



## Toxics Cleanup Program

### Policy 800A: Property Access

*Established:* February 1991

*Contact:* Policy and Technical Support Unit, Headquarters

*Purpose:* The purpose of this policy is to give Ecology staff guidance in gaining access to property for the investigations and cleanup of hazardous waste sites. For the purpose of this policy, entry onto property means being physically present on the property.

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

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

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

## **Purpose and Applicability**

The purpose of this policy is to give Ecology staff guidance in gaining access to property for the investigations and cleanup of hazardous waste sites. For the purpose of this policy, entry onto property means being physically present on the property.

### **1. The Department May Enter Property To Conduct Investigations.**

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On the basis of statutory authority, whenever there is a reason to believe that a release or threatened release of a hazardous substance has occurred, authorized employees, agents or contractors of the Department of Ecology may enter upon any property to conduct investigations or remedial actions. (RCW 70.105D.030)

### **2. Reasonable Notice To Site Owner And Operator, To The Extent Known To The Department, Shall Be Served Before Entering Property.**

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The Under 70.105D.030, before entering property, the investigator shall provide the owner and operator with a reasonable notice of the intent to access property. The process for property access is discussed in WAC 173-340-800. Reasonable notice shall be achieved through one of the following means:

- a. A conversation with the owner and operator, to the extent known by the Department, in which property access is immediately granted. This may be accomplished either by providing a written notice in person or a verbal notice either in person or by telephone;
- b. A conversation with the owner and operator, to the extent known by the Department, in which notice of intent to access property in twenty-four hours is given. This may be accomplished either by providing a written notice in person or a verbal notice either in person or by telephone;
- c. A written notice to the owner and operator, to the extent known by the Department, by regular mail, at least three days prior to the entry.

The investigator shall document the service of verbal notice for the file.

If access cannot be achieved through any of these means, the investigator should leave the site immediately and pursue other legal means to access the property. For example, call the local emergency response unit or the Attorney General's Office to obtain a search warrant. (See PRO 800 re: Acquiring A Search Warrant.)

### **3. Reasonable Notice To Access Property Must Contain Specific Information:**

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To the extent known to the Department, the following information shall, as appropriate to the circumstances, be included in a notice requesting property access.

- a. Explanation of Ecology's statutory authority to enter and inspect the property. (See 70.105D.030 RCW)
- b. Site location;
- c. The reason for needing entry; for example, to investigate a complaint, begin an initial investigation, conduct a site hazard assessment, etc;
- d. When access is needed;
- e. How long the investigation will take;
- f. The planned activities; for example, collect samples, photograph the site, etc;

If sampling will be performed, inform the owner/operator of their right to take split samples as long as their sampling does not interfere with the investigator's sampling.

- g. If the owner/operator will not be present during the site visit, request them to designate an alternate site contact person with the authority to grant access to all appropriate areas of the site;
- h. The agency contact person's name and number; and
- i. A commitment to keep them informed. For example, consistent with Chapter 173-03 WAC, Site Management 1-62 September 5, 1991 relating to Public Records, all information not subject to the exemption under RCW 42.17.310, shall be made available to the owner/operator. Refer to guidance materials on public disclosure in the Resource Handbook (EIM 411.3).

### **4. The Investigator Shall Not Enter Property When Permission Is Denied.**

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Unless emergency conditions exist, the investigator shall not enter property when permission is denied.

Documentation of efforts to determine the owner/ operator should be made.

If the owner/operator denies access to the site the investigator may contact the Ecology Division of the Attorney General's Office to obtain a search warrant to gain access to the site. (See PRO 800 re: Acquiring A Search Warrant.)

## **5. Emergencies Do Not Require Prior Notice Of Intent To Enter.**

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Ecology inspectors may determine that an emergency condition exists if the primary concern is: for alleviating the immediate danger to human life, health, safety, or the environment, and/or stabilizing the release or threatened release.

In order to mitigate an emergency situation posed by a release or threatened release, an investigator may enter property without prior permission from, or notice to, the owner/operator. The Department shall make efforts, reasonable under the circumstances of the site, to promptly notify owners and operators, to the extent known to the Department, of the actions taken.

Under conditions of emergency, the owner/operator of a site is likely to be cooperative and invite, or at least not resist, the Department's entry onto the site. If the owner/operator denies the investigator access to the property, then the investigator should:

- a. Briefly attempt to negotiate with the owner/ operator to gain cooperation, stating our right under the Model Toxics Control Act and other statutes to access property under emergency conditions, and if the owner/operator continues to deny the investigator entry; then,
- b. Leave the site immediately and pursue other legal means to access the property, for example, the investigator might call the local emergency response unit or the Ecology Division of the Attorney General's Office to obtain a search warrant. (See PRO 800 re: How to Obtain a Search Warrant)

If no one is present at the site, and a good faith effort does not reveal the identity of the owner/ operator, the investigator may enter property without prior notice to the owner or operator to conduct an emergency investigation and emergency actions. Under these circumstances, the owner and operator shall be identified and notified of the Department's findings as soon as is reasonable.

## **6. The Investigator Shall Seek Entry Pursuant To The Model Toxics Control Act.**

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If the actions at the site are likely to be conducted pursuant to Ch.70.105D RCW then access to property shall be sought consistent with that authority. However, if Ecology actions are likely to be conducted pursuant to the Water Pollution Control Act, RCW 90.48.090 or the Hazardous Waste Management Act, RCW 70.105.130(d), then entry to property may be gained through those authorities.

Where MTCA actions at the site will likely be conducted under the act, bypassing the notice requirements of MTCA is not a recommended or preferred course of action.

**7. Under Certain Non-Emergency Conditions, Prior Notice Of Intent To Enter Property Is Not Required.**

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If no one is present at the site and a good faith effort has not revealed the identity of the owner/ operator and access is not inhibited by any physical barrier, such as no trespassing signs, fence, or other indication that public access is unavailable, then the investigator may enter the property without prior notice.

This is only expected to occur under rare circumstances. For example, if an investigator was responding to a complaint of a potential release in an open area where the description of the site location was unclear, then the inspector could do a reconnaissance of the area to locate the site so the owner/operator can be identified. This may involve walking on private property.

**8. Orders And Decrees Shall Contain Conditions For Site Access.**

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Whenever investigations or remedial actions are conducted under an order or consent decree, the MTCRA requires that Ecology's investigators, agents, or contractors shall not be denied access to property. All orders and decrees shall contain provisions for obtaining access to the site to implement the terms of the order or decree and those provisions shall constitute reasonable notice. For sites where there is no agreement regarding access, or the order or decree is with someone other than the owner/operator, then reasonable notice consistent with Paragraph 2 must be provided before accessing property.

**9. The Investigator Shall Use All Reasonable Means To Notify An Absent Property Owner.**

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The investigator shall ask the resident, occupant, operator, or other person in charge of the site for the identity of any absent property owners so they may be informed about the Department's intended actions regarding the site.

**10. The Investigator Shall Comply With All Applicable State And Federal Health And Safety Requirements.**

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During entry to property, all investigators shall comply with the state and federal health and safety requirements determined appropriate to the circumstances at the site by the best judgment of the investigator. When an investigator is unsure how to proceed, contact the program safety officer for advice.

**11. The Ongoing Operations At The Site Should Not Be Disrupted.**

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The investigator shall make reasonable efforts to avoid disrupting the ongoing operations of the site. Except under emergency circumstances or while working under a warrant, when the nature of the investigation is likely to disrupt operations at the site, to the extent possible, the investigator shall inform the owner/ operator in advance. In general, this will occur at the time reasonable notice is given (see paragraph 2).

**12. Ecology Employees Or Contractors Shall Make Reasonable Efforts To Help Potentially Liable Persons Gain Access To Property.**

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When conducting remedial actions under an order or decree, potentially liable persons who need access to property that is not their own must attempt to secure access from the owner. If they fail in their attempt, Ecology employees or contractors shall make reasonable efforts to help them access property necessary to conduct the remedial action. Any information, test results, or data the PLP gains from property access under this paragraph must be shared with the Department and placed in the site file.

**13. Site Managers Shall Maintain An Investigative Record**

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The site manager shall keep a complete record, including a telephone log and correspondence file, of all information collected during an investigation for the site file.

**14. The Site Record Shall Be Available For Public Review**

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Information collected during an investigation of a release or threatened release shall be disclosed to the public upon request, in accordance with rules for information disclosure contained within Ch.42.17 RCW and the management of public records in Ch.173-03 WAC. Refer to guidance materials on public disclosure in the Resource Handbook (EIM 411.3).