adopted the proposed rule language in WAC 173-322A-320(10)(a). The authorizing statute specifically limits the use of extended grant agreements to projects with eligible costs exceeding \$20 million (RCW 70.105D.070(4)(e)(i), as amended by Chapter 1, Laws of 2013 2nd spec. sess.). While not explicated stated in the legislation, it is Ecology's understanding the limit was set to prevent budgeted funds from being tied up in a small subset of cleanup sites.

When determining whether an oversight remedial action project meets the \$20 million eligible cost threshold, Ecology plans to apply the following guidelines:

- Eligible costs will be calculated as if the entire project is being conducted at the time of application, with no discounting of future costs.
- For a site where there is more than one local government PLP, Ecology will include the eligible costs of all the local governments.

Issue 9-12: May Ecology fund more than 50% of the eligible costs for projects under an extended grant agreement?

- Commenter: Seattle Public Utilities and Seattle City Light (15)
- Rule Section: WAC 173-322A-320(10)(c)

Response: NO

Ecology has adopted the proposed rule language in WAC 173-322A-320(10)(c). The authorizing statute specifically prohibits funding more than 50% of the eligible costs for projects under an extended grant agreement (RCW 70.105D.070(4)(e)(i)(B), as amended by Chapter 1, Laws of 2013 2nd spec. sess.). While not explicated stated in the legislation, it is Ecology's understanding the limit was set to prevent budgeted funds from being tied up in a small subset of cleanup sites.

Chapter 10: Independent Remedial Action Grants (WAC 173-322A-330)

This chapter provides a concise explanatory statement for WAC 173-322A-330, which governs independent remedial action grants. This chapter provides a summary of the proposed rule (Section 10.1), describes any differences between the proposed and adopted rule (Section 10.2), and responds to any public comments on the proposed rule (Section 10.3).

10.1 Summary of Proposed Rule

WAC 173-322A-330 governs independent remedial action grants. These grants provide funding to local governments that investigate and clean up hazardous waste sites independently under the voluntary cleanup program. This section modifies and replaces WAC 173-322-080. Differences between the sections are tracked in “Rule Proposal with Tracked Changes” (Ecology, 2014).

The proposed rule:

- Provided two reimbursement options: post-cleanup reimbursement grants (existing option) and periodic reimbursement grants (new option).
- For periodic reimbursement grants, specified terms and conditions and authorized Ecology to withhold up to 20% of each payment until the cleanup is completed.
- Changed the project eligibility requirements. In particular: (1) the applicant may be a prospective purchaser; (2) the project may involve the cleanup of just a property within a site; and (3) the applicant does not need to have access to conduct the cleanup, provided that such access is obtained in accordance with a schedule.
- Changed the factors used to prioritize projects for funding or limit funding of projects.
- Changed the application and funding process, consistent with WAC 173-322A-200.
- Clarified which project costs are eligible and which project costs are ineligible for funding, including retroactive costs.
- Increased the limit on eligible project costs from \$400,000 to \$600,000.
- Changed the criteria that define economically disadvantaged local governments, which are eligible to receive up to an additional 25% of eligible project costs.
- Added the authority to increase funding up to a total of 90% of the eligible project costs under certain conditions.
- Added the authority to provide grants for more than one project under a single grant agreement.

10.2 Differences between Proposed and Adopted Rules

The changes Ecology made to the text of the proposed rule, including all deletions and additions, are identified in Appendix D to this document. The changes (other than editing) and Ecology’s reasons for making them are summarized below.

- WAC 173-322A-330(4)(b): Added as a separate priority-setting factor whether the applicant is a prospective purchaser of a brownfield property within a redevelopment opportunity zone.

Reason: To more explicitly reflect funding priorities in the authorizing statute, RCW 70.105D.070(4)(a)(ii). This change is based on public comment.

- WAC 173-322A-330(5)(a): Changed how frequently Ecology will solicit project proposals from annually to biennially.

Reason: Same as for parallel change to WAC 173-322A-200(1).

- WAC 173-322A-330(5)(a): Added authority for Ecology to update its ten-year financing plan as needed during a biennium.

Reason: Same as for parallel change to WAC 173-322A-200(1).

- WAC 173-322A-330(5)(e): Added authority for Ecology to adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

Reason: Same as for parallel change to WAC 173-322A-200(5).

- WAC 173-322A-330(10): For periodic reimbursement grants, clarified that the purpose of withholding 20% of each payment is to help ensure the recipient completes the cleanup of the hazardous waste site or property.

Reason: To clarify why payment is withheld and when payment of withheld amounts may be made. This change is based on public comment.

10.3 Response to Comments

Issue 10-1: Should Ecology be allowed to fund projects periodically during the cleanup instead of just at the end of the cleanup?

- Commenter: Maul Foster & Alongi, Inc. (2)
- Rule Sections: WAC 173-322A-330(2) and (10)

Response: YES

The commenter expressed support for creating an option for reimbursing costs on a periodic basis during the cleanup, as opposed to just at the end of the cleanup. Ecology appreciates this support. This change reflects a change to MTCA in Senate Bill 5296 authorizing Ecology to provide periodic reimbursement (RCW 70.105D.070(4)(e)(ii)).

Issue 10-2: When prioritizing projects for funding, should the economic and community benefits of a project be considered in addition to the health and ecological risks posed by the contamination?

- Commenter: Maul Foster & Alongi, Inc. (1)
- Rule Section: WAC 173-322A-330(4)

Response: YES

The commenter expressed support for expanding the prioritization factors for independent remedial action grants to include economic and community benefits, in addition to health and ecological risks of projects. Ecology appreciates this support and is adopting the proposed rule language.

In 2013, Senate Bill 5296 amended MTCA to specifically direct Ecology to consider both human and ecological risk and land reuse potential when allocating staffing and financial assistance. However, this does not preclude Ecology from allocating resources based solely on human or environmental risks (RCW 70.015D.030(1)(j)). Ecology believes the adopted rule reflects this statutory mandate.

Issue 10-3: When prioritizing projects for funding, should whether the applicant is a prospective purchaser of a brownfield property within a redevelopment opportunity zone be considered as a factor?

- Commenter: Maul Foster & Alongi, Inc. (4)
- Rule Section: WAC 173-322A-330(4)

Response: YES

Senate Bill 5296 authorizes local governments to establish “redevelopment opportunity zones” within their jurisdictions (RCW 70.105D.150). Within these zones, the legislation provides additional tools to facilitate the cleanup and redevelopment of brownfield properties. The commenter noted the legislation also talks about prioritizing grants for projects within these zones under certain conditions and that this should be recognized in the rule. Ecology concurs.

Ecology has revised the proposed rule to add as a separate priority-setting factor whether the applicant is a prospective purchaser of a brownfield property within a redevelopment opportunity zone. Ecology is adding this factor to more explicitly reflect the funding priorities for independent remedial action grants in the authorizing statute, RCW 70.105D.070(4)(a)(ii). Ecology has also revised WAC 173-322A-100 to define the term “redevelopment opportunity zone.” The definition is taken from the authorizing statute, RCW 70.105D.020(31).

However, because redevelopment opportunity zones are a new tool for local governments, and many other redevelopment authorities and tools exist, Ecology has decided to not make these zones a distinguishing criterion beyond that established in the statute. This may change over time as more experience is gained with these zones.

Issue 10-4: Should Ecology reimburse costs incurred more than five years before the submission of a completed application?

- Commenter: Seattle Public Utilities and Seattle City Light (24, 25)
- Rule Sections: WAC 173-322A-330(7)(a) and 173-322A-330(10)(b)(iv)

Response: NO

Ecology has adopted the proposed rule language, which reflects an existing requirement (WAC 173-322-080(6)). Retroactive costs incurred more than five years before the submission of a completed application are not eligible for funding. The limit is designed to reflect the nature of most independent cleanups and to incentivize more expeditious cleanups. The limit also reflects the practical difficulty in adequately documenting older costs.

Post-cleanup reimbursement grants are designed for smaller, less complex sites. The applicant may apply for such a grant only after Ecology has issued a no further action determination for the site or property (WAC 173-322A-330(3)(c)). The application is not complete without the no further action determination. Under the voluntary cleanup program, Ecology's goal is to respond to requests for written opinions with 90 days. On average, Ecology responds within about 45 days. The applicant should submit an application as soon as possible after receiving a no further action determination. Costs incurred more than five years before the date of the completed application are not eligible for funding (WAC 173-322A-330(7)(a)).

Periodic reimbursement grants are designed for larger, more complex sites. The applicant may apply for such a grant at any time during the cleanup process. However, costs incurred before the date of the completed application will only be reimbursed after Ecology has issued a no further action determination for the site or property (WAC 173-322A-330(10)(b)(iv)). Costs incurred more than five years before the date of the completed application are not eligible for funding (WAC 173-322A-330(7)(a)). The applicant should therefore submit an application within five years of starting the cleanup to ensure that all costs are eligible for funding.

Issue 10-5: Should the economic disadvantage of neighborhoods within a larger city be considered when determining whether to fund a higher share of eligible costs?

- Commenter: Seattle Public Utilities and Seattle City Light (15, 17)
- Rule Sections: WAC 173-322A-330(9)(a)(i) and 173-322A-100(16)

Response: NO

Ecology has adopted the proposed rule language. The concept of economic disadvantage is used in the rule to authorize additional funding if a city is economically distressed and has difficulty paying for the cleanup of a contaminated site. It is a measure of the economic health of the overall city, since the wealth of the entire city is leveraged when paying for the cleanup. It would be inappropriate to measure this wealth on a neighborhood level, even if the data existed to allow this.

The adopted rule does include as a prioritization factor whether the contaminated site is located within a highly impacted community (WAC 173-322A-330(4)(d)). This environmental justice/ equity factor will be applied on a neighborhood level when prioritizing grants, provided adequate data is available.

Issue 10-6: For periodic reimbursement grants, does the recipient need to complete remedial actions at the site or property for withheld funds to be paid by Ecology?

- Commenter: Seattle Public Utilities and Seattle City Light (23)
- Rule Section: WAC 173-322A-320(10)(b)(iii)

Response: YES

Ecology has revised the proposed rule to clarify that Ecology may withhold twenty percent of each periodic reimbursement payment as security for the recipient's completion of remedial actions at the site or property. The completion of remedial actions at the site or property is signified by the issuance of a no further action determination by Ecology. Any funds withheld by Ecology may be paid to the recipient at this time.

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Chapter 11: Area-wide Groundwater Investigation Grants (WAC 173-322A-340)

This chapter provides a concise explanatory statement for WAC 173-322A-340, which governs area-wide groundwater investigation grants. This chapter provides a summary of the proposed rule (Section 11.1), describes any differences between the proposed and adopted rule (Section 11.2), and responds to any public comments on the proposed rule (Section 11.3).

11.1 Summary of Proposed Rule

WAC 173-322A-340 governs area-wide groundwater investigation grants. These grants provide funding to local governments that investigate known or suspected area of area-wide groundwater contamination. This section modifies and replaces WAC 173-322-090. Differences between the sections are tracked in “Rule Proposal with Tracked Changes” (Ecology, 2014). The proposed rule:

- Limited the grants to area-wide groundwater investigations; the grants may not be used for cleaning up sites.
- Changed the project eligibility requirements for the grants. In particular: (1) the applicant does not need to be a potentially liable person or seek reimbursement of grant funds from such a person; (2) the applicant does not need to have access to conduct the investigation, provided that such access is obtained in accordance with a schedule; (3) the project must be included in the ten-year financing plan; and (4) the project must not be required under an order or decree (such projects may be funded by an oversight remedial action grant).
- Changed the factors used to prioritize projects for funding or limit funding of projects.
- Changed the application and funding process, consistent with WAC 173-322A-200.
- Changed or clarified which project costs are eligible and which project costs are ineligible for funding, including retroactive costs.
- Established a limit on eligible project costs of \$500,000.

11.2 Differences between Proposed and Adopted Rules

The changes Ecology made to the text of the proposed rule, including all deletions and additions, are identified in Appendix D to this document. The changes (other than editing) and Ecology’s reasons for making them are summarized below.

- WAC 173-322A-340(3)(b): Added as a separate priority-setting factor whether the hazardous waste site is within a redevelopment opportunity zone.

Reason: To more explicitly reflect funding priorities in the authorizing statute, RCW 70.105D.070(4)(e)(vii). This change is based on public comment.

- WAC 173-322A-340(4)(a): Changed how frequently Ecology will solicit project proposals from annually to biennially.

Reason: Same as for parallel change to WAC 173-322A-200(1).

- WAC 173-322A-340(4)(a): Added authority for Ecology to update its ten-year financing plan as needed during a biennium.

Reason: Same as for parallel change to WAC 173-322A-200(1).

- WAC 173-322A-340(4)(e): Added authority for Ecology to adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

Reason: Same as for parallel change to WAC 173-322A-200(5).

11.3 Response to Comments

Issue 11-1: When prioritizing projects for funding, should the economic and community benefits of a project be considered in addition to the health and ecological risks posed by the contamination?

- Commenter: Maul Foster & Alongi, Inc. (1)
- Rule Section: WAC 173-322A-340(3)

Response: YES

The commenter expressed support for expanding the prioritization factors for area-wide groundwater investigation grants to include economic and community benefits, in addition to health and ecological risks of projects. Ecology appreciates this support and is adopting the proposed rule language.

In 2013, Senate Bill 5296 amended MTCA to specifically direct Ecology to consider both human and ecological risk and land reuse potential when allocating staffing and financial assistance. However, this does not preclude Ecology from allocating resources based solely on human or environmental risks (RCW 70.015D.030(1)(j)). Ecology believes the adopted rule reflects this statutory mandate.

Issue 11-2: When prioritizing projects for funding, should whether the hazardous waste site is located within a redevelopment opportunity zone be considered as a factor?

- Commenter: Maul Foster & Alongi, Inc. (4)
- Rule Section: WAC 173-322A-340(3)

Response: YES

Senate Bill 5296 authorizes local governments to establish “redevelopment opportunity zones” within their jurisdictions (RCW 70.105D.150). Within these zones, the legislation provides additional tools to facilitate the cleanup and redevelopment of brownfield properties. The commenter noted the legislation also talks about prioritizing grants for projects within these zones under certain conditions and that this should be recognized in the rule. Ecology concurs.

Ecology has revised the proposed rule to add as a separate priority-setting factor whether the contaminated site is within a redevelopment opportunity zone. Ecology is adding this factor to more explicitly reflect the funding priorities for integrated planning grants in the authorizing statute, RCW 70.105D.070(4)(e)(vii). Ecology has also revised WAC 173-322A-100 to define the term “redevelopment opportunity zone.” The definition is taken from the authorizing statute, RCW 70.105D.020(31).

However, because redevelopment opportunity zones are a new tool for local governments, and many other redevelopment authorities and tools exist, Ecology has decided to not make these zones a distinguishing criterion beyond that established in the statute. This may change over time as more experience is gained with these zones.

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Chapter 12: Safe Drinking Water Action Grants (WAC 173-322A-350)

This chapter provides a concise explanatory statement for WAC 173-322A-350, which governs safe drinking water action grants. This chapter provides a summary of the proposed rule (Section 12.1), describes any differences between the proposed and adopted rule (Section 12.2), and responds to any public comments on the proposed rule (Section 12.3).

12.1 Summary of Proposed Rule

WAC 173-322A-350 governs safe drinking water action grants. These grants provide funding to local governments, or a local government applying on behalf of a purveyor, to help provide safe drinking water to areas contaminated by, or threatened by contamination from, hazardous waste sites. This section modifies and replaces WAC 173-322-100. Differences between the sections are tracked in “Rule Proposal with Tracked Changes” (Ecology, 2014). The proposed rule:

- Clarified several project eligibility requirements and prohibits the use of the grant for projects required under an order or decree. Such projects may be funded by an oversight remedial action grant.
- Changed the factors used to prioritize projects for funding or limit funding of projects.
- Changed the application and funding process, consistent with WAC 173-322A-200.
- Changed or clarified which project costs are eligible and which project costs are ineligible for funding, including retroactive costs. Changes included: (1) the cost of individual service connections is eligible without private financing, but such costs are not eligible for undeveloped lots; (2) the costs of oversizing or extending a water system for future development is ineligible; and (3) local improvement districts assessments are ineligible.
- Increased the share of eligible project costs that may be funded from 50% to 90%. The local government does not need to be economically disadvantaged to qualify for additional funding.

12.2 Differences between Proposed and Adopted Rules

The changes Ecology made to the text of the proposed rule, including all deletions and additions, are identified in Appendix D to this document. The changes (other than editing) and Ecology’s reasons for making them are summarized below.

- WAC 173-322A-350(2)(e): Clarified that Ecology is the one that determines whether the drinking water source has been contaminated, or is threatened to be contaminated, by one or more hazardous substances.

Reason: To clarify who determines whether the specified condition has been met.

- WAC 173-322A-350(3)(e): Added as a priority-setting factor the ability of the grant to leverage other public or private funding for the provision of safe drinking water.

Reason: To be consistent with the priority-setting factors for other grants and to reflect the fact that other funding is still necessary to conduct the actions.

- WAC 173-322A-350(4)(a): Changed how frequently Ecology will solicit project proposals from annually to biennially.

Reason: Same as for parallel change to WAC 173-322A-200(1).

- WAC 173-322A-350(4)(a): Added authority for Ecology to update its ten-year financing plan as needed during a biennium.

Reason: Same as for parallel change to WAC 173-322A-200(1).

- WAC 173-322A-350(4)(e): Added authority for Ecology to adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

Reason: Same as for parallel change to WAC 173-322A-200(5).

12.3 Response to Comments

No comments were received specifically on this section of the proposed rule. Comments about the application process described in WAC 173-322A-350(4) are addressed in Chapter 4 of this document.

Chapter 13: Meth Lab and Derelict Vessel Grants (Eliminated)

This chapter provides a concise explanatory statement for the elimination of meth lab and derelict vessel grants, which were governed by former WAC 173-322-110 and 173-322-120, respectively. This chapter provides a summary of the proposed elimination of the grants (Section 13.1), describes any differences between the proposed and adopted rule (Section 13.2), and responds to any public comments on the proposed rule (Section 13.3).

12.1 Summary of Proposed Rule

Meth lab site assessment and cleanup grants were governed by WAC 173-322-110. These grants provided funding to local health districts and departments that assessed and cleaned up sites of meth production. The proposed rule eliminated these grants.

Derelict vessel remedial action grants were governed by WAC 173-322-120. These grants provided funding to local governments that clean up and dispose of hazardous substances from abandoned or derelict vessels that posed a threat to human health or the environment. The proposed rule eliminated these grants.

12.2 Differences between Proposed and Adopted Rules

No changes were made to the proposed rule. The grants are eliminated.

12.3 Response to Comments

No comments were received on the proposed elimination of these grants.

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References

Laws of 2007, Chapter 446 (Substitute House Bill 1761).

<http://dlr.leg.wa.gov/billsummary/default.aspx?year=2007&bill=1761>

Laws of 2013 2nd Special Session, Chapter 1 (Second Engrossed Second Substitute Senate Bill 5296). <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5296&year=2013>

Revised Code of Washington (RCW), Chapter 34.05. Administrative Procedure Act.

Revised Code of Washington (RCW), Chapter 70.105D. Model Toxics Control Act.

WA Administrative Code (WAC), Chapter 173-322. Remedial Action Grants and Loans.

WA Administrative Code (WAC), Chapter 173-322A. Remedial Action Grants and Loans.

WA Administrative Code (WAC), Chapter 173-340. Model Toxics Control Act – Cleanup.

WA Department of Ecology (Ecology), 2014. Model Toxics Control Accounts Biennial Report: 2011-2013 Biennium. Publication number 13-09-058.

WA Department of Ecology (Ecology), 2014. Rule Proposal with Tracked Changes: Chapters 173-322 and 173-322A WAC, Remedial Action Grants and Loans. Publication number 14-09-048.

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Appendix A

Commenter Index

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Purpose of Index

The Commenter Index on the following page identifies the people who commented on the rule proposal and where you can find Ecology's response to their comments.

Commenters

In total, 3 people submitted comments on the rule proposal. Ecology assigned each commenter a unique identification number (from 1 to 3) in the order comments were submitted. The commenters are identified in the Index by:

- Number;
- Name and affiliation; and
- The date comments were submitted.

Comments

Ecology identified a total of 25 separate comments. Ecology assigned each of those comments a unique number (from 1 to 25). That number is identified in:

- The Index; and
- The margins of the written comments (Appendix B) and the public hearing transcripts (Appendix C).

Issues

For each of those 25 comments, the Index identifies the Issue number (e.g., "6-2") in the Concise Explanatory Statement where Ecology responded to the comment.

Commenter Index

Commenter				Response to Comment	
#	Name	Affiliation	Date	Comment #	Issue #s
1	Michael P. Stringer, Project Planner	Maul Foster & Alongi, Inc.	5/29/14	1	8-2, 9-4, 10-2, 11-1
				2	10-1
				3	8-1
				4	8-3, 9-5, 10-3, 11-2
				5	4-2, 4-3
2	John M. Mohr, Executive Director	Port of Everett	6/04/14	6	6-4, 6-7
				7	6-2, 6-3, 6-7
				8	6-2, 6-3, 6-4, 6-7
				9	6-5, 6-6
3	Susan Saffery	Seattle Public Utilities and Seattle City Light	6/05/14	10	9-1, 9-11
				11	4-1, 6-1, 9-1, 9-6, 9-10
				12	5-1
				13	4-1, 9-1, 9-6
				14	9-8
				15	9-9, 9-12, 10-5
				16	6-9
				17	9-9, 10-5
				18	9-7
				19	6-8
				20	5-2
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				22	9-3
				23	10-6
24	10-4				
25	10-4				

Appendix B

Copies of Written Comments

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June 4, 2014

Adrienne Dorrah
Department of Ecology
Toxics Cleanup Program
PO Box 47600
Olympia, WA 98504-7600

RE: Comments of Proposed Amendments to Chapter 173-322 WAC

Dear Ms. Dorrah:

The Port of Everett (“Port”) appreciates the opportunity to comment on the Department of Ecology’s (“Ecology”) proposed amendments to the Remedial Action Grant and Loan rules. The Port has been an active partner with Ecology in the effort to clean up Puget Sound, with multiple sites proceeding through various stages of cleanup under MTCA agreed orders or consent decrees. Through our partnership, Ecology and the Port have made incredible strides in reaching our mutual cleanup goals. We recognize that reaching these goals is highly important for the community of Everett as they will provide the foundation for an environmentally and economically healthy waterfront. We greatly appreciate the past grant funds that the Port has received – in our opinion, the careful use of these funds has resulted directly in high quality cleanups on a reasonable timeframe.

Overall, the Port believes the proposed rule amendments are well crafted and will facilitate faster and more efficient cleanups. The Port has only two specific comments on the rule.

- WAC 173-322A-220 (6): The Port believes the amendment allowing proceeds from contribution settlements to be used as match is a positive and constructive change to the rules. However, the Port requests clarification from Ecology on three points:
 - 6 ○ The Port requests Ecology to confirm that, even if a contribution settlement occurs late in the course of a cleanup process (say, just after approval of the Cleanup Action Plan), Ecology will compare the settlement against the total grant-eligible remedial action costs for the site, including costs incurred prior to the settlement, for purposes of determining if any refund is due to Ecology under WAC 173-322A-220 (6)(c). This is the way Ecology has historically evaluated insurance settlements under the grant rules, and clarification from Ecology that contribution settlement will be treated the same way would be appreciated.
 - 7 ○ The Port additionally requests confirmation from Ecology that contribution settlements may be used as match for cleanups that are in progress and covered by a current grant agreement at the time the rule amendments become effective. By

B-1

confirming the applicability of the contribution settlement match provisions to cleanups that straddle the effective date of the rule amendments, along with the clarification requested above, Ecology will provide grant recipients a clear understanding of how this aspect of the rule amendments applies to current and future cleanups.

- 8
- Finally, the Port requests confirmation from Ecology that for “straddling” cleanups, a contribution settlement that occurs before the effective date of the rule may be used as match.
- 9
- WAC 173-322A-220 (6)(a): The Port is concerned that the notice required under this provision is vague, confusing, and undermines the confidentiality of Port legal strategy and puts the Port at a strategic disadvantage compared with private PLPs. The provisions of subsection 220 (6)(a) require that a grant recipient provide notice to Ecology of “an action to recover the claim.” Neither “action” nor “claim” are defined, but we assume a “claim” is a claim for contribution under RCW 70.105D.080. While the filing of a lawsuit would be an obvious and specific “action” to recover a claim, the vast majority of MTCA contribution matters never make it to court. Instead, they are resolved as the result of non-judicial settlement negotiations between the PLPs. The decision to enter into such settlement negotiations is a matter of legal strategy discussed by the Port Commission in executive session. As authorized by law, settlement matters are not discussed by the Commission in public session until a provisional settlement agreement has been reached in order to protect the Port’s legal position. If the Port is required under subsection 220 (6)(a) to notify Ecology of the initiation of settlement negotiations with other PLPs, such notice would be a public document describing an otherwise confidential legal strategy decision made by the Port. In other words, the provisions of subsection 220 (6)(a) would (at least partially) conflict with the executive session provisions of the Open Public Meetings Act, RCW 42.30.110. Requiring notice of settlement negotiations to Ecology would also put the Port at a disadvantage to other PLPs, because the decision to enter into settlement negotiation with a particular PLP (or set of PLPs) on a multi-party site is often a matter of strategy aimed at providing leverage over certain parties to expedite the cleanup and/or gain a more equitable allocation of liability. For all the forgoing reasons, we urge Ecology to omit subsection 220 (6)(a) from the final rule.

Thank you for your consideration of our comments. We look forward to working with Ecology under the revised rules as part of our larger cooperative effort to advance the Everett cleanup sites and reach the goals of the Puget Sound Initiative.

Sincerely,



John M. Mohr
Executive Director

June 5, 2014

To: Adrienne Dorrah, Department of Ecology, Toxics Cleanup Program

From: Susan Saffery, Seattle Public Utilities (SPU), Corporate Policy

Subject: SPU and SCL Comments - Remedial Action Grant Program Draft Rule Chapter 173-322A WAC

We appreciate the opportunity to comment on the draft rule for the Remedial Action Grant Program Chapter 173-322A WAC. These comments reflect the input of professional staff from Seattle Public Utilities and Seattle City Light with scientific, policy and programmatic expertise in this subject matter. We appreciate the hard work of Ecology staff to inform interested parties and discuss changes in State statute and related rule changes. We hope these comments will be useful - and addressed - as you revise and finalize this rule. When reviewing our comments, please feel free to contact me if you need clarification or would like more information.

Comments

- 10 1. GENERAL REQUIREMENT - Extended grant agreements
11 This seems to limit projects to \$20M+, which will not make sense in some instances. For example: the South Park Landfill project grant takes us through the RI/FS/DCAP and this phase of the project is therefore less than \$20M; Ecology would appear to need to write a new grant each biennium or if more funds are added during a biennium rather than simply amend the agreement. This would increase transaction costs and time as the City would have to re-apply for a grant each biennium or any time funds were added in between.
Proposed improvement: Extended grant agreements should be provided for long-term projects, preferably wherever needed, but at least those that are already under an agreement.
- 12 2. GENERAL REQUIREMENT - Prioritization
We have concern about the criterion that projects will only be given priority if they can “show substantial progress.” “Substantial progress” is not defined. Does the review take into account delays outside the PLP’s control (e.g. potentially, delays with regulatory review)?
Proposed improvement: Site progress will take into account factors beyond the PLPs’ control that may hinder progress.
- 13 3. OVERSIGHT GRANTS - Section (4) Application Process
It is not clear under what circumstances a grant application is required. Do existing grant-funded projects have to reapply? How often? What are the criteria for triggering re-application?

- 14 4. OVERSIGHT GRANTS - Funding of Eligible Costs
Section (7)(a) provides general criteria for funding certain projects at over 50% of eligible costs; however, there is no mention of how these determinations will be made. The criteria seem subjective and could lead to a less than clear path for Ecology to make eligibility determinations.
- 15 This section specifically excises extended grant agreements from higher-than-50% funding. Given that several high profile projects with extended grant agreements are in economically disadvantaged communities, why not include this grant category?
Proposed improvement: include extended grant agreements, at least in economically disadvantaged communities. (Modified as suggested in comment #6 below.)
- 16 5. GENERAL REQUIREMENT – Reimbursement schedules
We don't fully understand the proposal requiring monthly reimbursement schedules but are concerned it could be unnecessarily cumbersome and burdensome, considering we only bill the grant quarterly.
- 17 6. GENERAL REQUIREMENT - Economic disadvantage criteria
The proposed rule will give priority to cities and towns with lower incomes and employment. This is a problem in neighborhoods like South Park, located in a city that has high income overall, but where residents of this community would meet the criteria. Urban areas have economic challenges as well and cleanups in low-income areas could happen sooner with equitable access to grant funding.
Proposed improvement: More accurately define “economically disadvantaged communities” to include economically disadvantaged neighborhoods, cleanup or other areas located in more affluent cities.
- 18 7. OVERSIGHT GRANTS – eligible costs timeline
Costs incurred negotiating an order or decree – restricts eligibility to only costs incurred 90 days prior to the effective date of the order or decree. We understand the intent but more flexibility would be useful and appropriate, given the time it takes to negotiate with other PLPs and get city council approval to sign the order or decree.
Proposed improvement: extend to 18 months to compensate for the 3-6 month governance process and PLP negotiations required plus reasonable Ecology negotiation time.
- 19 8. OVERSIGHT/GRANTS - Fiscal Controls
Section 7.c. states: *“Requests for reimbursement and adequate documentation of eligible costs incurred after the agreement signature date must be submitted to the department within ninety days of incurring the costs.”*
This is a complicated and potentially problematic when there are incidences when legal settlements may occur before remedial actions are implemented. In the South Park Landfill case, the City paid a settlement to SPPD to cover certain elements of construction of SPPD's remedy but cannot bill the grant until construction is underway because Ecology requires backup invoices in order to reimburse our settlement amount. There may be years between a negotiated settlement of this kind and the actual construction that generates the necessary documentation of costs. And it can actually be desirable to Ecology if PLPs negotiate settlements earlier in the process to avoid delays later.
Proposed improvement: remove or modify this language to support the ability to negotiate legal settlements earlier in the process.

- 20 9. OVERSIGHT/GRANTS - Funding Priority
Section 3(h) (this is also applicable to the independent cleanup section) provides specific factors Ecology will consider in determining funding priorities but then adds a catchall in 3(h) that states “Other factors as determined and published by the department.” If new factors are to be considered, will there be the opportunity to comment on these before they are implemented?
10. OVERSIGHT - Remedial Action Grants
- 21 • WAC 173-322-070 (2)(c)(iii) – This language appears to imply that a prospective purchaser needs to have signed an order or decree. A prospective purchaser is unlikely to sign up to an order for property he/she does not own.
Proposed improvement: Revise language to state that while the site may be under Order, a prospective purchaser may be conducting a cleanup without having signed the Order.
- 22 • WAC 173-322-070(2)(c)(iii). As currently written it is not clear how this criteria works. It seems like an unusual situation where an applicant would sign an order or decree requiring another party to conduct a remedial action?
Proposed improvement: We would like to have the following relationship allow local governments that are PLPs to be eligible for a grant: Where the local government has entered into an agreement with another party, we should be able to reimburse that party for a portion of the remedial action costs incurred under an order or decree signed by the local government, and visa-versa.
- 23 11. INDEPENDENT CLEANUPS
Section (10) states Ecology can withhold 20% from reimbursements “as security for the recipient’s performance” but does not specify how performance is defined. This provision seems arbitrary and may invite dispute.
- 24 12. INDEPENDENT CLEANUPS - Retroactive cost eligibility
Section 7, on retroactive cost eligibility, states that costs must be incurred within five years of the date of the completed grant application. Is there an eligibility requirement for when cleanup was completed? For example, if the cleanup required 6 years of effort, would the first year of cleanup costs be covered? Or if the cleanup is completed in 2 years and the grant application is submitted within 1 year following (3 yrs total), but Ecology does not issue a No Further Action decision until after the 5 year deadline, are costs still eligible for reimbursement?
- 25 13. INDEPENDENT CLEANUPS – Post-cleanup Reimbursement
Section 10, Post-cleanup reimbursement of retroactive costs – same comment as Comment 13, above. What if Ecology does not issue a No Further Action determination until after the 5-year deadline for retroactive costs has passed?
Proposed improvement: The concerns raised in comments #12/13 should be addressed in the final rule.

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Appendix C

Transcript of Public Hearing

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Bari Schreiner:

So I'm Bari Schreiner, hearing officer for this hearing. This morning we're to conduct a hearing on the rule proposal for Chapters 173-322 and 173-332A, Remedial Action Grants and Loans. Let the record show that it is 10:40 AM on May 29, 2014. Participants are attending either through the webinar or at the Department of Ecology headquarters building, 300 Desmond Drive, Lacey, Washington 98503.

A notice of this hearing was published in the *Washington State Register* May 7, 2014, *Washington State Register* No. 14-09-052. In addition, notices of the hearing were emailed to about 1,400 people who subscribe to the agency's WAC Track Listserv, which updates subscribers of all agency rulemaking activities. It was also emailed to about 700 people specifically interested in the Model Toxics Control Act or Remedial Action Grants, including subscribers to the Remedial Action Grants Listserv, subscribers to the MTCA-SMS Listserv, workgroup members or invitees, and grant recipients. Notice of the hearing was also published in the Toxics Cleanup Program's Site Register, which was emailed to about 650 subscribers on May 1, 2014, and a news release was issued on April 23, 2014.

We're now going to be calling people up to provide testimony. This will be based on the order I have your cards or that you raised your hand on the webinar. Again, if you're on the webinar please click on the Raise Hand icon if you want to provide testimony today.

So the first person I have on the list is Michael Stringer. If you'll come up and sit in the chair here, that's so that we can make sure we get the recording and the people on the phone are able to hear.

Michael Stringer:

Hello. This is Michael Stringer with the consulting firm Maul Foster & Alongi. And for background on us, we have worked with the Department of Ecology to prepare their brownfield policy recommendations report in 2011 that provided the basis for some of these reforms that were put into the Senate Bill 5296. And we just wanted to state that we are very supportive and appreciative of the work of the Department of Ecology to improve the performance and effectiveness of the Remedial Action Grant Program. We especially are supportive of the expanded prioritization factors that have been put in to balance the economic and community benefits of these projects, in addition to the health and ecological risks associated with contamination.

1

2 We're also very supportive of the changes to make the Independent
3 Remedial Action Grants funded on the continuing basis instead of
4 just at the end of the project, and supportive of making the
5 Integrated Planning Grant, which has been a highly successful pilot
6 program, to make it a fully permanent program.

7 We have two general comments that we'd like to make of things
8 that we think could be improved in the draft rule. One is that the
9 Senate Bill 5296 talks about prioritizing grants for redevelopment
10 opportunity zones, and we don't see that mentioned in the rule, and
11 it might be something that needs to be clarified, that if projects in
12 those redevelopment opportunity zones are prioritized that it
13 should echo through the grant rule as well.

14 And on the theme that was mentioned about balancing certainty
15 and flexibility, we have some concerns about the annual grant
16 cycle and the requirement that for oversight Remedial Action
17 Grants that our project be listed on a ten-year financing plan. We
18 understand how important that will be for managing cash flow and
19 budgets in the program and appreciate that, but think that just the
20 stacking of the criteria of requirements of the annual application
21 and the requirement to be on the ten-year financing plan may
22 overly limit the Department's discretion to be able to fund
23 opportunistic projects that come up with the real estate cycle.

24 So for example, we recently completed a project with the Port of
25 Sunnyside, where that project needed to meet a timeframe for
26 transaction as well as the budgeting and annual cycles of the Port,
27 and if that project would have had to wait an annual cycle to be
28 able to get funding it likely would not have occurred. So we
29 recommend that being listed on the ten-year financing plan
30 eligibility requirement either be removed or modified to clearly,
31 explicitly state that if funds are available the Department has
32 discretion to be able to fund projects off-cycle.

33 Thank you.

Bari Schreiner:

34 Thank you. Is there anybody on the webinar? I want to add for the
35 people on the webinar, you can submit comments today using the
36 chat feature. Please, if you do decide to submit them, include your
37 name and contact information, either an email or an address, so
38 that we can make sure that we have a way to send you the Concise
39 Explanatory Statement and any updated information. Is there
40 anyone here in the room who has changed their mind that would
41 like to provide comments at this time?

No? Anyone on the webinar? All right.

It is also important if you are participating on the webinar and you haven't already provided Adrienne with an email or contact information, we request that you do that so that we can make sure that you're added to our interested party list for the rule.

Okay. If you'd like to send Ecology written comments after this hearing please remember they must be received no later than June 6, 2014. Please send them to Adrienne Dorrah, Department of Ecology, Toxics Cleanup Program, PO Box 47600, Olympia, Washington 98504-7600. The email you can use is RAGrule@ecy.wa.gov, or they can be faxed to 360-407-7154.

All testimony received at this hearing along with all written comments received no later than June 6, 2014 will be part of the official record for this proposal. Ecology will send notice about the Concise Explanatory Statement, or CES publication, to everyone that provided written comments or verbal testimony on this rule proposal and submitted contact information, everyone that signed in for today's hearing that provided an email address, and other interested parties on the agency's mailing list for this rule.

The CES, among other things, contains the agency's response to questions and issues of concern that were raised during the public comment period. If you would like to receive a copy but didn't fill out a sign-in card or provide your information through the chat feature in the webinar, please let us know or you could contact Adrienne after the hearing too, to provide that information. Staff will be available after the meeting to answer any questions, or again, you could contact Adrienne or Michael using the contact information provided for submitting comments or that were provided on the slide.

The next step is to review the comments and make a determination whether to adopt the rule proposal. Ecology Director Maia Bellon will consider the rule documentation and staff recommendations and will make a decision about adopting. Adoption is currently scheduled for no earlier than July 30, 2014. If the proposed rule should be adopted that day and filed with the Code Reviser it will go into effect 31 days later.

Please let us know if we can be of any further help to you today. On behalf of Department of Ecology, thank you for coming. I appreciate your cooperation and courtesy. Let the record show this hearing is adjourned at 10:49 AM. Thank you.

[End of Audio]

Appendix D

Differences between Proposed and Adopted Rule Language

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Differences between Proposed and Adopted Rule Language

EDITOR'S NOTE: Changes to the proposed rule language are tracked using strikeouts and underlines. The changes are also highlighted. The changes are tracked using OTS-6298.2 as the baseline.

Chapter 173-322A WAC REMEDIAL ACTION GRANTS AND LOANS

NEW SECTION

WAC 173-322A-010 Purpose and authority. (1) This chapter recognizes that:

(a) The state contains thousands of hazardous waste sites that present serious threats to human health and the environment, including the state's water resources;

(b) Many of these hazardous waste sites, such as landfills and port facilities, are owned or operated by local governments;

(c) Many of the properties affected by these hazardous waste sites are brownfield properties, where economic development and other community reuse objectives are hindered by the presence of contamination; and

(d) The cost of cleaning up these hazardous waste sites in many cases is beyond the financial means of local governments and ratepayers.

(2) This chapter establishes requirements for a program of grants and loans to local governments for remedial action pursuant to RCW 70.105D.070 (4) and (8).

(3) The purpose of the remedial action grants and loans program established by this chapter is to expedite the cleanup and redevelopment of hazardous waste sites and to lessen the impact of the cleanup on ratepayers and taxpayers. The remedial action grants and loans shall be used to supplement local government funding and funding from other sources to carry out remedial actions.

NEW SECTION

WAC 173-322A-020 Relation to other laws and rules. (1) Nothing in this chapter shall influence, affect, or modify department programs, regulations, or enforcement of applicable laws relating to hazardous waste site investigation and cleanup.

(2) Nothing in this chapter shall modify the order or decree the department has secured with potentially liable persons or prospective purchasers for remedial action. The execution of remedial actions pursuant to the order or decree shall in no way be contingent upon the availability of grant funding.

Differences between Proposed and Adopted Rule Language

(3) All grants and loans shall be subject to existing accounting and auditing requirements of state laws and regulations applicable to the issuance of grants and loans.

NEW SECTION

WAC 173-322A-100 Definitions. Unless otherwise defined in this chapter, words and phrases used in this chapter shall be defined according to WAC 173-340-200 and 173-204-505.

(1) **"Agreement signature date"** means, for the purposes of grant and loan agreements, the date the agreement document is signed by the department.

(2) **"Applicant"** means a local government that applies for a grant or loan.

(3) **"Area-wide groundwater contamination"** means groundwater contamination on multiple adjacent properties with different ownerships consisting of hazardous substances from multiple sources that have resulted in commingled plumes of contaminated groundwater that are not practicable to address separately.

(4) **"Average market rate"** means the average market rate for tax-exempt general obligation municipal bonds for the month of June preceding the agreement signature date, as determined using rates published by *Bond Buyer*.

(5) **"Biennium"** means the twenty-four-month fiscal period extending from July 1st of odd-numbered years to June 30th of odd-numbered years.

(6) **"Brownfield property"** means previously developed and currently abandoned or underutilized real property and adjacent surface waters and sediment where environmental, economic, or community reuse objectives are hindered by the release or threatened release of hazardous substances that the department has determined requires remedial action under this chapter or that the United States Environmental Protection Agency has determined requires remedial action under the federal cleanup law.

(7) **"Budget"** means, for the purpose of grant and loan agreements, a breakdown of eligible costs by task.

(8) **"Cleanup action"** means the term as defined in WAC 173-340-200 or 173-204-505.

(9) **"Construction completion"** means physical construction of a cleanup action component is complete.

(10) **"Coordinated water system plan"** means a plan for public water systems within a critical water supply service area which identifies the present and future water system concerns and sets forth a means for meeting those concerns in the most efficient manner possible pursuant to chapter 246-293 WAC.

(11) **"Decree"** or **"consent decree"** means a consent decree issued under ~~WAC 173-340-520~~ chapter 70.105D RCW or the federal cleanup law.

Differences between Proposed and Adopted Rule Language

(12) **"Department"** means the department of ecology.

(13) **"Department share"** means the department's share of eligible costs.

(14) **"Director"** means the director of the department of ecology.

(15) **"Economically disadvantaged county"** means a county whose per capita income is equal to or below ~~the median county per capita income of counties in Washington state,~~ as determined on July 1st of each odd-numbered year using the latest official American Community Survey five-year estimates of the U.S. Department of Commerce.

(16) **"Economically disadvantaged city or town"** means a city or town whose per capita income is equal to or below ~~the median city or town per capita income of cities and towns in Washington state,~~ as determined on July 1st of each odd-numbered year using the latest official American Community Survey five-year estimates of the U.S. Department of Commerce.

(17) **"Eligible cost"** means a project cost that is eligible for funding under this chapter and the terms of the grant or loan agreement.

(18) **"Extended grant agreement"** means a grant agreement entered into under RCW 70.105D.070 (4)(e)(i).

(19) **"Feasibility study"** means the term as defined in chapter 173-340 or 173-204 WAC.

(20) **"Federal cleanup law"** means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9601 et seq.

(21) **"Grant agreement"** means a binding agreement between the local government and the department that authorizes the disbursement of funds to the local government to reimburse it for a portion of expenditures in support of a specified scope of services.

(22) **"Hazardous substances"** means any hazardous substance as defined in WAC 173-340-200.

(23) **"Hazardous waste site"** means any facility where there has been confirmation of a release or threatened release of a hazardous substance that requires remedial action.

(24) **"Highly impacted community"** means a community that the department has determined is likely to bear a disproportionate burden of public health risks from environmental pollution.

(25) **"Independent remedial actions"** means remedial actions conducted without department oversight or approval and not under an order or consent decree.

(26) **"Initial investigation"** means a remedial action that consists of an investigation under WAC 173-340-310.

(27) **"In-kind contributions"** means property or services that benefit a project and are contributed to the recipient by a third party without direct monetary compensation. In-kind contributions include interlocal costs, donated or loaned real or personal property, volunteer services, and employee services donated by a third party.

Differences between Proposed and Adopted Rule Language

(28) **"Innovative technology"** means new technologies that have been demonstrated to be technically feasible under certain site conditions, but have not been widely used under the conditions that exist at the hazardous waste site. Innovative technology has limited performance and cost data available.

(29) **"Interim action"** means a remedial action conducted under WAC 173-340-430.

(30) **"Loan agreement"** means a binding agreement between the local government and the department that authorizes the disbursement of funds to the local government that must be repaid. The loan agreement includes terms such as interest rates and repayment schedule, scope of work, performance schedule, and project budget.

(31) **"Local government"** means any political subdivision of the state, including a town, city, county, special purpose district, or other municipal corporation, including brownfield renewal authority created under RCW 70.105D.160.

(32) **"No further action determination"** or **"NFA determination"** means a written opinion issued by the department under WAC 173-340-515(5) that the independent remedial actions performed at a hazardous waste site or property meet the substantive requirements of chapter 173-340 WAC and that no further remedial action is required at the hazardous waste site or property. The opinion is advisory only and not binding on the department.

(33) **"Order"** means an order issued under chapter 70.105D RCW, including enforcement orders issued under WAC 173-340-540 and agreed orders issued under WAC 173-340-530, or an order issued under the federal cleanup law, including unilateral administrative orders (UAO) and administrative orders on consent (AOC).

(34) **"Oversight remedial actions"** means remedial actions conducted under an order or decree.

(35) **"Partial funding"** means funding less than the maximum department share allowed under this chapter.

(36) **"Potentially liable person"** or **"PLP"** means any person whom the department finds, based on credible evidence, to be liable under RCW 70.105D.040.

(37) **"Potentially responsible party"** or **"PRP"** means "covered persons" as defined under section 9607(a)(1) through (4) of the federal cleanup law (42 U.S.C. Sec. 9607(a)).

(38) **"Property"** means, for the purposes of independent remedial action grants, the parcel or parcels of real property affected by a hazardous waste site and addressed as part of the independent remedial action.

(39) **"Prospective purchaser"** means a person who is not currently liable for remedial action at a facility and who proposes to purchase, redevelop, or reuse the facility.

(40) **"Public water system"** means a Group A water system as defined in WAC 246-290-020.

(41) **"Purveyor"** means an agency or subdivision of the state or a municipal corporation, firm, company, mutual or cooperative associa-

Differences between Proposed and Adopted Rule Language

tion, institution, partnership, or person or any other entity that owns or operates a public water system, or the authorized agent of such entities.

(42) **"Recipient"** means a local government that has been approved to receive a grant or loan.

(43) **"Recipient share"** or **"match"** means the recipient's share of eligible costs.

(44) **"Redevelopment opportunity zone"** means a geographic area designated under RCW 70.105D.150.

~~(44)~~(45) **"Remedial action"** means any action or expenditure consistent with the purposes of chapter 70.105D RCW to identify, eliminate, or minimize any threat posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.

~~(45)~~(46) **"Remedial investigation"** means the term as defined in chapter 173-340 or 173-204 WAC.

~~(46)~~(47) **"Retroactive costs"** means costs incurred before the agreement signature date.

~~(47)~~(48) **"Safe drinking water"** means water meeting drinking water quality standards set by chapter 246-290 WAC.

~~(48)~~(49) **"Scope of work"** means the tasks and deliverables of the grant or loan agreement.

~~(49)~~(50) **"Site"** means any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, or aircraft; or any site or area where a hazardous substance, other than a legal consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located.

~~(50)~~(51) **"Site hazard assessment"** means a remedial action that consists of an investigation performed under WAC 173-340-320.

~~(51)~~(52) **"Voluntary cleanup program"** means the program authorized under RCW 70.105D.030 (1)(i) and WAC 173-340-515.

NEW SECTION

WAC 173-322A-200 Funding cycle. (1) Project solicitation. ~~Annually~~Biennially, the department will solicit project proposals from local governments to develop its budget and update its ten-year financing plan for remedial action grants and loans. The department may update its ten-year financing plan as needed during the biennium. Project proposals for each type of grant or loan must be submitted on forms provided by the department and include sufficient information to make the determinations in subsection (3) of this section. For multi-biennial oversight remedial action grant projects, proposals must be

Differences between Proposed and Adopted Rule Language

updated biennially. To be considered for inclusion in the department's budget for remedial action grants and loans, project proposals **and up-dates** should be submitted by the dates published by the department.

(2) **Application submittal.** Applications for each type of grant or loan must be submitted on forms provided by the department and include sufficient information to make the determinations in subsections (3) and (4) of this section. **For multibiennial oversight remedial action grant projects, an application must be submitted before each biennium for which additional funds are requested.** Completed applications should be submitted by the dates published by the department.

(3) **Project evaluation and ranking.** Project proposals and applications for each type of grant or loan will be reviewed by the department for completeness and evaluated to determine:

- (a) Project eligibility; and
- (b) Funding priority under WAC 173-322A-210.

(4) **Agreement development.** The department will make funding decisions only after funds have been appropriated. After deciding to fund **an eligible** project, the department will negotiate with the applicant the scope of work and budget for the grant and develop the agreement. The department will consider:

- (a) Funding priority under WAC 173-322A-210;
- (b) Cost eligibility;
- (c) Allowable funding of eligible costs; and
- (d) Availability of state funds and other funding sources.

(5) Fund management. The department may adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

NEW SECTION

WAC 173-322A-210 Funding priorities. (1) **Among types of grants and loans.** The department will fund remedial action grants and loans in the following order of priority:

- (a) Oversight remedial action grants and loans under an existing extended grant agreement;
- (b) Site assessment grants and other remedial action grants and loans for previously funded projects, provided that substantial progress has been made; and
- (c) Remedial action grants and loans for new projects.

(2) **For each type of grant or loan.** For each type of remedial action grant or loan, the department will further prioritize projects for funding or limit funding for projects based on the factors specified in WAC 173-322A-300 through 173-322A-350, as applicable.

(3) **Oversight remedial action loans.** The department will fund an oversight remedial action loan from the same fund allocation used to fund the associated oversight remedial action grant. When the demand for funds exceeds the amount allocated, the department will give the oversight remedial action grant and loan the same priority.

Differences between Proposed and Adopted Rule Language

NEW SECTION

WAC 173-322A-220 Fiscal controls. (1) **General.** The department will establish reasonable costs for all grants and loans, require local governments to manage projects in a cost-effective manner, and ensure that all potentially liable persons assume responsibility for remedial action.

(2) **Funding discretion.** The department retains the discretion to not provide a grant or loan for an eligible project or to provide less funding for an eligible project than the maximum allowed under this chapter.

(3) **Funding limits.** The department may not provide more funding for an eligible project than the maximum allowed under this chapter for each type of grant or loan.

(4) **Retroactive funding.** Retroactive costs are not eligible for funding, except as provided under this chapter for each type of grant or loan.

(5) **Cash management of grants.** For oversight remedial action grants, the department may not:

(a) Allocate more funds for a project each biennium than are estimated to be necessary to complete the scope of work for that biennium. The biennial scope of work must be approved by the department; or

(b) Allocate more funds for a project unless the local government has demonstrated to the department that funds awarded during the previous biennium have been substantially expended or contracts have been entered into to substantially expend the funds.

(6) **Consideration of insurance, contribution, and cost recovery claims.** A recipient may use proceeds from an insurance claim or a contribution or cost recovery claim under RCW 70.105D.080 or the federal cleanup law seeking recovery of remedial action costs at a hazardous waste site to meet recipient share requirements, ~~provided that the recipient complies with the following conditions~~ subject to the conditions in (a) through (f) of this subsection.

(a) Applicability. The project at the hazardous waste site is currently funded on or will be funded after July 1, 2014, under a grant agreement.

~~(a)~~ (b) Notice of action claims. Upon application for the grant or within thirty days of ~~taking an action~~ filing a lawsuit or insurance claim to recover ~~the claim~~ remedial action costs at the hazardous waste site, whichever is later, the recipient must notify the department of the ~~action~~ filing.

(c) Notice of proceeds. Upon application for the grant, the recipient must notify the department of the total amount of proceeds received to date on any claims for remedial action costs at the hazardous waste site. The department may require the recipient to periodically update the total amount of proceeds received on the claims. The department may also require the recipient to provide documentation of the proceeds received on the claims.

Differences between Proposed and Adopted Rule Language

~~(b)~~(d) **Notice of resolution.** Upon application for the grant or within thirty days of resolving any resolution of a claim for remedial action costs at the hazardous waste site, whichever is later, the recipient must:

(i) Notify the department of the resolution;

(ii) Specify the amount of proceeds received under the resolution and the portion of the proceeds attributable to eligible costs; and

(iii) Provide the department a copy of the settlement, judgment, or other document resolving the claim or portion of the claim.

~~(e)~~(e) **Repayment of grant funds.** If the total proceeds from a claim all the claims for remedial action costs at a hazardous waste site exceed the following costs, then the department may reduce the department share or require repayment of costs reimbursed by the department under a grant agreement by up to the amount of the exceedance:

(i) The cost incurred by the recipient to pursue the claims;

(ii) The cost of remedial actions incurred by the recipient that are not funded by the department at the hazardous waste site, including costs incurred before resolution of the claims; and

(iii) If approved by the department, the cost of remedial actions incurred by the recipient that are not funded by the department for an eligible project at a hazardous waste site that is not the basis for the claims.

~~(e)~~(f) **Eligibility of payments to other recipients.** Contribution and cost recovery claim payments are not eligible costs if the payments are made for remedial actions previously funded by a grant to another jurisdiction.

(7) **Reimbursement request deadlines.**

(a) Requests for reimbursement and adequate documentation of eligible retroactive costs incurred before the application date must be submitted to the department in the application.

(b) Requests for reimbursement and adequate documentation of eligible retroactive costs incurred between the application date and the agreement signature date must be submitted to the department within ninety days of the agreement signature date.

(c) Requests for reimbursement and adequate documentation of eligible costs incurred after the agreement signature date must be submitted to the department within ninetyone hundred twenty days of incurring the costs.

(d) If requests for reimbursement are not submitted by the deadlines in (a) through (c) of this subsection, as applicable, the department may deny reimbursement of the costs.

(8) **Spending plans for grant or loan agreements.** The department may require grant or loan recipients to provide and periodically update a spending plan for the grant or loan.

(9) **Financial responsibility.** As established by the Model Toxics Control Act, chapter 70.105D RCW, and implementing regulations, potentially liable persons bear financial responsibility for remedial action costs. The remedial action grant and loan programs may not be

Differences between Proposed and Adopted Rule Language

used to circumvent the responsibility of a potentially liable person. Remedial action grants and loans shall be used to supplement local government funding and funding from other sources to carry out required remedial action.

(10) **Puget Sound action agenda.** The department may not fund projects designed to address the restoration of Puget Sound that are in conflict with the action agenda developed by the Puget Sound partnership under RCW 90.71.310.

NEW SECTION

WAC 173-322A-300 Site assessment grants. (1) **Purpose.** The purpose of site assessment grants is to provide funding to local governments that conduct initial investigations and site hazard assessments on behalf of the department. The department retains the authority to review and verify results and make determinations based on the initial investigations and site hazard assessments conducted by local governments.

(2) **Project eligibility.** To be eligible for a site assessment grant, a project must meet all of the following requirements:

(a) The applicant must be a local health district or department;

(b) The department has agreed the applicant may conduct initial investigations or site hazard assessments on its behalf; and

(c) The scope of work for initial investigations and site hazard assessments must conform to WAC 173-340-310 and 173-340-320 and applicable department guidelines.

(3) **Funding priority.** The department will prioritize eligible projects for funding or limit funding for eligible projects based on the priorities in WAC 173-322A-210 and the following factors:

(a) The need for initial investigations or site hazard assessments within the jurisdiction of the applicant, as determined by the department;

(b) The population within the jurisdiction of the applicant; and

(c) The performance of the applicant under prior site assessment grant agreements.

(4) **Application process.**

(a) **Project solicitation.** ~~Annually~~**Biennially**, the department will solicit project proposals from local governments to develop its budget and update its ten-year financing plan for remedial action grants and loans. **The department may update its ten-year financing plan as needed during the biennium.** Project proposals must be submitted on forms provided by the department and include sufficient information to make the determinations in (c) of this subsection. To be considered for inclusion in the department's budget for remedial action grants and loans, project proposals should be submitted by the dates published by the department.

(b) **Application submittal.** Applications must be submitted on forms provided by the department and include sufficient information to

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make the determinations in (c) and (d) of this subsection. Completed applications should be submitted by the dates published by the department.

(c) **Project evaluation and ranking.** Project proposals and applications will be reviewed by the department for completeness and evaluated to determine:

- (i) Project eligibility under subsection (2) of this section; and
- (ii) Funding priority under subsection (3) of this section.

(d) **Agreement development.** The department will make funding decisions only after funds have been appropriated. After deciding to fund an eligible project, the department will negotiate with the applicant the scope of work and budget for the grant and develop the agreement. The department will consider:

- (i) Funding priority under subsection (3) of this section;
- (ii) Cost eligibility under subsections (5) and (6) of this section;

- (iii) Allowable funding under subsection (7) of this section; and
- (iv) Availability of state funds and other funding sources.

(e) **Fund management.** The department may adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

(5) **Cost eligibility.** To be eligible for funding, a project cost must be eligible under this subsection and the terms of the grant agreement and be approved by the department.

(a) **Eligible costs.** Eligible costs for a site assessment grant include reasonable costs for the following:

- (i) Initial investigations under WAC 173-340-310;
- (ii) Site hazard assessments under WAC 173-340-320; and
- (iii) Administrative or technical support for initial investigations or site hazard assessments performed by the department.

(b) **Ineligible costs.** Ineligible costs for a site assessment grant include, but are not limited to, the following:

(i) The cost of developing the grant application or negotiating the grant agreement;

(ii) The cost of dispute resolution under the grant agreement;

(iii) Retroactive costs, except as provided under subsection (6) of this section;

(iv) Legal costs including, but not limited to, the cost of seeking legal advice, pursuing cost recovery, contribution, or insurance claims, participating in administrative hearings, pursuing penalties or civil or criminal actions against persons, defending actions taken against the recipient, penalties incurred by the recipient, and any attorney fees incurred by the recipient;

(v) The cost of testing buildings and other structures for drug use residuals;

(vi) The cost of testing buildings and other structures for radon, lead paint, or asbestos that is not required as a remedial action under chapter 70.105D RCW or the federal cleanup law; and

(vii) In-kind contributions.

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(6) **Retroactive cost eligibility.** Retroactive costs are eligible for funding if the costs are incurred between the start of the biennium and the agreement signature date and are eligible under subsection (5) of this section.

(7) **Funding of eligible costs.**

(a) **Department share.** The department may fund up to one hundred percent of the eligible costs.

(b) **Recipient share.** The recipient shall fund the percentage of the eligible costs not funded by the department under (a) of this subsection. The recipient may not use in-kind contributions to meet this requirement.

NEW SECTION

WAC 173-322A-310 Integrated planning grants. (1) **Purpose.** The purpose of integrated planning grants is to provide funding to local governments to conduct assessments of brownfield properties and develop integrated projects plans for their cleanup and adaptive reuse. The grants are intended to encourage and expedite the cleanup of brownfield properties and to lessen the impact of the cleanup cost on ratepayers and taxpayers.

(2) **Project eligibility.** For the purposes of this grant, a project consists of integrated planning for a single hazardous waste site or for an area affected by multiple hazardous waste sites. A project may extend over more than one biennium. To be eligible for a grant, the project must meet the following requirements:

(a) The applicant must be a local government;

(b) ~~The hazardous waste site must be located within the jurisdiction of the applicant~~ The applicant must have an ownership interest in property or have a demonstrated interest in purchasing property affected by the hazardous waste site;

(c) The applicant must have the necessary access to complete the project or obtain such access in accordance with the schedule in the grant agreement; and

(d) The applicant must not be required to conduct the actions under an order or decree.

(3) **Funding priority.** The department will prioritize eligible projects for funding or limit funding for eligible projects based on the priorities in WAC 173-322A-210 and the following factors:

(a) The threat posed by the hazardous waste site to human health and the environment;

(b) Whether the hazardous waste site is within a redevelopment opportunity zone;

~~(b)~~ (c) The land reuse potential of the hazardous waste site;

~~(e)~~ (d) Whether the hazardous waste site is located within a highly impacted community;

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~~(d)~~(e) The readiness of the applicant to start and complete the work to be funded by the grant and the performance of the applicant under prior grant agreements;

~~(e)~~(f) The ability of the grant to expedite the cleanup of the hazardous waste site;

~~(f)~~(g) The ability of the grant to leverage other public or private funding for the cleanup and reuse of the hazardous waste site;

~~(g)~~(h) The distribution of grants throughout the state and to various types and sizes of local governments; and

~~(h)~~(i) Other factors as determined and published by the department.

(4) Application process.

(a) **Project solicitation.** ~~Annually~~Biennially, the department will solicit project proposals from local governments to develop its budget and update its ten-year financing plan for remedial action grants and loans. ~~The department may update its ten-year financing plan as needed during the biennium.~~ Project proposals must be submitted on forms provided by the department and include sufficient information to make the determinations in (c) of this subsection. To be considered for inclusion in the department's budget for remedial action grants and loans, project proposals should be submitted by the dates published by the department.

(b) **Application submittal.** Applications must be submitted on forms provided by the department and include sufficient information to make the determinations in (c) and (d) of this subsection. Completed applications should be submitted by the dates published by the department.

(c) **Project evaluation and ranking.** Project proposals and applications will be reviewed by the department for completeness and evaluated to determine:

(i) Project eligibility under subsection (2) of this section; and

(ii) Funding priority under subsection (3) of this section.

(d) **Agreement development.** The department will make funding decisions only after funds have been appropriated. After deciding to fund ~~an eligible~~ project, the department will negotiate with the applicant the scope of work and budget for the grant and develop the agreement. The department will consider:

(i) Funding priority under subsection (3) of this section;

(ii) Cost eligibility under subsections (5) and (6) of this section;

(iii) Allowable funding under subsections (7) and (8) of this section; and

(iv) Availability of state funds and other funding sources.

~~(e) Fund management. The department may adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.~~

(5) **Cost eligibility.** To be eligible for funding, a project cost must be eligible under this subsection and the terms of the grant agreement and be approved by the department.

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(a) **Eligible costs.** Eligible costs for an integrated planning grant include, but are not limited to, reasonable costs for the following:

- (i) Environmental site assessments;
- (ii) Remedial investigations;
- (iii) Health assessments;
- (iv) Feasibility studies;
- (v) Site planning;
- (vi) Community involvement;
- (vii) Land use and regulatory analyses;
- (viii) Building and infrastructure assessments;
- (ix) Economic and fiscal analyses; and
- (x) Any environmental analyses under chapter 43.21C RCW.

(b) **Ineligible costs.** Ineligible costs for an integrated planning grant include, but are not limited to, the following:

- (i) The cost of developing the grant application or negotiating the grant agreement;
- (ii) The cost of dispute resolution under the grant agreement;
- (iii) Retroactive costs, except as provided under subsection (6) of this section;
- (iv) Legal costs including, but not limited to, the cost of seeking client advice, pursuing cost recovery, contribution, or insurance claims, participating in administrative hearings, pursuing penalties or civil or criminal actions against persons, penalties incurred by the recipient, defending actions taken against the recipient, and any attorney fees incurred by the recipient; and
- (v) In-kind contributions.

(6) **Retroactive cost eligibility.** Retroactive costs are eligible for reimbursement if the costs are incurred during the period of a prior grant agreement, the costs are eligible under subsection (5) of this section, and the costs have not been reimbursed by the department.

(7) **Limit on eligible costs for a project.**

(a) For a project consisting of a study of a single hazardous waste site, the eligible costs for the project may not exceed two hundred thousand dollars.

(b) For a project consisting of a study area involving more than one hazardous waste site, the eligible costs for the project may not exceed three hundred thousand dollars.

(c) A hazardous waste site may not be included in more than one project.

(8) **Funding of eligible costs.**

(a) **Department share.** The department may fund up to one hundred percent of the eligible costs.

(b) **Recipient share.** The recipient shall fund the percentage of the eligible costs not funded by the department under (a) of this subsection. The recipient may not use in-kind contributions to meet this requirement.

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(9) **Administration of multiple grants.** The department may provide integrated planning grants to a local government for more than one project under a single grant agreement.

NEW SECTION

WAC 173-322A-320 Oversight remedial action grants. (1) **Purpose.** The purpose of oversight remedial action grants is to provide funding to local governments that investigate and clean up hazardous waste sites under an order or decree. The grants are intended to encourage and expedite remedial action and to lessen the impact of the cost of such action on ratepayers and taxpayers.

(2) **Project eligibility.** For the purposes of this grant, a project consists of remedial actions conducted under **anone or more orders or decrees** at a single hazardous waste site. A project may extend over more than one biennium. To be eligible for a grant, a project must meet all of the following requirements:

(a) The applicant must be a local government;

(b) The applicant must be a potentially liable person, potentially responsible party, or prospective purchaser at the hazardous waste site;

~~(c) The applicant must meet one of the following criteria:~~

~~(i) The applicant is required by the department to conduct remedial action under an order or decree issued under chapter 70.105D RCW;~~

~~(ii) The applicant is required by the U.S. Environmental Protection Agency to conduct remedial action under an order or decree issued under the federal cleanup law and the order or decree has been signed or acknowledged in writing by the department as a sufficient basis for remedial action grant funding; or~~

~~(iii) The applicant has signed an order or decree issued under chapter 70.105D RCW requiring a potentially liable person or prospective purchaser other than the applicant to conduct remedial action at a hazardous waste site and the applicant has entered into an agreement with the other person to reimburse the person for a portion of the remedial action costs incurred under the order or decree; and~~

(c) The project must meet one of the following criteria:

(i) The applicant is required to conduct remedial actions at the hazardous waste site under an order or decree; or

(ii) A person other than the applicant is required to conduct remedial actions at the hazardous waste site under an order or decree and the applicant has:

(A) Signed the order or decree; and

(B) Entered into a written agreement with the other person to reimburse the person for a portion of the remedial action costs incurred under the order or decree;

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(d) If the order or decree is issued under the federal cleanup law, it must be signed or acknowledged in writing by the department as a sufficient basis for funding under this chapter; and

~~(d)~~(e) The project must be included in the department's ten-year financing plan required under RCW 70.105D.030(5).

(3) **Funding priority.** The department will prioritize eligible projects for funding or limit funding for eligible projects based on the priorities in WAC 173-322A-210 and the following factors:

(a) The threat posed by the hazardous waste site to human health and the environment;

~~(b)~~ Whether the applicant is a prospective purchaser of a brown-field property within a redevelopment opportunity zone;

~~(b)~~(c) The land reuse potential of the hazardous waste site;

~~(e)~~(d) Whether the hazardous waste site is located within a highly impacted community;

~~(d)~~(e) The readiness of the applicant to start and complete the work to be funded by the grant and the performance of the applicant under prior grant agreements;

~~(e)~~(f) The ability of the grant to expedite the cleanup of the hazardous waste site;

~~(f)~~(g) The ability of the grant to leverage other public or private funding for the cleanup and reuse of the hazardous waste site;

~~(g)~~(h) The distribution of grants throughout the state and to various types and sizes of local governments; and

~~(h)~~(i) Other factors as determined and published by the department.

(4) **Application process.**

(a) **Project solicitation.** ~~Annually~~Biennially, the department will solicit project proposals from local governments to develop its budget and update its ten-year financing plan for remedial action grants and loans. ~~The department may update its ten-year financing plan as needed during the biennium.~~ Project proposals must be submitted on forms provided by the department and include sufficient information to make the determinations in (c) of this subsection. ~~For multibiennial projects, proposals must be updated biennially.~~ To be considered for inclusion in the department's budget for remedial action grants and loans, project proposals ~~and updates~~ should be submitted by the dates published by the department.

(b) **Application submittal.** Applications must be submitted on forms provided by the department and include sufficient information to make the determinations in (c) and (d) of this subsection. ~~For multibiennial projects, an application must be submitted before each biennium for which additional funds are requested.~~ Completed applications should be submitted by the dates published by the department.

(c) **Project evaluation and ranking.** Project proposals and applications will be reviewed by the department for completeness and evaluated to determine:

(i) Project eligibility under subsection (2) of this section; and

(ii) Funding priority under subsection (3) of this section.

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(d) **Agreement development.** The department will make funding decisions only after funds have been appropriated. After deciding to fund an eligible project, the department will negotiate with the applicant the scope of work and budget for the grant and develop the agreement. The department will consider:

- (i) Funding priority under subsection (3) of this section;
- (ii) Cost eligibility under subsections (5) and (6) of this section;
- (iii) Allowable funding under subsections (7) and (8) of this section; and
- (iv) Availability of state funds and other funding sources.

(e) **Fund management.** The department may adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

(5) **Cost eligibility.** To be eligible for funding, a project cost must be eligible under this subsection and the terms of the grant agreement and be approved by the department.

(a) **Eligible costs.** Eligible costs for an oversight remedial action grant include, but are not limited to, reasonable costs for the following:

- (i) Emergency or interim actions;
 - (ii) Remedial investigations;
 - (iii) Feasibility studies and selection of the remedy;
 - (iv) Engineering design and construction of the selected remedy;
- and
- (v) Operation and maintenance or monitoring of a cleanup action component for up to one year after construction completion of the component.

(b) **Ineligible costs.** Ineligible costs for an oversight remedial action grant include, but are not limited to, the following:

- (i) The cost of developing the grant application or negotiating the grant agreement;
- (ii) The cost of dispute resolution under the order or decree or the grant agreement;
- (iii) The costs incurred under an order or decree by a potentially liable person, potentially responsible party, or prospective purchaser other than the recipient, except as provided under subsection (2)(c)(iii) of this section;
- (iv) Retroactive costs, except as provided under subsection (6) of this section;
- (v) The remedial action costs of the department or the U.S. Environmental Protection Agency reasonably attributable to the administration of an order or decree for remedial action at the hazardous waste site, including reviews of reimbursement requests;

(vi) Natural resource damage assessment and restoration costs and liability for natural resource damages under chapter 70.105D RCW or the federal cleanup law;

(vii) Site development and mitigation costs not required as part of a remedial action;

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(viii) Legal costs including, but not limited to, the cost of seeking client advice, pursuing cost recovery, contribution, or insurance claims, participating in administrative hearings, pursuing penalties or civil or criminal actions against persons, penalties incurred by the recipient, defending actions taken against the recipient, and any attorney fees incurred by the recipient; and

(ix) In-kind contributions.

(6) **Retroactive cost eligibility.** The following retroactive costs are eligible for reimbursement if they are also eligible under subsection (5) of this section:

(a) Costs incurred under the order or decree between the effective date of the order or decree and the agreement signature date;

(b) Costs incurred under the order or decree during the period of a prior grant agreement that have not been reimbursed by the department;

(c) Costs incurred negotiating the order or decree, provided that the costs ~~are not legal costs and~~ were incurred within ~~ninety days before the effective date of the order or decree:~~

(i) Sixty days after starting negotiations for an order; or

(ii) One hundred twenty days after starting negotiations for a decree; and

(d) Costs incurred before the effective date of the order or decree conducting independent remedial actions, provided that:

(i) ~~the~~The actions are:

~~(i)~~(A) Conducted within five years before the ~~effective date of the start of negotiations for the~~ order or decree;

~~(ii)~~(B) Consistent with the remedial actions required under the order or decree;

~~(iii)~~(C) Compliant with the substantive requirements of chapter 173-340 WAC; and

~~(iv)~~(D) Incorporated as part of the order or decree; and

(ii) Costs incurred before the start of negotiations for the order or decree do not exceed six hundred thousand dollars.

(7) **Funding of eligible costs.**

(a) **Department share.** The department may fund up to fifty percent of the eligible costs. Except for extended grant agreements, the department may fund a higher percentage of the eligible costs as follows.

(i) The department may fund up to an additional twenty-five percent of the eligible costs if the applicant is:

(A) An economically disadvantaged county, city, or town; or

(B) A special purpose district with a hazardous waste site located within an economically disadvantaged county, city, or town.

(ii) The department may fund up to an additional fifteen percent of the eligible costs if the applicant uses innovative technology.

(iii) The department may fund up to a total of ninety percent of the eligible costs if the eligible costs for the project are less than five million dollars and the director or designee determines the additional funding would:

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(A) Prevent or mitigate unfair economic hardship imposed by cleanup liability;

(B) Create new substantial economic development, public recreational opportunities, or habitat restoration opportunities that would not otherwise occur; or

(C) Create an opportunity for acquisition and redevelopment of brownfield property under RCW 70.105D.040(5) that would not otherwise occur.

(b) **Recipient share.** The recipient shall fund the percentage of the eligible costs not funded by the department under (a) of this subsection. The recipient may not use in-kind contributions to meet this requirement.

(8) **Cash management of grants.**

(a) The department may not allocate more funds for a project each biennium than are estimated to be necessary to complete the scope of work for that biennium. The biennial scope of work must be approved by the department.

(b) The department may not allocate more funds for a project unless the local government has demonstrated to the department that funds awarded during the previous biennium have been substantially expended or contracts have been entered into to substantially expend the funds.

(9) **Administration of multiple grants.** Except for extended grant agreements, the department may provide oversight remedial action grants to a local government for more than one project under a single grant agreement.

(10) **Extended grant agreements.**

(a) **Project eligibility.** The department may provide an oversight remedial action grant to a local government for a hazardous waste site under an extended grant agreement if, in addition to meeting the eligibility requirements in subsection (2) of this section, the project extends over multiple biennia and the eligible costs for the project exceed twenty million dollars.

(b) **Agreement duration.** The initial duration of an extended grant agreement may not exceed ten years. The department may extend the duration of the agreement upon finding substantial progress has been made on remedial actions at the site.

(c) **Department share.** Under an extended grant agreement, the department may not fund more than fifty percent of the eligible costs.

NEW SECTION

WAC 173-322A-325 Oversight remedial action loans. (1) Purpose. The purpose of oversight remedial action loans is to supplement local government funding and funding from other sources to meet the recipient share requirements for oversight remedial action grants under WAC 173-322A-320. The loans are intended to encourage and expedite the

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cleanup of hazardous waste sites and to lessen the impact of the cleanup cost on ratepayers and taxpayers.

(2) **Types of loans.** There are two different types of oversight remedial action loans, a standard loan and an extraordinary financial hardship loan. The two types of loans have different project eligibility requirements and different terms and conditions for repayment based upon the applicant's ability to repay the loan.

(a) **Standard loan.** A standard loan is a loan that includes the terms and conditions for repayment.

(b) **Extraordinary financial hardship loan.** An extraordinary financial hardship loan is a loan that includes deferred terms and conditions for repayment. Deferred terms and conditions may not be indefinite. Any such loan must be approved by the director or designee.

(3) **Project eligibility.** For the purposes of this loan, a project consists of remedial actions conducted under an order or decree at a single hazardous waste site. A project may extend over more than one biennium. To be eligible for a loan, a project must meet all of the following requirements:

(a) The applicant must have an oversight remedial action grant for the project under WAC 173-322A-320; and

(b) The applicant must demonstrate the following to the department's satisfaction. The department may require an independent third-party financial review to **make support** the demonstration:

(i) For a standard loan, the applicant's financial need for the loan and ability to repay the loan; or

(ii) For an extraordinary financial hardship loan, the applicant's financial need for the loan, inability to repay the loan under present circumstances, and ability to repay the loan in the future.

(4) **Funding priority.** The department will assign an oversight remedial action loan the same priority as the associated oversight remedial action grant.

(5) **Application process.**

(a) **Project solicitation.** **AnnuallyBiennially**, the department will solicit project proposals from local governments to develop its budget and update its ten-year financing plan for remedial action grants and loans. **The department may update its ten-year financing plan as needed during the biennium.** Project proposals must be submitted on forms provided by the department and include sufficient information to make the determinations in (c) of this subsection. **For multibiennial projects, proposals must be updated biennially.** To be considered for inclusion in the department's budget for remedial action grants and loans, project proposals **and updates** should be submitted by the dates published by the department.

(b) **Application submittal.** Applications must be submitted on forms provided by the department and include sufficient information to make the determinations in (c) and (d) of this subsection. **For multibiennial projects, an application must be submitted before each biennium for which additional funds are requested.** Completed applications should be submitted by the dates published by the department.

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(c) **Project evaluation and ranking.** Project proposals and applications will be reviewed by the department for completeness and evaluated to determine:

(i) Project eligibility under subsection (3) of this section. If the department determines the applicant meets the eligibility requirements for an extraordinary financial hardship loan, then the department may, upon the approval by the director, provide such a loan to the applicant instead of a standard loan; and

(ii) Funding priority under subsection (4) of this section.

(d) **Agreement development.** The department will make funding decisions only after funds have been appropriated. After deciding to fund an eligible project, the department will negotiate with the applicant the scope of work and budget for the loan and develop the agreement. The department will consider:

(i) Funding priority under subsection (4) of this section;

(ii) Cost eligibility under subsections (6) and (7) of this section;

(iii) Allowable funding under subsection (8) of this section; and

(iv) Availability of state funds and other funding sources.

(e) Fund management. The department may adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

(6) **Cost eligibility.** The eligible costs for oversight remedial action loans shall be the same as the eligible costs for oversight remedial action grants under WAC 173-322A-320(5).

(7) **Retroactive cost eligibility.** The eligibility of retroactive costs for oversight remedial action loans shall be the same as the eligibility of retroactive costs for the oversight remedial action grants under WAC 173-322A-320(6).

(8) **Funding by department.** The department may provide the recipient of an oversight remedial action loan for up to one hundred percent of the recipient share under WAC 173-322A-320 (7)(b). The loan shall be used by the recipient to supplement local government funding and funding from other sources to meet the recipient share requirement.

(9) **Repayment by recipient.** The terms and conditions for repayment of a loan shall be specified in the loan agreement.

(a) **Standard loans.** For a standard loan, the following terms and conditions shall apply. Additional terms and conditions may be specified in the loan agreement.

(i) **Repayment periods and interest rates.**

(A) If the repayment period is less than or equal to five years, the interest rate shall be thirty percent of the average market rate.

(B) If the repayment period is more than five years and less than or equal to twenty years, the interest rate shall be sixty percent of the average market rate.

(ii) **Interest accrual.** Interest shall accrue on each disbursement as it is paid to the recipient.

(b) **Extraordinary financial hardship loans.** For an extraordinary financial hardship loan, the repayment terms and conditions specified

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in (a) of this subsection may be adjusted or deferred. Deferred terms and conditions are dependent on periodic review of the recipient's ability to pay. Terms and conditions may not be deferred indefinitely.

NEW SECTION

WAC 173-322A-330 Independent remedial action grants. (1) Purpose. The purpose of independent remedial action grants is to provide funding to local governments that investigate and clean up hazardous waste sites independently under the voluntary cleanup program. The grants are intended to encourage and expedite independent remedial action and to lessen the impact of the cost of such action on ratepayers and taxpayers.

(2) **Types of grants.** The department may provide the following types of independent remedial action grants:

(a) **Post-cleanup reimbursement grant.** Under this grant, the department may reimburse the recipient after the department has issued a no further action determination for the hazardous waste site or property under the voluntary cleanup program.

(b) **Periodic reimbursement grant.** Under this grant, the department may reimburse the recipient periodically during the investigation and the cleanup of a hazardous waste site or property under the voluntary cleanup program.

(3) **Project eligibility.** For the purposes of these grants, a project consists of independent remedial actions at a single hazardous waste site. A project may extend over more than one biennium. To be eligible for a grant, the project must meet all of the following requirements:

(a) The applicant must be a local government;

(b) The applicant must be a potentially liable person, potentially responsible party, or prospective purchaser at the hazardous waste site or have an ownership interest in the hazardous waste site;

(c) For post-cleanup reimbursement grants, the applicant must have completed independent remedial actions at the hazardous waste site or property and received a no further action determination for the site or property under the voluntary cleanup program;

(d) For periodic reimbursement grants, the applicant must:

(i) Enroll the hazardous waste site in the voluntary cleanup program before entering into a grant agreement for the site;

(ii) Conduct independent remedial actions at the hazardous waste site or property in accordance with work plans authorized by the department under the voluntary cleanup program; and

(iii) Have necessary access to conduct independent remedial actions at the hazardous waste site or obtain such access in accordance with a schedule in the grant agreement.

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(4) **Funding priority.** The department will prioritize eligible projects for funding or limit funding for eligible projects based on the priorities in WAC 173-322A-210 and the following factors:

(a) The threat posed by the hazardous waste site to human health and the environment;

~~(b)~~ Whether the applicant is a prospective purchaser of a brown-field property within a redevelopment opportunity redevelopment zone;

~~(b)~~(c) The land reuse potential of the hazardous waste site;

~~(e)~~(d) Whether the hazardous waste site is located within a highly impacted community;

~~(d)~~(e) The readiness of the applicant to start and complete the work to be funded by the grant and the performance of the applicant under prior grant agreements;

~~(e)~~(f) The ability of the grant to expedite the cleanup of the hazardous waste site;

~~(f)~~(g) The ability of the grant to leverage other public or private funding for the cleanup and reuse of the hazardous waste site;

~~(g)~~(h) The distribution of grants throughout the state and to various types and sizes of local governments; and

~~(h)~~(i) Other factors as determined and published by the department.

(5) **Application process.**

(a) **Project solicitation.** ~~Annually~~Biennially, the department will solicit project proposals from local governments to develop its budget and update its ten-year financing plan for remedial action grants and loans. ~~The department may update its ten-year financing plan as needed during the biennium.~~ Project proposals must be submitted on forms provided by the department and include sufficient information to make the determinations in (c) of this subsection. To be considered for inclusion in the department's budget for remedial action grants and loans, project proposals should be submitted by the dates published by the department.

(b) **Application submittal.** Applications must be submitted on forms provided by the department and include sufficient information to make the determinations in (c) and (d) of this subsection. Completed applications should be submitted by the dates published by the department.

(c) **Project evaluation and ranking.** Project proposals and applications will be reviewed by the department for completeness and evaluated to determine:

(i) Project eligibility under subsection (3) of this section; and

(ii) Funding priority under subsection (4) of this section.

(d) **Agreement development.** The department will make funding decisions only after funds have been appropriated. After deciding to fund an eligible project, the department will negotiate with the applicant the scope of work and budget for the grant and develop the agreement. The department will consider:

(i) Funding priority under subsection (4) of this section;

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(ii) Cost eligibility under subsections (6) and (7) of this section;

(iii) Allowable funding under subsections (8) and (9) of this section; and

(iv) Availability of state funds and other funding sources.

(e) Fund management. The department may adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

(6) **Cost eligibility.** To be eligible for funding, a project cost must be eligible under this subsection and the terms of the grant agreement and be approved by the department.

(a) **Eligible costs.** Eligible costs for an independent remedial action grant include, but are not limited to, reasonable costs for the following:

(i) Emergency or interim actions;

(ii) Remedial investigations;

(iii) Feasibility studies and selection of the remedy;

(iv) Engineering design and construction of the selected remedy;

(v) Operation and maintenance or monitoring of a cleanup action component for up to one year after construction completion of the component; and

(vi) Development of independent remedial action plans or reports submitted to the department for review under the voluntary cleanup program.

(b) **Ineligible costs.** Ineligible costs for an independent remedial action grant include, but are not limited to, the following:

(i) The cost of developing the grant application or negotiating the grant agreement;

(ii) The cost of dispute resolution under the voluntary cleanup program or the grant agreement;

(iii) Retroactive costs, except as provided under subsection (7) of this section;

(iv) Cost of technical consultations provided by the department under the voluntary cleanup program, including reviews of reimbursement requests;

(v) Natural resource damage assessment and restoration costs and liability for natural resource damages under chapter 70.105D RCW or the federal cleanup law;

(vi) Site development and mitigation costs not required as part of a remedial action;

(vii) Legal costs including, but not limited to, the cost of seeking client advice, pursuing cost recovery, contribution, or insurance claims, participating in administrative hearings, pursuing penalties or civil or criminal actions against persons, penalties incurred by the recipient, defending actions taken against the recipient, and any attorney fees incurred by the recipient; and

(viii) In-kind contributions.

Differences between Proposed and Adopted Rule Language

(7) **Retroactive cost eligibility.** The following retroactive costs are eligible for reimbursement if they are also eligible under subsection (5) of this section:

(a) Costs incurred within five years before the date of the completed grant application; and

(b) Costs incurred during the period of a prior grant agreement that have not been reimbursed by the department.

(8) **Limit on eligible costs for a project.** The eligible costs for a project may not exceed six hundred thousand dollars.

(9) **Funding of eligible costs.**

(a) **Department share.** Except as otherwise provided in this subsection, the department may only fund up to fifty percent of the eligible costs.

(i) The department may fund up to an additional twenty-five percent of the eligible costs if the applicant is:

(A) An economically disadvantaged county, city, or town; or

(B) A special purpose district with a hazardous waste site located within an economically disadvantaged county, city, or town.

(ii) The department may fund up to a total of ninety percent of the eligible costs if the director or designee determines the additional funding would:

(A) Prevent or mitigate unfair economic hardship imposed by the cleanup liability;

(B) Create new substantial economic development, public recreational opportunities, or habitat restoration opportunities that would not otherwise occur; or

(C) Create an opportunity for acquisition and redevelopment of brownfield property under RCW 70.105D.040(5) that would not otherwise occur.

(b) **Recipient share.** The recipient shall fund the percentage of the eligible costs not funded by the department under (a) of this subsection. The recipient may not use in-kind contributions to meet this requirement.

(10) **Reimbursement of eligible costs.**

(a) **Post-cleanup reimbursement grants.** For post-cleanup reimbursement grants, the department may reimburse the recipient for eligible costs only after the department has issued a no further action determination for the hazardous waste site or property under the voluntary cleanup program.

(b) **Periodic reimbursement grants.** For periodic reimbursement grants, the department may reimburse the recipient for eligible costs in accordance with the following terms and conditions.

(i) **Remedial action work plans.** The recipient must submit independent remedial action work plans to the department for review and authorization under the voluntary cleanup program.

(ii) **Periodic reimbursement of remedial actions.** The department may reimburse the recipient no more frequently than quarterly for the following:

Differences between Proposed and Adopted Rule Language

(A) The development of independent remedial action work plans and reports;

(B) Independent remedial actions performed in accordance with a work plan authorized by the department in writing; and

(C) Any other independent remedial actions authorized by the department in writing.

(iii) **Performance guarantee for periodic reimbursement.** The department may withhold twenty percent of each periodic reimbursement payment as security for the recipient's ~~performance~~ **completion of remedial actions at the hazardous waste site or property**. Any funds withheld by the department may be paid to the recipient when the department issues a no further action determination for the hazardous waste site or property.

(iv) **Post-cleanup reimbursement of retroactive costs.** The department may reimburse the recipient for the retroactive costs specified in subsection (7)(a) of this section, but only after the department has issued a no further action determination for the hazardous waste site or property.

(11) **Administration of multiple grants.** The department may provide independent remedial action grants to a local government for more than one project under a single grant agreement.

NEW SECTION

WAC 173-322A-340 Area-wide groundwater investigation grants. (1) **Purpose.** The purpose of area-wide groundwater investigation grants is to provide funding to local governments that investigate known or suspected areas of area-wide groundwater contamination. The investigations are intended to facilitate the cleanup and redevelopment of properties affected by area-wide groundwater contamination.

(2) **Project eligibility.** For the purposes of this grant, a project consists of an investigation of area-wide groundwater contamination in a single study area. A project may extend over more than one biennium. To be eligible for a grant, a project must meet all of the following requirements:

(a) The applicant must be a local government;

(b) The project must involve the investigation of known or suspected area-wide groundwater contamination;

(c) The applicant must not be required to conduct the investigation under an order or decree;

(d) The applicant must have the necessary access to conduct the ~~remedial actions~~ **investigation** or obtain such access in accordance with a schedule in the grant agreement; and

(e) The project must be included in the ten-year financing plan required under RCW 70.105D.030(5).

Differences between Proposed and Adopted Rule Language

(3) **Funding priority.** The department will prioritize eligible projects for funding or limit funding for eligible projects based on the priorities in WAC 173-322A-210 and the following factors:

(a) The threat posed by the hazardous waste sites to human health and the environment;

~~(b)~~ Whether the hazardous waste site is within a redevelopment opportunity zone;

~~(b)~~(c) The land reuse potential of the hazardous waste sites;

~~(e)~~(d) Whether the hazardous waste sites are located within a highly impacted community;

~~(d)~~(e) The readiness of the applicant to start and complete the work to be funded by the grant and the performance of the applicant under prior grant agreements;

~~(e)~~(f) The ability of the grant to expedite the cleanup of the hazardous waste sites;

~~(f)~~(g) The ability of the grant to leverage other public or private funding for the cleanup and reuse of the hazardous waste sites;

~~(g)~~(h) The distribution of grants throughout the state and to various types and sizes of local governments; and

~~(h)~~(i) Other factors as determined and published by the department.

(4) **Application process.**

(a) **Project solicitation.** ~~Annually~~Biennially, the department will solicit project proposals from local governments to develop its budget and update its ten-year financing plan for remedial action grants and loans. ~~The department may update its ten-year financing plan as needed during the biennium.~~ Project proposals must be submitted on forms provided by the department and include sufficient information to make the determinations in (c) of this subsection. To be considered for inclusion in the department's budget for remedial action grants and loans, project proposals should be submitted by the dates published by the department.

(b) **Application submittal.** Applications must be submitted on forms provided by the department and include sufficient information to make the determinations in (c) and (d) of this subsection. Completed applications should be submitted by the dates published by the department.

(c) **Project evaluation and ranking.** Project proposals and applications will be reviewed by the department for completeness and evaluated to determine:

(i) Project eligibility under subsection (2) of this section; and

(ii) Funding priority under subsection (3) of this section.

(d) **Agreement development.** The department will make funding decisions only after funds have been appropriated. After deciding to fund ~~an eligible project~~, the department will negotiate with the applicant the scope of work and budget for the grant and develop the agreement. The department will consider:

(i) Funding priority under subsection (3) of this section;

Differences between Proposed and Adopted Rule Language

(ii) Cost eligibility under subsections (5) and (6) of this section;

(iii) Allowable funding under subsections (7) and (8) of this section; and

(iv) Availability of state funds and other funding sources.

(e) Fund management. The department may adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

(5) **Cost eligibility.** To be eligible for funding, a project cost must be eligible under this subsection and the terms of the grant agreement and be approved by the department.

(a) **Eligible costs.** Eligible costs for an area-wide groundwater investigation grant include, but are not limited to, the reasonable costs for the following:

(i) Identifying the sources of the area-wide groundwater contamination;

(ii) Determining the nature and extent of the area-wide groundwater contamination;

(iii) Identifying the preferential groundwater contaminant migration pathways;

(iv) Identifying area-wide geologic and hydrogeologic conditions; and

(v) Establishing area-wide natural groundwater quality, including aquifer classification under WAC 173-340-720.

(b) **Ineligible costs.** Ineligible costs for an area-wide groundwater ~~remedial-action~~ investigation grant include, but are not limited to, the following:

(i) The cost of developing the grant application or negotiating the grant agreement;

(ii) The cost of dispute resolution under the grant agreement;

(iii) Retroactive costs, except as provided under subsection (6) of this section;

(iv) Natural resource damage assessment and restoration costs and liability for natural resource damages under chapter 70.105D RCW or the federal cleanup law;

(v) Site development and mitigation costs not required as part of the remedial action;

(vi) Legal costs including, but not limited to, the costs of seeking client advice, pursuing cost recovery, contribution, or insurance claims, participating in administrative hearings, pursuing penalties or civil or criminal actions against persons, penalties incurred by the recipient, the cost of defending actions taken against the recipient, and any attorney fees incurred by the recipient; and

(vii) In-kind contributions.

(6) **Retroactive cost eligibility.** Retroactive costs are eligible for reimbursement if the costs are incurred during the period of a prior grant agreement, the costs are eligible under subsection (5) of this section, and the costs have not been reimbursed by the department.

Differences between Proposed and Adopted Rule Language

(7) **Limit on eligible costs for a project.** The eligible costs for a project may not exceed five hundred thousand dollars.

(8) **Funding of eligible costs.**

(a) **Department share.** The department may fund up to one hundred percent of the eligible costs.

(b) **Recipient share.** The recipient shall fund the percentage of the eligible costs not funded by the department under (a) of this subsection. The recipient may not use in-kind contributions to meet this requirement.

NEW SECTION

WAC 173-322A-350 Safe drinking water action grants. (1) **Purpose.** The purpose of safe drinking water action grants is to assist local governments, or a local government applying on behalf of a purveyor, in providing safe drinking water to areas contaminated by, or threatened by contamination from, hazardous waste sites.

(2) **Project eligibility.** For the purposes of this grant, a project consists of safe drinking water actions at a single hazardous waste site. A project may extend over more than one biennium. To be eligible for a grant, a project must meet all of the following requirements:

(a) The applicant must be a local government;

(b) The applicant must be a purveyor or the applicant must be applying on behalf of a purveyor;

(c) The applicant or purveyor must be in substantial compliance, as determined by the department of health, with applicable rules of the state board of health or the department of health, including chapter 246-290 WAC (Group A public water supplies), chapter 246-292 WAC (Waterworks operator certification), chapter 246-293 WAC (Water System Coordination Act), and chapter 246-294 WAC (Drinking water operating permits);

(d) The drinking water source must be affected or threatened by one or more hazardous substances originating from a hazardous waste site;

(e) **The department of ecology has determined that the**~~The drinking water source must:~~

(i) **Exhibits** levels of hazardous substances that exceed the ~~primary~~ maximum contaminant levels (MCLs) established by the state board of health and set forth in WAC 246-290-310;

(ii) **Exhibits** levels of hazardous substances that exceed the cleanup levels established by the department of ecology under Part VII of chapter 173-340 WAC; or

(iii) **Be Is** threatened to exceed the levels of hazardous substances identified in (e)(i) or (ii) of this subsection;

(f) If the safe drinking water action includes water line extensions, the extensions must be consistent with the coordinated water

Differences between Proposed and Adopted Rule Language

system plan prepared under chapter 70.116 RCW and any plans for new development prepared under chapter 36.70 or 36.70A RCW for the geographic area containing the affected water supplies; and

(g) The applicant must not be required to conduct the safe drinking water action under an order or decree.

(3) **Funding priority.** The department will prioritize eligible projects for funding or limit funding for eligible projects based on the priorities in WAC 173-322A-210 and the following factors:

(a) The threat posed by the hazardous waste site to drinking water;

(b) Whether the drinking water serves a highly impacted community;

(c) The per capita cost of providing safe drinking water;

(d) The ability of the grant to expedite the provision of safe drinking water;

(e) The ability of the grant to leverage other public or private funding for the provision of safe drinking water;

~~(e)~~(f) The readiness of the applicant to start and complete the work to be funded by the grant and the performance of the applicant under prior grant agreements; and

~~(f)~~(g) Other factors as determined and published by the department.

(4) **Application process.**

(a) **Project solicitation.** ~~Annually~~Biennially, the department will solicit project proposals from local governments to develop its budget and update its ten-year financing plan for remedial action grants and loans. ~~The department may update its ten-year financing plan as needed during the biennium.~~ Project proposals must be submitted on forms provided by the department and include sufficient information to make the determinations in (c) of this subsection. To be considered for inclusion in the department's budget for remedial action grants and loans, project proposals should be submitted by the dates published by the department.

(b) **Application submittal.** Applications must be submitted on forms provided by the department and include sufficient information to make the determinations in (c) and (d) of this subsection. Completed applications should be submitted by the dates published by the department.

(c) **Project evaluation and ranking.** Project proposals and applications will be reviewed by the department for completeness and evaluated to determine:

(i) Project eligibility under subsection (2) of this section; and

(ii) Funding priority under subsection (3) of this section.

(d) **Agreement development.** The department will make funding decisions only after funds have been appropriated. After deciding to fund ~~an eligible project~~, the department will negotiate with the applicant the scope of work and budget for the grant and develop the agreement. The department will consider:

(i) Funding priority under subsection (3) of this section;

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(ii) Cost eligibility under subsections (5) and (6) of this section;

(iii) Allowable funding under subsection (7) of this section; and

(iv) Availability of state funds and other funding sources.

(e) Fund management. The department may adjust funding levels or fund additional eligible projects during a biennium if additional funds should become available.

(5) **Cost eligibility.** To be eligible for funding, a project cost must be eligible under this subsection and the terms of the grant agreement and be approved by the department.

(a) **Eligible costs.** Eligible costs for a safe drinking water action grant include, but are not limited to, reasonable costs for the following, if needed:

(i) Water supply source development and replacement, including pumping and storage facilities, source meters, and reasonable appurtenances;

(ii) Transmission lines between major system components, including interties with other water systems;

(iii) Treatment equipment and facilities;

(iv) Distribution lines from major system components to system customers or service connections;

(v) Bottled water, as an interim action;

(vi) Fire hydrants;

(vii) Service meters;

(viii) Project inspection, engineering, and administration;

(ix) Individual service connections, including any connection fees and charges;

(x) Drinking water well decommissioning under WAC 173-160-381; and

(xi) Other costs identified by the department of health as necessary to provide a system that operates in compliance with federal and state standards.

(b) **Ineligible costs.** Ineligible costs for a safe drinking water action grant include, but are not limited to, the following:

(i) The cost of developing the grant application or negotiating the grant agreement;

(ii) The cost of dispute resolution under the grant agreement;

(iii) Retroactive costs, except as provided under subsection (6) of this section;

(iv) The cost of oversizing or extending a water system for future development;

(v) The cost of individual service connections for undeveloped lots;

(vi) Local improvement district assessments;

(vii) Operation and maintenance costs;

(viii) Natural resource damage assessment and restoration costs and liability for natural resource damages under chapter 70.105D RCW or the federal cleanup law;

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(ix) Legal costs including, but not limited to, the costs of seeking client advice, pursuing cost recovery, contribution, or insurance claims, participating in administrative hearings, pursuing penalties or civil or criminal actions against persons, penalties incurred by the recipient, defending actions taken against the recipient, and any attorney fees incurred by the recipient; and

(x) In-kind contributions.

(6) **Retroactive cost eligibility.** Retroactive costs are eligible for reimbursement if the costs are incurred during the period of a prior grant agreement, the costs are eligible under subsection (5) of this section, and the costs have not been reimbursed by the department.

(7) **Funding of eligible costs.**

(a) **Department share.** The department may fund up to ninety percent of the eligible costs.

(b) **Recipient share.** The recipient shall fund the percentage of the eligible costs not funded by the department under (a) of this subsection. The recipient may not use in-kind contributions to meet this requirement.