
# CONCISE EXPLANATORY STATEMENT
# for the
# Amendments
# to
# Chapter 173-322 WAC
# Remedial Action Grants and Loans

**Washington State Department of Ecology**
**Solid Waste and Financial Assistance Program**

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# Table of Contents

# List of Acronyms and Abbreviations

| | |
|---|---|
| CERCLA | Comprehensive Environmental Response, Compensation, and Liability Act |
| Ecology | Department of Ecology |
| EPA | U.S. Environmental Protection Agency |
| MTCA | Model Toxics Control Act |
| PLP | Potentially Liable Person |
| PRP | Potentially Responsible Party |
| RAG | Remedial Action Grant |
| RCRA | Resource Conservation and Recovery Act |
| RCW | Revised Code of Washington |
| WAC | Washington Administrative Code |

# Chapter 1 Introduction

## 1.1 Purpose

The Washington Administrative Procedure Act (APA) requires that an agency prepare a concise explanatory statement of the rule:

> (i) Identifying the agency's reasons for adopting the rule;
> (ii) Describing the differences between the text of the proposed rule … and the text of the rule as adopted, other than editing changes, stating the reasons for differences; and
> (iii) Summarizing all comments received regarding the proposed rule, and responding to the comments by category or subject matter, indicating how the final rule reflects agency consideration of the comments, or why it fails to do so.

RCW 34.05.325(6)(a). The concise explanatory statement must be prepared prior to final rule adoption and must be provided to any person upon request or from whom the agency received comment. RCW 34.05.325(6)(a),(b). This document constitutes the concise explanatory statement for the amendments to chapter 173-322 WAC, Remedial Action Grants and Loans. This document relies on documentation found in the rule-making file.

## 1.2 Background

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

As a general declaration of policy, the Model Toxics Control Act (MTCA), chapter 70.105D RCW, 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). The statute further states 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.

RCW 70.105D.010(2). Recognizing that "[t]he costs of eliminating these threats in many cases are beyond the financial means of our local governments and ratepayers," the general declaration of policy also declares that "[t]he main purpose of chapter 2, Laws of 1989 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 land and waters." Id.

To help accomplish those statutory goals, MTCA created the state toxics control account (STCA) and the local toxics control account (LTCA) in the state treasury, dividing revenue collected from the hazardous substance tax (HST) between the two accounts. RCW 70.105D.070. MTCA specifically directs that Ecology use the moneys deposited in the LTCA to provide grants or loans to local governments for the following purposes in descending order of priority:

(i) Remedial actions;
(ii) Hazardous waste plans and programs under chapter 70.105 RCW;
(iii) Solid waste plans and programs under chapters 70.95, 70.95C, 70.95I, and 70.105 RCW;
(iv) Funds for a program to assist in the assessment and cleanup of sites of methamphetamine production, but not to be used for the initial containment of such sites, consistent with the responsibilities and intent of RCW 69.50.511; and
(v) Cleanup and disposal of hazardous substances from abandoned or derelict vessels that pose a threat to human health or the environment.

RCW 70.105D.070(3)(a). MTCA also directs Ecology to "adopt rules for grant and loan issuance and performance." RCW 70.105D.070(7).

To achieve the general goals and specific objectives and requirements of MTCA, Ecology adopted chapter 173-322 WAC, Remedial Action Grants and Loans, in 1990. The rule was subsequently amended in 1993 and 2001. The rule implements the program of remedial action grants and loans for local governments established by MTCA. The intent of the program is to encourage and expedite the cleanup of hazardous waste sites and to lesson the impact of the cleanup on local taxpayers. The grants and loans are used to supplement local government funding and funding from other sources.

## 1.3 Purpose of the Rule Amendments

Ecology is amending chapter 173-322 WAC, Remedial Action Grants and Loans, for the following reasons:

**(1)** **To implement new grant programs:** Ecology is amending the rule to implement the grant programs that were recently authorized under the Model Toxics Control Act (MTCA), chapter 70.105D RCW. Those grant programs include:

- The methamphetamine lab site assessment and cleanup grant program; and
- The derelict vessel remedial action grant program.

Pursuant to RCW 70.105D.070(7), Ecology must adopt rules to implement these new grant programs.

**(2)** **To implement an existing loan program:** Although MTCA previously authorized the establishment of a loan program, guidelines for such a program had never been established in the rule. Ecology is amending the rule to establish those guidelines.

**(3)** **To improve the operation of existing grant programs:** Ecology is making several specific amendments to improve the operation and utility of existing grant programs, including:

- Allowing funding of remedial actions performed under CERCLA orders (including orders issued prior to the date of the rule amendments);
- Allowing proceeds from insurance claims to be used to meet the match requirement for a grant; and
- Increasing the funding limit for independent remedial action grants.

**(4)** **To improve the clarity and usability of the rule:** Ecology is reorganizing the rule to improve its clarity and usability.

## 1.4 Public Involvement Process

Ecology conducted public involvement and outreach efforts throughout the rule-making process. That effort included developing and updating a webpage that provided the public with information on rule-making activities and the opportunity to comment on the rule-making process. Ecology also met individually with representatives of local governments and prepared briefing materials for local government organizations. Informational materials were also developed and updated throughout the development of the rule amendments.

On October 4, 2004, Ecology filed with the Office of the Code Reviser proposed amendments to chapter 173-322 WAC, Remedial Action Grants and Loans. These proposed rule amendments were published on October 20, 2004, in the Washington State Register, Issue #04-20-076. Ecology also direct-mailed a focus sheet containing public involvement information to over 2,100 interested persons, including counties, cities, ports and other local governments. The proposed rule amendments were subject to a seventy-two day formal comment period, which ended on December 31, 2004. Ten commentors responded with written comments during this period.

Two public hearings were held on the proposal. Legal notices of these hearing were published in the Washington State Register on October 20, 2004 (WSR 04-20-076). Printed notice of hearing dates was also direct-mailed to over 2,100 interested persons, including counties, cities, ports and other local governments. The mailings were based on lists of interested persons maintained by the Solid Waste and Financial Assistance Program. Notice of hearing dates was also published on Ecology's webpage at http://www.ecy.wa.gov/programs/swfa/grants/ragrulerev.html and on Ecology's Public Events Calendar.

The following public hearings were held on the proposal:

December 9, 2004
6:30 p.m.
Washington State Department of Ecology
Headquarters Office
300 Desmond Drive
Lacey, WA

December 14, 2004
6:30 p.m.
Washington State Department of Ecology
Eastern Regional Office
N. 4601 Monroe
Spokane, WA

No members of the public attended either hearing. No oral or written comments were provided during the hearings.

## 1.5 Changes to the Proposed Rule Amendments

In response to comments on the proposed amendments to chapter 173-322 WAC, Remedial Action Grants and Loans, Ecology made several changes to the proposed rule. Those changes are highlighted in Appendix B. Most of those changes were made to improve the clarity of the rule and were not intended to change the meaning of the rule. Ecology made the following substantive changes to the proposed amendments based on public comment.

**(1) May a local government use insurance proceeds to meet the match requirement for a grant?**

While the proposed rule did not allow local governments to use insurance proceeds to meet the match requirement for a grant, the final rule does allow local governments to use insurance proceeds to meet the match requirement. See WAC 173-322-050(6). For more discussion regarding this issue, please refer to Chapter 4, Question #7.

**(2) Before obtaining a grant for conducting area-wide ground water remedial action on property owned by private parties, must a local government enter into a reimbursement agreement with those private parties?**

While the proposed rule required local governments to enter into a reimbursement agreement with private parties before obtaining grant funding, the final rule does not require local governments to enter into a reimbursement agreement with private parties before obtaining grant funding. See WAC 173-322-090(2). For more discussion regarding this issue, please refer to Chapter 8, Question #2.

## 1.6 Organization and Format of the Document

The Concise Explanatory Statement (CES) is organized based on the structure of chapter 173-322 WAC, Remedial Action Grants and Loans. For each section of the rule, the CES provides a brief overview of the amendments to that section and then responds to any comments received on that section.

The CES responds to comments received on the proposed rule amendments. Comments were received in writing. Ten commentors submitted comments on the proposal. Ecology reviewed these comments and identified 37 separate comments. Please note that these comments incorporate by reference any attachments.

The CES primarily responds to the identified comments in a question and answer format. The 37 comments were grouped into several generalized questions**.** Each of the generalized questions corresponds to a section or subsection of the rule and reflects a particular issue raised by one or more of the commentors. Ecology's response to those comments follows the generalized question.

**Appendix A – Comments on the Proposed Rule Amendments** presents the list of persons who commented on the proposed rule amendments and the text of those comments.

**Appendix B – Changes to the Proposed Rule Amendments** presents the text of the proposed rule and all of the changes that were made to the proposed rule that were adopted as part of the final rule.

**Appendix C – Comparison of the Old Rule and the New Rule** presents a table that identifies the source in the old rule of each section or subsection in the new rule. The purpose of the table is to clarify the reorganization of the rule.

# Chapter 2 Reorganization of the Rule

## 2.1 Overview of Amendments

The amendments to chapter 173-322 WAC, Remedial Action Grants and Loans, include a complete reorganization of the chapter. Ecology decided to reorganize the chapter to improve the clarity and usability of the chapter. The reorganization involves two basic changes.

First, the "site study and remediation grant" program has been split into the following three different grant programs:

- Oversight remedial action grants;
- Independent remedial action grants; and
- Area-wide ground water remedial action grants.

Second, the grant requirements have been organized by the type of grant instead of the type of requirement.

- Under the current rule, the sections of the chapter are organized by the type of requirement (e.g., applicant eligibility). Thus, the requirements applicable to a particular grant program are specified in several different sections, requiring the user to search through the entire rule to identify the relevant requirements.

- Under the proposed rule, the sections are organized by grant program (e.g., site hazard assessment). The applicable requirements for each grant program are included under each grant section and are organized by the steps in the grant process (from grant application to grant funding).

This reorganization reflects the organization of the Remedial Action Program Guidelines for the 2003-2005 biennium (Publication No. 99-505), which provides guidance on the operation of the grant and loan programs set forth in the rule.

The reorganization alone is not intended to change any of the regulatory requirements. Unless otherwise amended as part the rule-making action, the applicable requirements for each grant remain the same as under the current rule.

The sections of chapter 173-322 WAC are now organized as follows:

173-322-010 Purpose and authority.
173-322-020 Definitions.
173-322-030 Relation to other legislation and administrative rules.
173-322-040 Administration.
173-322-050 Fiscal controls.
173-322-060 Site hazard assessment grants.
173-322-070 Oversight remedial action grants.

173-322-080 Independent remedial action grants.
173-322-090 Area-wide ground water remedial action grants.
173-322-100 Safe drinking water action grants.
173-322-110 Methamphetamine lab site assessment and cleanup grants.
173-322-120 Derelict vessel remedial action grants.
173-322-130 Loans.

The subsections of each grant section are now organized as follows:

(1) Purpose.
(2) Applicant eligibility.
(_) Retroactive applicant eligibility. [Oversight remedial action grants ONLY]
(3) Application process.
    (a) Submittal.
    (b) Content.
(4) Application evaluation and prioritization.
(5) Cost eligibility.
    (a) Eligible costs.
    (b) Ineligible costs.
(6) Retroactive cost eligibility.
(7) Funding and reimbursement.
    (a) Adjustment of eligible costs.
    (b) Funding of eligible costs.
    (c) Additional funding.
    (d) Match requirement.
    (e) Reimbursement of grant funds.

To clarify the reorganization, a table was published along with the proposed rule amendments that identified the source in the current rule of each section or subsection in the proposed rule. That table has been updated to reflect changes to the proposed rule amendments and is provided in Appendix C.

## 2.2 Response to Comments

No comments were received regarding the reorganization of the rule.

# Chapter 3 Definitions

## 3.1 Overview of Amendments

To implement the new grant and loan programs, as well as the changes to the existing grant programs, several amendments were made to the terms and definitions set forth in WAC 173-322-020. Those amendments include adding new terms, amending the definition of existing terms, and deleting existing terms. Some of the new terms have been moved from elsewhere in the rule (e.g., "economically disadvantaged county") or adopted from the MTCA Cleanup Regulation, chapter 173-340 WAC (e.g., "site"). Several definitions were amended only to clarify existing terms, not to change the meaning of those terms (e.g., "cleanup action"). Other definitions were amended only for editorial reasons (e.g., "hazardous substances"). In summary:

The following terms were **added**:
- Abandoned or derelict vessels
- Economically disadvantaged county
- Federal cleanup law
- Initial containment of methamphetamine lab sites
- Innovative technology
- Loan agreement
- Methamphetamine lab site assessment
- Model Toxics Control Act (MTCA)
- Order
- Oversight remedial actions
- Partial funding
- Potentially responsible party (PRP)
- Retroactive costs
- Site

The definitions of the following terms were **amended**:
- Cleanup action
- Decree
- Grant agreement
- Hazard ranking
- Hazardous substances
- Independent remedial actions
- Interim action
- National priorities list (NPL)
- No further action (NFA) determination
- Oversight costs
- Potentially liable person (PLP)
- Remedial action
- Remedial investigation/feasibility study (RI/FS)

The following terms were **deleted**:

- Act
- Agreed order
- Consent order
- Disposal
- Enforcement order
- Minimum functional standards
- Site study and remediation

## 3.2 Response to Comments

Several comments were received regarding the amendments to WAC 173-322-020. Those comments are addressed below in a question and answer format. For a complete transcript of the relevant comments, please refer to Appendix A.

**(1) Should the definition of "federal cleanup law" be expanded to include the Resource Conservation and Recovery Act (RCRA) to make local governments eligible to receive grant funding for corrective actions required under federal RCRA orders?**

Port of Seattle
City of Seattle / King County

**Citation:** WAC 173-322-020 and 173-322-070(2)

**Response:** NO

See responses to Question #1 and Question #2 in Chapter 6.

**(2) Is the Model Toxics Control Act based on Initiative 97?**

Port of Seattle

**Citation:** WAC 173-322-020

**Response:** YES

The Model Toxics Control Act (MTCA), chapter 70.105D RCW, was passed by the voters in the November 1988 general election as Initiative 97. Although the Port correctly pointed out that there were two competing initiatives on the ballot in 1988, the two competing initiatives were 97 and 97B, not 97A and 97B as asserted by the Port. Note that the definition in chapter 173-322 WAC was obtained from, and is the same as, the definition in chapter 173-340 WAC. For more information, please refer to the 1998 Voters and Candidates Pamphlet for the State General Election.

# Chapter 4 General Requirements

## 4.1 Overview of Amendments

The reorganization of chapter 173-322 WAC involved the movement and consolidation of the administrative requirements and fiscal controls for the remedial action grant and loan programs. Those requirements and controls are now located in WAC 173-322-040 and WAC 173-322-050, respectively. See Chapter 2 for more information regarding the reorganization. The reorganization alone is not intended to change any of the regulatory requirements.

Several amendments, though, were made to those requirements. Some of those amendments were made to improve the clarity and usability of the rule and were not intended to change the meaning of the provisions. Substantive changes include the following:

- Expanding the applicability of the administrative requirements and fiscal controls to include not only the grant programs, but also the new loan program;
- Clarifying that grant and loan applications must be completed on forms provided by Ecology;
- Increasing the limit on independent remedial action costs that are eligible for grant funding from $200,000 to $400,000 (which increases the limit on grant funding from $100,000 to $200,000, assuming 50% grant funding);
- Allowing a local government to use proceeds from insurance claims to meet the match requirement for a grant. If the proceeds exceed the match requirement for the grant, then Ecology may reduce grant funding or require reimbursement of grant funding by up to the amount that the proceeds exceed the match requirement;
- Clarifying that the local government must specify in the grant application any proceeds it has received from contribution claims and any current or potential sources of local funding to meet the match requirement, including, but not limited to, other grants or loans and proceeds from insurance claims.
- Clarifying that, if Ecology provides the local government with a remedial action grant or loan, the local government must notify Ecology of any proceeds it receives from a contribution or insurance claim within 90 days of receipt of that claim.

## 4.2 Response to Comments

Several comments were received regarding the amendments to WAC 173-322-050 (Fiscal Controls). One comment was also received regarding the amendment to WAC 173-322-010 (Purpose and Authority). Those comments are addressed below in a question and answer format. For a complete transcript of the relevant comments, please refer to Appendix A.

**(1) To be eligible for grant funding, must a local government conduct remedial actions under an order or decree?**

Port of Seattle

**Citation:** WAC 173-322-010

**Response:** NO

Under both the current and proposed rules, Ecology may provide local governments with grants for conducting either oversight remedial actions (actions conducted under an order or decree) or independent remedial actions (actions conducted without Ecology oversight or approval). See WAC 173-322-040 of the current rule and WAC 173-322-070 and 173-322-080 of the proposed rule.

The Port argued that the language in the last sentence of WAC 173-322-010 seemed to contradict that fact. That sentence stated that "[t]he remedial action grants and loans shall be used to supplement local government funding and funding from other sources to carry out required remedial action." The Port suggested deleting the word "required" to eliminate the apparent contradiction.

The language was intended to reflect the requirement that the remedial actions conducted at a hazardous waste site must be necessary to meet the substantive requirements of the Model Toxics Control Act (MTCA), chapter 70.105D RCW, and its implementing regulations to be eligible for grant funding. Remedial actions that are not necessary to meet those requirements will not be funded.

Although the rule language was not intended to require that remedial actions also be conducted under an order or decree to be eligible for grant funding (as suggested by the Port), Ecology acknowledges that the language could be interpreted in that manner. Therefore, to eliminate the potential misinterpretation, Ecology has deleted the word "required" from the proposed rule language. However, local governments should remain aware of the fact that Ecology will only fund those remedial actions that are necessary to meet the substantive requirements of the Model Toxics Control Act (MTCA), chapter 70.105D RCW, and its implementing regulations.

**(2) Does Ecology's authority to provide grants and loans to local governments for conducting remedial action affect Ecology's duty to hold other potentially liable persons (PLPs) responsible for conducting remedial action?**

**Port of Seattle**

**Citation:** WAC 173-322-050(1)

**Response:** NO

Both the current and proposed rules state the following regarding the duty of Ecology when it provides grants and loans to local governments for conducting remedial action:

> The department will establish reasonable costs for all grants or loans, require local governments to manage projects in a cost-effective manner, and ensure that all potentially liable persons assume responsibility for remedial action.

See WAC 173-322-100(1) in the current rule and WAC 173-322-050(1) in the proposed rule. The rule language was intended to convey the following principle:

- Ecology's authority to provide grants and loans to local governments does not release Ecology from its duty to hold other PLPs responsible for conducting remedial action.

The Port argued that the rule language is subject to misinterpretation and requested that the language either be revised or deleted.

Although Ecology acknowledges that the current rule language is subject to possible misinterpretation, the language has not been a cause for concern since it was originally adopted in 1990. Consequently, instead of attempting to revise the language at this stage in the rule-making process, Ecology has decided to clarify the intent of the language.

The Port argued that the language could be misinterpreted to imply that Ecology must identify and hold financially responsible every PLP at a hazardous waste site before providing grant funding to a local government. Ecology did not intend, and the language should not be interpreted, to imply what the Port has suggested. While Ecology has a duty under MTCA to identify and hold PLPs responsible for conducting remedial action at a hazardous waste site (see, e.g., RCW 70.105D 050(1)), MTCA does not require Ecology to identify and hold accountable every PLP at a hazardous waste site. As noted above, the rule language was simply intended to convey the principle that Ecology's authority to provide local governments grants and loans does not release it from its duty to hold other PLPs responsible for conducting remedial action.

The Port also argued that the language could be misinterpreted to imply that a local government must identify and aggressively pursue all possible contributions claims against every PLP at a hazardous waste site before Ecology will provide grant funding to the local government. Again, Ecology did not intend, and the language should not be interpreted, to imply what the Port has suggested. While Ecology strongly encourages local governments to pursue possible contribution claims, the rule does not make the pursuit of such claims an eligibility requirement for grant funding.

**(3) Should the funding limit for an oversight remedial action grant be eliminated?**

City of Seattle / King County

**Citation:** WAC 173-322-050(3)(a)

**Response:** NO

Under both the current and proposed rules, the grant agreement represents the final funding commitment for the hazardous waste site and any request to amend the agreement to increase funding receives a lower priority than other grant applications. See WAC 173-322-100(3) in the current rule and WAC 173-322-050(3)(a) in the proposed

rule. The City of Seattle/King County requested that the rule be amended to eliminate the funding limit and the lower priority assigned to any subsequent request for additional grant funding. The comment refers to an existing rule requirement and raises an issue that is beyond the scope of the current rule-making. Therefore, the requested amendment has been denied.

**(4) Should the dollar limit on eligible costs for an independent remedial action grant ($400,000) be changed to a dollar limit on the amount of grant funding ($200,000)?**

Port of Seattle

**Citation:** WAC 173-322-050(3)(b) and 173-322-080(2)(d)

**Response:** NO

The current rule established a $200,000 limit on the total project costs eligible for funding under an independent remedial action grant. See current rule, WAC 173-322-090(1). The proposed rule increased that limit to $400,000. See proposed rule, WAC 173-322-050(3)(b) and 173-322-080(2)(d).

The proposed language in Section 050(3)(b), however, created a potential conflict with the language in Section 080(2)(d). While the language in Section 080(2)(d) established a $400,000 limit on the total costs eligible for grant funding, the language in Section 050(3)(b) established a $200,000 limit on grant funding. The potential conflict would only arise if the applicant was economically disadvantaged (and therefore eligible for up to 75% funding) and Ecology actually provided the applicant more than 50% funding.

The Port suggested that Ecology establish a limit on grant funding instead of a limit on the total costs eligible for grant funding. Ecology disagrees. Establishing a limit on funding instead of a limit on the total costs eligible for funding would change the existing rule requirement and eliminate the opportunity for providing additional funding under the rule to economically disadvantaged local governments. Therefore, Ecology has corrected the conflict by amending Section 050(3)(b).

The Port's comment also reflects, though, a misunderstanding of how the amount of grants funds is determined. Under the rule, the applicant must first identify the total eligible project costs. If that total exceeds $400,000, then the total must be reduced to $400,000. In such a case, the applicant would be eligible for funding for up to 50% of the total eligible costs ($200,000). If the applicant was a county, or was located within a county, that was economically disadvantaged, then the applicant would be eligible for funding for up to 75% of the total eligible costs ($300,000). Therefore, to clarify how grant funds are determined and how the limitation functions in determining the amount of grant funds, Ecology has deleted Section 080(2)(d) and amended Section 080(7)(a).

**(5) Should the dollar limit on eligible costs for an independent remedial action grant ($400,000) be eliminated?**

City of Seattle / King County

**Citation:** WAC 173-322-050(3)(b) and 173-322-080(2)(d)

**Response:** NO

The current rule established a $200,000 limit on the total project costs eligible for funding under an independent remedial action grant. See current rule, WAC 173-322-090(1). Ecology proposed an amendment to increase that limit to $400,000 to reflect the increased cost of routine cleanup actions and the increased use of independent remedial actions at somewhat more complex sites. See proposed rule, WAC 173-322-050(3)(b) and 173-322-080(2)(d), and the response to the Question above.

The City of Seattle and King County requested that the limit on total eligible costs simply be eliminated, arguing that the limit creates an inappropriate disincentive for conducting independent remedial actions. Ecology disagrees. While routine cleanup actions may be conducted independently, less routine cleanup actions should continue to be conducted under an order or decree. The funding limit reflects that existing policy. Therefore, the requested amendment has been denied.

**(6) How should the proceeds from contribution claims be referred to in the rule?**

Port of Seattle

**Citation:** WAC 173-322-050(5) and (8), and applicable provisions under each grant program

**Response:**
Under both the current and proposed rules, proceeds from contributions claims were either referred to as "contributions from private rights of actions" or "moneys from private rights of action." See, for example, WAC 173-322-100(5) in the current rule and WAC 173-322-050(5) in the proposed rule. As part of the proposed rule, Ecology added a definition for the term "private right of action." See WAC 173-322-020 in the proposed rule. The Port recommended that Ecology simply refer to such moneys as "proceeds from contribution claims." Ecology agrees and has adopted the Port's recommended approach throughout the rule. The adoption of that approach has also resulted in the deletion of the term "private right of action" from WAC 173-322-020.

**(7) Should a local government be allowed to use proceeds from an insurance claim to meet the match requirement for a grant?**

Port of Seattle
Port of Bellingham
Port of Anacortes

**Citation:** WAC 173-322-050(6) and applicable provisions under each grant program

**Response:** YES

Under the proposed rule, proceeds from insurance claims could not be used to meet the match requirement for a grant. See WAC 173-322-050(5) and, e.g., WAC 173-322-070(8)(a), (d) and (e) in the proposed rule. The following summary provides an overview of how insurance proceeds were considered under the proposed rule.

- **Pre-grant:** If the applicant received proceeds from an insurance claim before the effective date of the grant agreement, the proposed rule provided that Ecology must deduct those proceeds from the amount eligible for grant funding, after subtracting from those proceeds the legal costs incurred by the applicant pursuing the insurance claim. For example:

| **Assumptions** | |
|---|---|
| Project Costs | $100,000 |
| Insurance Proceeds | $70,000 |
| **Calculation of Grant Funding** | |
| Eligible Project Costs | $100,000 |
| Deduction | ($70,000) |
| Adjusted Eligible Project Costs | $30,000 |
| Grant Funding (50%) | $15,000 |
| **Result** | |
| Local Share | $85,000 |
| • Insurance | • $70,000 |
| • Match | • $15,000 |
| State Share (grant) | $15,000 |

- **Post-grant:** If the applicant received proceeds from an insurance claim after the effective date of the grant agreement, the rule proposed rule provided that the applicant must reimburse Ecology for a proportional share of those proceeds, after subtracting from those proceeds the legal costs incurred by the applicant pursing the insurance claim. For example:

| BEFORE GRANT | |
|---|---|
| **Assumptions** | |
| Project Costs | $100,000 |
| **Calculation of Grant Funding** | |
| Eligible Project Costs | $100,000 |
| Grant Funding (50%) | $50,000 |
| Match Requirement (50%) | $50,000 |
| **Interim Result** | |
| Local Share (match) | $50,000 |
| State Share (grant) | $50,000 |
| **AFTER GRANT** | |
| **Reimbursement of Grant Funding** | |
| Insurance Proceeds | $70,000 |
| Reimbursement of Grant Funding (50%) | $35,000 |
| **Final Result** | |
| Local Share | $85,000 |
| • Insurance | • $70,000 |
| • Match | • $15,000 |
| State Share (grant) | $15,000 |

Several of the Ports requested that the proposed rule be revised to allow a local government to use the proceeds from an insurance claim to meet the match requirement, with any amount in excess of the match requirement used to reduce the amount of the grant (if received before the grant was issued) or used to reimburse Ecology (if received after the grant was issued). In support of that request, the Ports made the following arguments:

- The revision would enable local governments to leverage more cleanups in a shorter period of time because local governments would pay less for each cleanup;
- Proceeds from insurance claims are different than proceeds from contribution claims because they represent a return on an investment; and
- The revision would eliminate the disincentive to pursue insurance claims.

For each of those arguments, there is a counter-argument that Ecology considered.

- While the revision would require local governments to pay less for each cleanup, the state government would be required to pay more for each cleanup. Thus, while the revision would increase the ability of local governments to leverage more cleanups locally in a shorter period of time, it would also, at the same time, reduce the ability of the state to leverage more cleanups statewide in a shorter period of time.
- While proceeds from insurance claims are not the same as proceeds from contribution claims, insurance policies are also not the same as other types of investments.
- The proposed rule arguably does not create a disincentive to pursue insurance claims because local governments are still responsible for a share of the remedial action

costs at a hazardous waste site and excess proceeds can often be used for purposes other than remedial action.

However, on balance, Ecology determined that a local government should be allowed to use the proceeds from an insurance claim to meet the match requirement for a grant. Accordingly, in response to the comments, Ecology has amended the rule to provide the following:

> The local government may use proceeds from insurance claims to meet the match requirement for the grant. If those proceeds exceed the match requirement for the grant, then the department may reduce grant funding or require a reimbursement of grant funding by up to the amount that those proceeds exceed the match requirement, after subtracting from that amount the legal costs incurred by the local government pursuing the insurance claims.

WAC 173-322-050(6).

Note that Ecology has retained the authority under the final rule to reduce grant funding or require a reimbursement of grant funding by up to the amount that insurance proceeds exceed the match requirement. Note further that while the final rule provides Ecology the authority, the final rule does not require Ecology to exercise that authority.

The following summary provides an overview of how insurance proceeds are considered under the final rule.

- **Pre-grant:** If the applicant receives proceeds from an insurance claim before the effective date of the grant agreement, the final rule provides that the local government may use the insurance proceeds to meet the match requirement and that Ecology may (but is not required to) reduce grant funding by up to the amount that the insurance proceeds exceed the match requirement. For example:

| **Assumptions** | |
|---|---|
| Project Costs | $100,000 |
| Insurance Proceeds | $70,000 |
| **Calculation of Grant Funding** | |
| Eligible Project Costs | $100,000 |
| Grant Funding (50%) | $50,000 |
| Match Requirement (50%) | $50,000 |
| **Adjustment of Grant Funding** | |
| Excess Insurance Proceeds (> Match) | $20,000 |
| Adjusted Grant Funding (30%) | $30,000 |
| Adjusted Match Requirement (70%) | $70,000 |
| **Result** | |
| Local Share (match = insurance) | $70,000 |
| State Share (grant) | $30,000 |

- **Post-grant:** If the applicant receives proceeds from an insurance claim after the effective date of the grant agreement, the final rule provides that the local government may use the insurance proceeds to meet the match requirement and that Ecology may (but is not required to) require reimbursement of grant funding under the grant agreement by up to the amount that the insurance proceeds exceed the match requirement. For example:

| **BEFORE GRANT** | |
|---|---|
| **Assumptions** | |
| Project Costs | $100,000 |
| **Calculation of Grant Funding** | |
| Eligible Project Costs | $100,000 |
| Grant Funding (50%) | $50,000 |
| Match Requirement (50%) | $50,000 |
| **Interim Result** | |
| Local Share (match) | $50,000 |
| State Share (grant) | $50,000 |
| **AFTER GRANT** | |
| **Reimbursement of Grant Funding** | |
| Insurance Proceeds | $70,000 |
| Match Requirement | $50,000 |
| Excess Insurance Proceeds (> Match) | $20,000 |
| Reimbursement of Grant Funding | $20,000 |
| **Final Result** | |
| Local Share (match = insurance) | $70,000 |
| State Share (grant) | $30,000 |

Please note that under the final rule the local government is still required to notify Ecology of any proceeds that the local government receives from an insurance claim, whether those proceeds are received before or after the effective date of the grant agreement. See WAC 173-322-050(8) and, e.g., 173-322-070(4)(b)(vii) in the final rule.

**(8) Does the receipt of remedial action grant funds by a local government alter either the liability or financial responsibility of the local government or any other party under MTCA?**

Port of Seattle

**Citation:** WAC 173-322-050(9)

**Response:** NO

Both the current and proposed rules state the following regarding the effect of the remedial action grant program on the liability and financial responsibility of local governments and other parties under MTCA:

> As established under the Model Toxics Control Act, chapter 70.105D RCW, and implementing regulations, the potentially liable persons (PLPs) bear financial responsibility for remedial action costs. The remedial action grant and loan programs may not be used to circumvent the responsibility of a PLP.

See WAC 173-322-090(7) in the current rule and WAC 173-322-050(8) in the proposed rule. The rule language was intended to convey the following principle:

- The liability of a party is established under MTCA and the financial responsibility of a liable party is based on the order or decree issued under MTCA.
- The receipt of remedial action grant funds by a party alters neither the liability nor financial responsibility of that party or any other party.

The Port argued that the rule language is subject to misinterpretation and requested that the language either be revised or deleted.

Although Ecology acknowledges that the current rule language is subject to possible misinterpretation, the language has not been a cause for concern since it was originally adopted in 1990. Consequently, instead of attempting to revise the language at this stage in the rule-making process, Ecology has decided to clarify the intent of the language.

With respect to the first sentence, the Port argued that the language could be misinterpreted to imply that MTCA establishes not only the liability of a party, but also the financial responsibility of that party. Ecology did not intend, and the language should not be interpreted, to imply what the Port has suggested. Ecology agrees with the Port that MTCA establishes only the liability of a party, not the financial responsibility of that party. The financial responsibility of a liability party is established by the order or decree issued under MTCA.

With respect to the second sentence, the Port argued that the language could be misinterpreted to imply that Ecology will not provide grant funding at multi-party sites unless every PLP has been identified and has agreed to fund its fair share of the costs. Again, Ecology did not intend, and the language should not be interpreted, to imply what the Port has suggested. Grant funding is not dependent on identifying every PLP and attaching financial responsibility to every PLP. The sentence is intended to emphasize the fact that providing a remedial action grant to a local government alters neither the liability nor financial responsibility of either the local government or other PLPs.

**(9) What types of administrative costs are eligible for grant funding, and who is eligible to receive reimbursement for such costs?**

Educational Service District

**Response:**
Under both the current and proposed rules, eligible costs include the costs of administering the grant and 25% of the salaries and benefits of those persons

administering or implementing the grant. The applicant may subcontract all or portions of the work to be conducted under the grant. That work could include administering the grant for the grantee, providing technical assistance to the grantee, and conducting the remedial actions for the grantee. The cost of procuring and administering the contract is an eligible administrative cost. For a comprehensive list of eligible administrative costs, please refer to Part III of *Administrative Requirements for Ecology Grants and Loans*, Publication No. 91-18.

An Education Service District cannot directly obtain funding under a remedial action grant unless they meet the applicant eligibility requirements for the particular grant program. For example, to obtain an independent remedial action grant, the District would have to be a local government that is either a potentially liable person (PLP) at a hazardous waste site or an owner of a hazardous waste site. WAC 173-322-080(2).

An Educational Service District (ESD) can provide services to a school district as a subcontractor. The cost of those services are eligible for grant funding, provided that the ESD was properly procured as a subcontractor and the costs incurred are eligible under the particular grant program.

The administrative cost of applying for a grant is not an eligible cost. For example, if an applicant applied for a grant and Ecology determined that the applicant was not eligible, then Ecology would not provide the applicant grant funding.

Indirect costs are also not eligible costs. Indirect costs are costs that benefit more than one activity of the grantee and that are not directly assignable to a particular objective of the project.

# Chapter 5 Site Hazard Assessment Grant Program

## 5.1 Overview of Amendments

The requirements applicable to the site hazard assessment grant program have been reorganized by the type of grant instead of the type of requirement. The reorganization alone is not intended to change any of the regulatory requirements. See Chapter 2 for more information regarding the reorganization. The requirements applicable to the site hazard assessment grant program are set forth in WAC 173-322-060.

Although a few amendments were made to those requirements, those amendments were made to improve the clarity and usability of the rule and were not intended to change the meaning of the provision. No substantive changes were made to those requirements.

## 5.2 Response to Comments

No comments were received regarding the site hazard assessment grant program.

# Chapter 6 Oversight Remedial Action Grant Program

## 6.1 Overview of Amendments

The reorganization of chapter 173-322 WAC involved the creation of three different grant programs from the former "site study and remediation" grant program. One of the grant programs that was created is the oversight remedial action grant program. See Chapter 2 for more information regarding the reorganization.

The requirements applicable to the oversight remedial action grant program have been reorganized by the type of grant instead of the type of requirement. The reorganization alone is not intended to change any of the regulatory requirements. The requirements applicable to the oversight remedial action grant program are set forth in WAC 173-322-070.

Several amendments were made to those requirements. Some of those amendments were made to improve the clarity and usability of the rule and were not intended to change the meaning of the provisions. Substantive changes include the following:

- Updating applicant eligibility requirements based on statutory changes, including deleting references to the pre-MTCA statutory authorities;
- Amending applicant eligibility requirements to allow funding of remedial actions performed under CERCLA orders;
- Amending the applicant eligibility requirements to allow funding of remedial actions performed under CERCLA orders issued prior to the effective date of the rule amendments, provided that the local government submits a grant application within 6 months of the effective date of the rule amendments (i.e., limited time offer). However, Ecology will prioritize funding of ongoing and future projects over funding of completed projects; and
- Allowing a local government to use proceeds from insurance claims to meet the match requirement for a grant. If the proceeds exceed the match requirement for the grant, then Ecology may reduce grant funding or require reimbursement of grant funding by up to the amount that the proceeds exceed the match requirement.

## 6.2 Response to Comments

Several comments were received regarding the oversight remedial action grant program and the amendments to WAC 173-322-070. Those comments are addressed below in a question and answer format. For a complete transcript of the relevant comments, please refer to Appendix A.

**(1) May Ecology provide grant funding under the rule for corrective actions conducted under MTCA orders or decrees?**

Port of Seattle
City of Seattle / King County

**Citation:** WAC 173-322-020 and 173-322-070(2)

**Response:** YES

Under both the current and proposed rules, Ecology may provide local governments grant funding for corrective actions conducted under orders or decrees issued under the Model Toxics Control Act (MTCA), chapter 70.105D RCW. See WAC 173-322-040(2) in the current rule and WAC 173-322-070(2)(c)(i) in the proposed rule. The comments by the Port of Seattle and the City of Seattle/King County seem to be based on the assumption that Ecology does not have this authority.

To clarify, the State of Washington has been delegated the authority to implement the federal Resource Conservation and Recovery Act (RCRA), 42 U.S.C. 6901 et seq., as amended. Under chapter 70.105 RCW, Ecology is designated as the agency within the State of Washington that is responsible for implementing RCRA. Under chapter 173-303 WAC, if corrective action is required to address releases of dangerous wastes or dangerous constituents at a facility that is seeking or is required to have a permit to treat, store, recycle or dispose of dangerous wastes, Ecology has the authority to require such action under an order or decree issued under MTCA. Under chapter 173-322 WAC, if a local government is required to take corrective action under such an order or decree, then it is eligible to receive grant funding for that corrective action, provided that the local government meets the other eligibility requirements.

Ecology is not aware of any facilities for which a local government has either requested, or Ecology has provided, grant funding for corrective actions. Either there is a low demand for such funding or local governments are unaware that such funding is available. The Terminal 91 facility noted by the Port was under a MTCA order (#DE98HW-N108) and therefore would have been eligible for funding, provided that the local government met the other eligibility requirements set forth in the rule.

**(2) Should Ecology provide funding for corrective actions conducted under federal RCRA orders?**

Port of Seattle
City of Seattle / King County

**Citation:** WAC 173-322-020 and 173-322-070(2)

**Response:** NO

Under both the current and proposed rules, Ecology may not provide local governments grant funding for corrective actions conducted under federal Resource Conservation and Recovery Act (RCRA) orders. See WAC 173-322-040(2) in the current rule and WAC 173-322-070(2) in the proposed rule. Both the Port of Seattle and the City of Seattle/King County requested that Ecology amend the rule to make local governments eligible to receive grant funding for corrective actions conducted under federal RCRA

orders, arguing that corrective actions are remedial actions that should be eligible for funding.

Although Ecology agrees that corrective actions can be eligible remedial actions, Ecology disagrees that local governments should be eligible to receive grant funding for corrective actions conducted under federal RCRA orders because the State of Washington, as explained in response to the previous question, has been delegated the authority to implement the federal Resource Conservation and Recovery Act (RCRA). Under chapter 173-303 WAC, if corrective action is required to address releases of dangerous wastes or dangerous constituents at a facility, Ecology has the authority to require such action under an order or decree issued under MTCA. Under chapter 173-322 WAC, if a local government is required to take corrective action under such an order or decree, then it is eligible to receive grant funding for that corrective action, provided that the local government meets the other eligibility requirements. Therefore, the requested amendment has been denied.

**(3) Should a local government (LG) be allowed to obtain grant funding if the LG is a potentially liable person (PLP), but not a signatory to the order or decree, provided the LG enters into a separate allocation agreement with another PLP who is a signatory to the order or decree?**

Port of Seattle
City of Seattle / King County

**Citation:** WAC 173-322-070(2)

**Response:** NO

Under both the current and proposed rules, to be eligible to receive an oversight remedial action grant, the local government must not only be a potentially liable person (PLP) or potentially responsible party (PRP), but also be a signatory of the order or decree requiring the remedial action. See WAC 173-322-040(2) in the current rule and WAC 173-322-070(2) in the proposed rule. Both the Port of Seattle and the City of Seattle/King County requested that Ecology amend the proposed rule to make a local government eligible for grant funding even if the local government is not a signatory to the order or decree, provided the local government enters into a separate allocation agreement with another PLP or PRP who is a signatory to the order or decree. The comments refer to an existing rule requirement and raise an issue that is beyond the scope of the current rule-making. Therefore, the requested amendment has been denied.

**(4) If a CERCLA order was issued before the effective date of the rule amendments and the applicant met the retroactive eligibility requirements, would the applicant be eligible for grant funding even if the remedial actions required under that order were ongoing on the effective date of the rule amendments? If so, how would grant applications be addressed under the rule?**

City of Seattle/King County

**Citation:** WAC 173-322-070(3)

**Response:** YES

Under WAC 173-322-070(3), if the CERCLA order was issued before the effective date of the rule amendments and the applicant met the retroactive eligibility requirements, then the applicant would be eligible for grant funding even if the remedial actions required under that order were ongoing on the effective date of the rule amendments.

Procedurally, the applicant must submit an application to Ecology within 6 months of the effective date of the rule amendments. WAC 173-322-070(3)(d). The application should cover both the costs already incurred under the order (past costs) and the costs that have yet to be incurred under the order (future costs). Ecology will not accept applications submitted more than 6 months after the effective date of the rule amendments, even if the applicant submitted a prior application for that same order within the 6 month period. Ecology will prioritize the funding of ongoing projects (including past costs) over the funding of completed projects. The funding of ongoing projects will likely be covered under a single grant agreement. However, Ecology has the discretion to cover ongoing projects under more than one grant agreement.

**(5) Should retroactive applicant eligibility or retroactive costs be limited to a specific period of time (e.g., 5 years) for oversight remedial action grants?**

City of Seattle/King County

**Citation:** WAC 173-322-070(3)

**Response:** NO

Under the proposed rule, retroactive applicant eligibility for an oversight remedial action grant is not restricted based on the date the CERCLA order was issued. WAC 173-322-070(3). Furthermore, if the applicant is eligible for grant funding under WAC 173-322-070(3), then any costs incurred under the CERCLA order that are eligible under WAC 173-322-070(6) are eligible for funding, regardless of how long before the effective date of the rule amendments the costs were actually incurred. WAC 173-322-070(4).

The City of Seattle and King County requested that the proposed rule be amended to limit the retroactive applicant eligibility or retroactive costs to a specific period of time (e.g., 5 years), arguing that without such a limitation insufficient funds will be available for current, ongoing and future projects.

Ecology has denied the requested amendment for the following reasons. First, the retroactivity provision set forth in the rule is intended to reflect the prior policy and practice of providing grants to local governments that conducted remedial actions under a

CERCLA order. Second, given that intent, there is arguably no legitimate basis for treating applicants differently based simply on the date the CERCLA order was issued. Of course, the applicant must still be able to substantiate the costs that were actually incurred under the CERCLA order. Third, while the retroactivity provision may increase the demand for limited grant funds, that demand can be managed through prioritization of grant funding. Consistent with prior policy, Ecology will prioritize the funding of ongoing and future projects over the funding of completed projects.

**(6) Should the deadline for submitting an application for an oversight remedial action grant be extended from 60 days after the issuance of the order or decree to 90 or 120 days?**

Port of Seattle

**Citation:** WAC 173-322-070(4)(a)

**Response:** NO

The proposed rule requires that "the application for an oversight remedial action grant must be submitted to the department within sixty days of the effective date of the order or decree." WAC 173-322-070(4)(a). The Port requested that Ecology amend the proposed rule to extend the deadline for submitting grant applications to 90 or 120 days.

The Port's comment refers to an existing rule requirement and raises an issue that is beyond the scope of the current rule-making. For purposes of comparison, please refer to WAC 173-322-110(3) in the current rule. Therefore, the requested amendment has been denied.

**(7) If a local government enters into an allocation agreement with another potentially liable person (PLP) instead of signing the order or decree, should the deadline for submitting an application for an oversight remedial action grant be based on the effective date of the allocation agreement instead of the effective date of the order or decree?**

City of Seattle/King County

**Citation:** WAC 173-322-080(4)(a)

**Response:** NO

The proposed rule requires that "the application for an oversight remedial action grant must be submitted to the department within sixty days of the effective date of the order or decree." WAC 173-322-080(4)(a). The City of Seattle/King County requested that Ecology amend the proposed rule to provide that the deadline for submitting the application be based on the effective date of the allocation agreement if the local

government enters into an allocation agreement with another potentially liable person (PLP) instead of signing the order or decree.

The requested amendment is directly related to the City of Seattle's prior request that Ecology amend the proposed rule to make a local government eligible for grant funding even if the local government is not a signatory to the order or decree, provided the local government enters into a separate allocation agreement with another PLP who is a signatory to the order or decree. Ecology denied that request because the comment refers to an existing rule requirement and raised an issue that is beyond the scope of the current rule-making. See Question #3 above. Since Ecology denied that request, there is no need to amend the existing rule requirement that pertains to the application deadline. Therefore, the requested amendment has also denied.

**(8) Should Ecology have the authority to consider EPA's scoring of hazardous waste sites on the national priorities list (NPL) when prioritizing funding for oversight remedial action grants?**

Port of Seattle

**Citation:** WAC 173-322-070(5)(b)(i)

**Response:** YES

Under both the current and proposed rules, when pending applications for oversight remedial action grants exceed the amount of funds available, Ecology may prioritize applications or limit grant awards based on the following:

> Relative hazard ranking as determined by the department in accordance with WAC 173-322-330 or the U.S. Environmental Protection Agency's National Priorities List ranking. Higher ranking sites will receive a higher funding priority;

See WAC 173-322-070(1)(a) in the current rule and WAC 173-322-070(5)(b)(i) in the proposed rule. The Port requested that the provision be deleted entirely, arguing that EPA's hazard ranking system (HRS) cannot be used to compare the relative hazard posed to human health and the environment by hazard waste sites on the national priorities list (NPL).

The Port's comment refers to an existing rule requirement and raises an issue that is beyond the scope of the current rule-making. Furthermore, Ecology continues to believe that the HRS can be used to help compare the relative hazard posed by hazardous waste sites on the NPL, despite the many limitations of the system. Therefore, the requested amendment has been denied.

When pending applications for oversight remedial action grants exceed the amount of funds available, the rule provides Ecology the authority to prioritize grant applications or limit grant awards based on the relative hazard to human health and the environment

posed by the applicable hazardous waste sites. Both the state and federal ranking systems were identified as systems that could be used by Ecology to help determine the relative hazard posed by different hazardous waste sites. Ecology recognizes, though, that both systems have limitations (e.g., the scoring system may not accurately reflect the hazard posed by a site and the system may change over time). Therefore, Ecology also recognizes that use of those systems may require the use of best professional judgment. Ecology is not aware, however, that EPA ever stops scoring a hazardous waste site once the requisite score for being listed on the NPL of 28.5 has been attained.

**(9) What is required for project costs to be eligible for reimbursement?**

Port of Seattle

**Citation:** WAC 173-322-070(6) and similar provision for each grant program

**Response:**
Both the current and proposed rules provide that "[c]osts must be eligible under this section and be approved by the department in order to be eligible for reimbursement." See WAC 173-322-050(4) in the current rule and WAC 173-322-070(6) in the proposed rule. This requirement also applies to each of the other grant programs (see, e.g., WAC 173-322-080(5)). The Port requested that the provision be deleted, arguing that the provision is meaningless.

The Port's comment refers to an existing rule requirement and raises an issue that is beyond the scope of the current rule-making. Furthermore, contrary to the assertion of the Port, the provision is meaningful. Therefore, the requested amendment has been denied.

The provision is intended to convey two different requirements for two different stages in the grant process. First, to determine funding for the grant agreement, Ecology must determine which types of project costs are eligible for funding under the rule. Second, after the grant recipient has actually incurred particular costs, Ecology must determine whether the particular costs incurred are eligible for reimbursement under the grant agreement.

**(10) Should the funding limit for an oversight remedial action grant be eliminated?**

City of Seattle / King County

**Citation:** WAC 173-322-050(3)(a)

**Response:** NO

See response to Question #3 in Chapter 4.

# Chapter 7 Independent Remedial Action Grant Program

## 7.1 Overview of Amendments

The reorganization of chapter 173-322 WAC involved the creation of three different grant programs from the former "site study and remediation" grant program. One of the grant programs that was created is the independent remedial action grant program. See Chapter 2 for more information regarding the reorganization.

The requirements applicable to the independent remedial action grant program have been reorganized by the type of grant instead of the type of requirement. The reorganization alone is not intended to change any of the regulatory requirements. The requirements applicable to the independent remedial action grant program are set forth in WAC 173-322-080.

Several amendments were made to those requirements. Some of those amendments were made to improve the clarity and usability of the rule and were not intended to change the meaning of the provisions. Substantive changes include the following:

- Increasing the limit on independent remedial action costs that are eligible for grant funding from $200,000 to $400,000 (which increases the limit on grant funding from $100,000 to $200,000, assuming 50% grant funding);
- Basing the priority of an independent remedial action grant on the date of the grant application;
- Allowing a local government to use proceeds from insurance claims to meet the match requirement for a grant. If the proceeds exceed the match requirement for the grant, then Ecology may reduce grant funding or require reimbursement of grant funding by up to the amount that the proceeds exceed the match requirement.

## 7.2 Response to Comments

Several comments were received regarding the independent remedial action grant program and the amendments to WAC 173-322-080. Those comments are addressed below in a question and answer format. For a complete transcript of the relevant comments, please refer to Appendix A.

**(1) Should a local government be eligible to receive grant funding for independent remedial actions conducted at a hazardous waste site if the local government has not completed remedial actions at the site and received from Ecology a no further action (NFA) determination? Should a local government be eligible to obtain grant funding for only interim actions?**

Port of Seattle

**Citation:** WAC 173-322-080(2)(c)

**Response:** NO

Under both the current and proposed rules, the local government must have completed independent remedial actions at a hazardous waste site and received from Ecology a no further action (NFA) determination to be eligible for grant funding. See WAC 173-322-040(2)(b)(i)(E) in the current rule and WAC 173-322-080(2)(c) in the proposed rule. The Port requested that Ecology delete that existing rule requirement. Eliminating that requirement would make local governments eligible to obtain grant funding for only interim actions. The Port's comment refers to an existing rule requirement and raises an issue that is beyond the scope of the current rule-making. Therefore, the requested amendment has been denied.

**(2) Should the dollar limit on eligible costs for an independent remedial action grant ($400,000) be changed to a dollar limit on the amount of grant funding ($200,000)?**

Port of Seattle

**Citation:** WAC 173-322-050(3)(b) and 173-322-080(2)(d)

**Response:** NO

See response to Question #4 in Chapter 4.

**(3) Should the dollar limit on eligible costs for an independent remedial action grant ($400,000) be eliminated?**

City of Seattle / King County

**Citation:** WAC 173-322-050(3)(b) and 173-322-080(2)(d)

**Response:** NO

See response to Question #5 in Chapter 4.

**(4) Should the deadline for submitting the application for an independent remedial action grant be based on the date of submission of the independent remedial action report instead of the date of receipt of the NFA determination?**

Port of Seattle

**Citation:** WAC 173-322-080(3)(a)

**Response:** NO

Both the current and proposed rules require that the application for an independent remedial action grant be submitted to Ecology within sixty days of receipt of the no further action (NFA) determination. See WAC 173-322-110(3) in the current rule and

WAC 173-322-080(3)(a) in the proposed rule. The Port requested that the deadline for submitting a grant application be based on the date the independent remedial action report is submitted to Ecology, not the date of receipt of the NFA determination. The Port's comment is directly related to its prior request that Ecology not require local governments to complete independent remedial actions and obtain a no further action (NFA) determination to be eligible for grant funding. Ecology denied that request because the comment referred to an existing rule requirement and raised an issue that is beyond the scope of the current rule-making. See response to Question #1 above. Since Ecology denied that request, there is no need to amend the application deadline, which is also an existing rule requirement. Therefore, the requested amendment has been denied.

**(5) Should the application deadline for an independent remedial action grant be extended from 60 days after receipt of the NFA determination to 90 or 120 days?**

Port of Seattle

**Citation:** WAC 173-322-080(3)(a)

**Response:** NO

Both the current and proposed rules require that the application for an independent remedial action grant be submitted to Ecology within sixty days of receipt of the no further action (NFA) determination. See WAC 173-322-110(3) in the current rule and WAC 173-322-080(3)(a) in the proposed rule. The Port requested that Ecology amend the rule to extend the deadline for submitting grant applications to 90 or 120 days. The Port's comment refers to an existing rule requirement and raises an issue that is beyond the scope of the current rule-making. Therefore, the requested amendment has been denied.

**(6) Should the application for an independent remedial action grant include a copy of the no further action (NFA) determination?**

Port of Seattle

**Citation:** WAC 173-322-080(3)(b)(v)

**Response:** YES

Both the current and proposed rules require that applications for independent remedial action grants include a copy of the document containing the no further action (NFA) determination" See WAC 173-322-060(2)(e) in the current rule and WAC 173-322-080(3)(b)(v) in the proposed rule. The Port requested that Ecology delete that requirement. The comment is directly related to the Port's earlier comment that is addressed under Question #1 above. The Port's comment refers to an existing rule requirement and raises an issue that is beyond the scope of the current rule-making. Therefore, the requested amendment has been denied.

**(7) Should the scope of work for independent remedial actions be negotiated as part of the grant agreement?**

Port of Seattle

**Citation:** WAC 173-322-080(4)(a)

**Response:** NO

The proposed rule stated that "the department and the applicant will negotiate the scope of work and budget for the grant." WAC 173-322-080(4)(a). The Port correctly noted in its comment that there is no need to negotiate the scope of work for independent remedial actions as part of the grant agreement because the work has already been completed. The Port also correctly noted that the department may still negotiate the amount of that work that will be eligible for grant funding. Therefore, in response to the comment, Ecology has amended the language in WAC 173-322-080(4)(a) to eliminate the reference to the scope of work.

**(8) Should independent remedial action costs incurred more than five years before the date of the grant application be eligible for funding?**

Port of Seattle

**Citation:** WAC 173-322-080(6)

**Response:** NO

Both the current and proposed rules require that only those remedial action costs incurred within five years of the application date are eligible for grant funding. See WAC 173-322-100(4) in the current rule and WAC 173-322-080(6) in the proposed rule. The Port requested that Ecology delete the five year limitation, unless the deadline for submitting a grant application was based not on the date of receipt of the no further action (NFA) determination, but rather on the date the independent remedial action report was submitted to Ecology. This comment is partially related to the Port's earlier comments that are addressed under Questions #1 and #4 above. The Port's comment refers to an existing rule requirement and raises an issue that is beyond the scope of the current rule-making. Therefore, the requested amendment has been denied.

# Chapter 8 Area-Wide Ground Water Remedial Action Grant Program

## 8.1 Overview of Amendments

The reorganization of chapter 173-322 WAC involved the creation of three different grant programs from the former "site study and remediation" grant program. One of the grant programs that was created is the area-wide ground water remedial action grant program. See Chapter 2 for more information regarding the reorganization.

The requirements applicable to the area-wide ground water remedial action grant program have been reorganized by the type of grant instead of the type of requirement. The reorganization alone is not intended to change any of the regulatory requirements. The requirements applicable to the area-wide ground water remedial action grant program are set forth in WAC 173-322-090.

Several amendments were made to those requirements. Some of those amendments were made to improve the clarity and usability of the rule and were not intended to change the meaning of the provisions. Substantive changes include the following:

- Amending applicant eligibility requirements to allow funding of remedial actions performed under CERCLA orders; and
- Allowing a local government to use proceeds from insurance claims to meet the match requirement for a grant. If the proceeds exceed the match requirement for the grant, then Ecology may reduce grant funding or require reimbursement of grant funding by up to the amount that the proceeds exceed the match requirement.

## 8.2 Response to Comments

Several comments were received regarding the area-wide ground water remedial action grant program and the amendments to WAC 173-322-090. Those comments are addressed below in a question and answer format. For a complete transcript of the relevant comments, please refer to Appendix A.

**(1) If Ecology provides the local government with an area-wide ground water remedial action grant for conducting remedial action on property owned by private parties, should the grant amount be partially repaid to the department and should the terms of the repayment be included in the grant agreement?**

Port of Seattle

**Citation:** WAC 173-322-050(7) and 173-322-090(7)(e)

**Response:** YES

Both the current and proposed rules require that grant funds must be partially repaid to Ecology if Ecology provides the local government with an area-wide ground water remedial action grant for conducting remedial action on property owned by private parties. The rules also require that the terms of repayment must be included in the grant agreement. See WAC 173-322-090(3) and 173-322-110(6) in the current rule and WAC 173-322-050(6) and 173-322-090(7)(e) in the proposed rule. The Port requested that the requirements be eliminated. The Port's comment refers to an existing regulatory requirement and raises an issue that is beyond the scope of the current rule-making. Ecology also disagrees with some the reasoning of the Port. Therefore, the requested amendment has been denied.

The applicant eligibility requirements for area-wide remedial action grants are not the same as for oversight and independent remedial action grants. In particular, to be eligible for grant funding, the local government does not need to be either a potentially liable person or an owner of the hazardous waste site. The local government need only apply on behalf of property owners affected by the hazardous waste site to facilitate area-wide ground water action. WAC 173-322-090(2)(c).

Ecology, however, does not have the statutory authority under MTCA to provide grant funding to anyone other than local governments. RCW 70.105D.070(3). While Ecology may provide a local government with grant funding to conduct remedial actions at a hazardous waste site within its jurisdiction that is owned by private parties to facilitate the cleanup of the site, Ecology will not provide such funding without a guarantee that the funding will be at least partially repaid to Ecology, particularly if the local government is neither a potentially liable person at the site nor an owner of the site.

**(2) If Ecology provides the local government with an area-wide ground water remedial action grant for conducting remedial action on property owned by private parties, should the local government be required to enter into a reimbursement agreement with private parties before entering into a grant agreement with Ecology?**

Port of Seattle

**Citation:** WAC 173-322-090(2)

**Response:** NO

As noted in the response to Question #1 above, both the current and proposed rules require that grant funds must be partially repaid to Ecology if Ecology provides the local government with an area-wide ground water remedial action grant for conducting remedial action on property owned by private parties. The rules also require that the terms of repayment must be included in the grant agreement. See WAC 173-322-090(3) and 173-322-110(6) in the current rule and WAC 173-322-050(6) and 173-322-090(7)(e) in the proposed rule.

The proposed rule, however, also included a requirement that the local government enter into a reimbursement agreement with private parties prior to entering into a grant agreement with Ecology. See WAC 173-322-090(2)(f) in the proposed rule. The Port requested that this additional requirement be eliminated. Ecology agrees that funds from affected property owners do not always need to be committed prior to grant funding. Therefore, in response to the comment, Ecology has deleted this additional requirement.

However, as under the current rule, local governments must still repay Ecology and the terms of repayment must be included in the grant agreement if area-wide ground water remedial actions are conducted on property owned by private parties. Consequently, local governments should still consider entering into a reimbursement agreement with private parties before negotiating the terms of a grant agreement with Ecology.

**(3) Must the grant application include a commitment by the local government to partially reimburse Ecology from any current or future funds obtained from affected property owners?**

Port of Seattle

**Citation:** WAC 173-322-090(3)(b)(ix)

**Response:** YES

The proposed rule required that the grant application include "[a] commitment by the applicant to partially reimburse the department from funds obtained from affected property owners." WAC 173-322-090(3)(b)(ix). The Port questioned whether this provision implied that funds from affected property owners must be committed to prior to grant funding and suggested the an editorial change to clarify the intent. Contrary to the suggestion by the Port, the provision does not require that funds from affected property owners be committed prior to grant funding. To clarify the intent, Ecology has adopted the Port's suggested editorial change. However, please note that the local government must still commit to repaying Ecology if grant funds are used to conduct remedial actions on property owned by private parties.

# Chapter 9 Safe Drinking Water Remedial Action Grant Program

## 9.1 Overview of Amendments

The requirements applicable to safe drinking water remedial action grant program have been reorganized by the type of grant instead of the type of requirement. The reorganization alone is not intended to change any of the regulatory requirements. The requirements applicable to the safe drinking water remedial action grant program are set forth in WAC 173-322-100.

Several amendments were made to those requirements. Some of those amendments were made to improve the clarity and usability of the rule and were not intended to change the meaning of the provisions. Substantive changes include the following:

- Amending applicant eligibility requirements to allow funding of remedial actions performed under CERCLA orders; and
- Allowing a local government to use proceeds from insurance claims to meet the match requirement for a grant. If the proceeds exceed the match requirement for the grant, then Ecology may reduce grant funding or require reimbursement of grant funding by up to the amount that the proceeds exceed the match requirement.

## 9.2 Response to Comments

No comments were received specifically on the safe drinking water remedial action grant program set forth in WAC 173-322-100. Please note, however, that several of the comments on the other grant programs (e.g., the oversight remedial action grant program) are relevant to this grant program because the regulatory requirements that the comments refer to also apply to other grant programs. Responses to those comments are provided under Chapter 4 or the grant program to which they were addressed. For a complete transcript of the relevant comments, please refer to Appendix A.

# Chapter 10 Methamphetamine Lab Site Assessment and Cleanup Grant Program

## 10.1 Overview of Amendments

The methamphetamine lab site assessment and cleanup grant program was recently authorized under the Model Toxics Control Act. See RCW 70.105D.070(3)(a)(iv). Before proposing rules to implement that program, Ecology developed a pilot program for the 2003-2005 biennium. That pilot program was set forth in the Remedial Action Program Guidelines (Publication No. 99-505). Except for the scheme for prioritizing grants, the adopted rules reflect the guidelines in the pilot program. The requirements applicable to methamphetamine lab site assessment and cleanup grant program are organized by the type of grant instead of the type of requirement. The requirements applicable to the grant program are set forth in WAC 173-322-110.

## 10.2 Response to Comments

Two comments were received regarding the methamphetamine lab site assessment and cleanup grant program set forth in WAC 173-322-110. Those comments are addressed below in a question and answer format. Please note, however, that several of the comments on the other grant programs (e.g., the oversight remedial action grant program) are relevant to this grant program because the regulatory requirements that the comments refer to also apply to other grant programs. Responses to those comments are provided under Chapter 4 or the grant program to which they were addressed. For a complete transcript of the relevant comments, please refer to Appendix A.

**(1) May the methamphetamine lab site assessment and cleanup grant program be expanded to include other sites of illegal drug manufacturing?**

Public Health Seattle & King County
Yakima Health District

**Citation:** RCW 70.105D.070(3) and WAC 173-322-110

**Response:** NO

The Model Toxics Control Act (MTCA), chapter 70.105D RCW, specifies that Ecology may only use the moneys deposited in the local toxics control account (LTCA) to provide grants and loans to local governments for specific purposes. RCW 70.105D.070(3)(a). While MTCA specifies that Ecology may fund "a program to assist in the assessment and cleanup of sites of methamphetamine production…consistent with the responsibilities and intent of RCW 69.50.511," MTCA does not specify that Ecology may fund a program to assist in the assessment and cleanup of other illegal drug manufacturing sites. RCW 70.105D.070(3)(a)(iv). Accordingly, Ecology does not have the statutory authority under MTCA to establish and fund a grant program under chapter 173-322 WAC to assist in the assessment and cleanup of other illegal drug manufacturing sites. The appropriate venue to address your concern is the state legislature.

# Chapter 11 Derelict Vessel Remedial Action Grant Program

## 11.1 Overview of Amendments

The derelict vessel remedial action grant program was recently authorized under the Model Toxics Control Act. See RCW 70.105D.070(3)(a)(v). Before proposing rules to implement that program, Ecology developed a pilot program for the 2003-2005 biennium. That pilot program was set forth in the Remedial Action Program Guidelines (Publication No. 99-505). Except for the scheme for prioritizing grants, the adopted rules reflect the guidelines in the pilot program. The requirements applicable to derelict vessel remedial action grant program are organized by the type of grant instead of the type of requirement. The requirements applicable to the grant program are set forth in WAC 173-322-120.

## 11.2 Response to Comments

No comments were received specifically on the derelict vessel remedial action grant program set forth in WAC 173-322-120. Please note, however, that some of the comments on the other grant programs (e.g., the oversight remedial action grant program) are relevant to this grant program because the regulatory requirements that the comments refer to also apply to other grant programs. Responses to those comments are provided under Chapter 4 or the grant program to which they were addressed. For a complete transcript of the relevant comments, please refer to Appendix A.

# Chapter 12 Loan Program

## 12.1 Overview of Amendments

Although the Model Toxics Control Act had always authorized the establishment of a loan program, Ecology had not previously developed and implemented a loan program as part of chapter 173-322 WAC. The rule simply allowed Ecology to provide loans on a case-by-case basis.

In 2002, Ecology decided to develop and implement a limited loan program. Before proposing rules to implement such a program, Ecology developed a pilot program for the 2003-2005 biennium. That pilot program was set forth in the Remedial Action Program Guidelines (Publication No. 99-505). The program was limited to providing economically disadvantaged counties additional funding in the form of a loan when limited grant funding was determined to be insufficient and additional fund dollars were available.

The adopted rules are intended to reflect the pilot program. However, the proposed rules differ from the pilot program in that the rules eliminate the availability of loans for meeting the match requirement for an area-wide ground water remedial action grant. Such loans were eliminated because up to 100% of the area-wide ground water remedial action costs are eligible for grant funding. Under the adopted rules, loans are only available for meeting the match requirement for an oversight remedial action grant.

## 12.2 Response to Comments

No comments were received specifically on the loan program set forth in WAC 173-322-130. Please note, however, that some of the comments on the oversight remedial action grant program are relevant to the associated loan program because the regulatory requirements that the comments refer to also apply to the loan program. Responses to those comments are provided under Chapter 6. For a complete transcript of the relevant comments, please refer to Appendix A.

# Chapter 13 Grant Funding for the Assessment and Cleanup of Area-Wide Soil Contamination

## 13.1 Background

Area-wide soil contamination generally refers to moderate levels of lead and arsenic soil contamination that is dispersed over a large geographic area, covering several hundred acres to many square miles. The primary sources of this contamination include the historical application of certain types of agricultural pesticides and the historical emissions from metal smelters in Washington State.

In January 2002, the Departments of Agriculture, Community Trade and Economic Development (CTED), Ecology, and Health asked the Area-Wide Soil Contamination Task Force to provide recommendations on how the agencies might improve the ways we respond to elevated levels of arsenic and lead in the soils of Washington State. After eighteen months of deliberation, the Task Force delivered their recommendations to the four agencies on June 20, 2003.

With respect to funding, the Task Force recommended that the Agencies:

- Provide financial assistance for local government efforts to address area-wide soil contamination, particularly the activities of local health jurisdictions; and
- Seek funding from a broad array of federal, state, and private sources, including the state and local toxics control accounts, the state legislature, the federal legislature; federal grant programs, private foundations, and potentially liable parties.

Under the Remedial Action Grant Program, Ecology is already providing grant funds from the local toxics control account (LTCA) to local governments to address area-wide soil contamination. For example, Ecology has provided grant funds to:

- Local health jurisdictions to conduct site hazard assessments under the Model Toxics Control Act (MTCA), chapter 70.105D RCW; and
- Local governments to conduct oversight and independent remedial actions under MTCA.

See WAC 173-322-060 through 173-322-080.

However, Ecology recognizes that the current sources of funding may not be adequate to meet the needs of local governments, particularly due to the restrictions that are placed on those sources of funding. Accordingly, in response to the Task Force recommendations, Ecology and the Office of the Governor are requesting that the state legislature appropriate funds from the state toxics control account (STCA) for the 2005-2007 biennium specifically for the investigation and cleanup of area-wide soil contamination that poses a threat to children. The capital budget account that would be created would enable Ecology to provide school districts an alternative source of funding for the investigation and cleanup of area-wide soil contamination within their jurisdictions.

## 13.2 Response to Comments

Several comments were received from school districts regarding the need for additional funding for local governments to address area-wide soil contamination within their jurisdictions. Those comments are addressed below in a question and answer format.

**(1) Should public school districts be eligible to receive additional funding up to 25% of eligible project costs as part of an oversight or independent remedial action grant?**

**(2) Should a separate grant program be established for the cleanup of area-wide lead and arsenic soil contamination?**

Wenatchee and Brewster School Districts

**Response:**
Under the current rule, and the rule as proposed, Ecology has the authority to use the moneys in the local toxics control account (LTCA) to provide grants to local governments to address area-wide soil contamination. For example, Ecology has the authority to provide grant funds to:

- Local health jurisdictions to conduct site hazard assessments under the Model Toxics Control Act (MTCA), chapter 70.105D RCW; and
- Local governments to conduct oversight and independent remedial actions under MTCA.

See WAC 173-322-060 through 173-322-080. The rule, though, does not specifically provide funding to address area-wide soil contamination and does not provide additional funding specifically for school districts to address sites with area-wide soil contamination. The school districts requested that the rule be amended to provide a specific program to address area-wide soil contamination and/or to provide additional funding specifically for schools districts to address sites with area-wide soil contamination.

As noted above, Ecology recognizes that the current sources of funding may not be adequate to meet the needs of local governments, particularly due to the restrictions that are placed on those sources of funding. Accordingly, in response to the Task Force recommendations, Ecology and the Office of the Governor are requesting that the state legislature appropriate funds from the state toxics control account (STCA) for the 2005-2007 biennium specifically for the investigation and cleanup of area-wide soil contamination that poses a threat to children. The capital budget account that would be created would enable Ecology to provide school districts an alternative source of funding for the investigation and cleanup of area-wide soil contamination within their jurisdictions.

Given that a comprehensive funding strategy is still being developed and that alternative funding sources are currently being sought through the state legislature, Ecology decided not to amend the rule at this time to specifically address area-wide soil contamination. Nonetheless, Ecology will continue to consider the comments submitted by the school districts as it develops and implements a comprehensive funding strategy to implement the Task Force recommendations.

# Appendix A

# Public Comment on the Proposed Rule Amendments

# List of Commentors
# and
# Table of Contents

| # | Name | Affiliation | Address | Document | Pages |
|---|---|---|---|---|---|
| 1 | Wayne Grotheer<br>Director, Health Environmental and Risk Services | Port of Seattle | P.O. Box 1209<br>Seattle, WA 98111-1209 | Letter | 10 |
| 2 | Stephen Karbowski<br>Assistant City Attorney | City of Seattle | 600 Fourth Ave., 4th Floor,<br>PO Box 94769,<br>Seattle, WA, 98124-4769 | Electronic<br><joint comment> | 3 |
| | Jeff Stern<br>Depart. of Natural Resources | King County | | | |
| 3 | Michael G. Stoner<br>Environmental Director | Port of Bellingham | 1801 Roeder Avenue<br>P.O. Box 1677<br>Bellingham, WA 98227-1677 | Letter & Attachment | 5 |
| 4 | Robert Elsner<br>Director of Projects and Environmental Planning | Port of Anacortes | P.O. Box 297<br>Anacortes, WA 98221 | Letter | 2 |
| 5 | Ngozi T. Oleru, Ph.D., MPH<br>Division Director,<br>Environmental Health Services Division | Public Health Seattle and King County | 999 Third Avenue, Suite 700<br>Seattle, WA 98104-4039 | Letter | 1 |
| 6 | Art McEwen | Yakima Health District | 104 N. 1st Street, Suite 204<br>Yakima, WA, 98901 | Electronic | 1 |
| 7 | Gary Callison | Wenatchee School District | 235 Sunset Ave<br>Wenatchee, WA, 98801 | Electronic | 1 |
| 8 | Jon De Jong | Wenatchee School District | 235 Sunset Ave<br>Wenatchee, WA, 98801 | Electronic | 1 |
| 9 | James D. Kelly | Brewster School District | P.O. Box 97<br>Brewster, WA 98812 | Electronic | 1 |
| 10 | Jim Kerns | Educational Service District 101 | 4202 S. Regal St.<br>Spokane, WA, 99223 | Electronic | 2 |

Port of Seattle



December 29, 2004

Diane Singer
Washington Dept. of Ecology
SWFA Program
PO Box 47600, Olympia, WA 98504-7600

Dear Ms. Singer:

Attached are the Port of Seattle's comments on Ecology's proposed amendments to the Model Toxics Control Act Grant Regulations, WAC Chapter 173-322. Local Toxics Grant funds have been an important component of many major cleanup actions carried out by local government entities, including some very significant environmental improvements implemented by the Port of Seattle. We all share an interest with Ecology in making this program as effective as possible in assisting local governments in carrying out MTCA remedial actions.

The draft amendments include significant improvements that will go a long way towards improving the Local Toxics Control Account (LTCA) grant program and encouraging environmental cleanup. These include allowing work under CERCLA administrative orders to be eligible for grant funding, including retroactive funding of work under EPA orders that has been completed in the past. Funding independent cleanups and work on area-wide groundwater issues are also important components of an improved program.

The attached comments go into detail on a number of suggested improvements to the draft regulations. They are presented in the order they appear in the regulations, not in terms of priority of the issues to the Port of Seattle. Issues of the highest priority to the Port of Seattle are as follows:

- The regulations should recognize the fundamental difference between contribution claims and insurance recoveries. Insurance recoveries should be available for use as the local matching funds for remedial actions. Insurance funds are a key component of local government cleanup efforts, and those local governments that paid premiums for the right to have claims paid by insurers should not be penalized for their foresight.

- Independent cleanups that are interim actions should be eligible for grant funding. This means that the "no further action" determination requirement should be dropped as a basis for grant eligibility. Given the recent changes in Ecology's approach to these determinations, requiring NFA determinations would severely limit the number of independent cleanups that would qualify for grants and would discourage local governments from carrying out those actions.

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- The definition of "Federal Cleanup Law" should include the federal Resource Conservation and Recovery Act. Washington's delegated program under RCRA makes use of MTCA's implementing regulations for corrective action cleanups and as such matches up well with MTCA requirements.

- In general, Ecology should avoid regulatory language that appears to require local governments to pursue all other PLPs at a site as a prerequisite to grant funding. Ecology has the discretion to choose a greater funding level for local governments that leverage LTCA funds with funds from other PLPs. However, recovery from other PLPs is fraught with many difficulties and may not always be worthwhile. As such, an absolute requirement of funding from other PLPs would unnecessarily discourage beneficial cleanups from moving forward.

Thank you for your efforts to improve the MTCA grant program. It has been an important catalyst for many beneficial cleanup actions and with the proper adjustments will continue to be an important component of cleanup planning for local governments in the future.

Very truly yours,

for Wayne Grotheer
Director, Health Environmental and Risk Services

**Port of Seattle Comments on Ecology's Proposed Amendments to the MTCA Grant Regulations, WAC Chapter 173-322 December 29, 2004**

## 173-322-010, Purpose and Authority

Delete "required" from the last sentence. Not all remedial action that will be grant eligible will be "required." Independent cleanups will now be eligible for grant funding as well as remedial actions required by consent decree or agreed order.

## 173-322-020, Definitions

Federal Cleanup Law Definition: The definition of "Federal Cleanup Law" should include the federal Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq., in addition to CERCLA. RCRA cleanups in Washington are essentially the same as MTCA cleanups, as Ecology has opted to implement RCRA corrective action through use of the MTCA regulations. The fortuity of whether a particular facility was subject to RCRA permitting at one time should not determine whether local government efforts to clean it up are eligible for LTCA grant funds. For example, the Port of Seattle's Terminal 91 is being addressed under a RCRA order, with the cleanup requirements being determined under MTCA regulations implemented by Ecology staff. The fact that a TSD was at one time operating at the Terminal means that corrective action requirements apply to the entire facility. The cleanup being performed, however, is no different than at other facilities where the MTCA regulations are applied. The federal vehicle involved in bringing the MTCA regulations to bear is different, and the definition of "Federal Cleanup Law" should recognize that both of these two methods for effecting cleanup are applicable to local governments in Washington.

Model Toxics Control Act Definition: The definition of "Model Toxics Control Act" should specify that the Initiative that became MTCA was Initiative 97A. There were two Initiative 97s, A and B. Initiative 97B was MTCA's predecessor law which had been passed by the Legislature prior to MTCA. MTCA was presented to the Legislature through the initiative process, and the Legislature failed to act on it. As a result, MTCA and the then-existing law were presented to the voters. The voters were asked to choose either 97A (MTCA), 97B or neither. Initiative 97A was passed and MTCA was codified as RCW Chapter 70.105D.

## 173-322-050, Fiscal Controls

Subsection (1), PLP Responsibility: Subsection (1) requires Ecology to ". . . ensure that all potentially liable persons assume responsibility for remedial action." This requirement is overbroad and beyond the purview of the LTCA grant regulations. As a general goal, the statement is laudable. However, placed in this location in the MTCA grant regulations, this statement could be interpreted as a requirement that local governments aggressively pursue all possible contribution or other claims against additional parties before grant funding is made available. MTCA does not require that each and every PLP be held accountable for remedial action costs, and the grant regulations should not create such a requirement out of the whole

cloth. The idea of a Local Toxics Control Account arose originally out of concern for landfill closures that a large number of smaller cities and counties were required to undertake. At landfills, a larger number of customers could at least theoretically be PLPs for generating hazardous substances that were disposed of with their solid waste. Grant funds have always been available for local landfill closure without a requirement that local governments force all non-exempt customers to assume some share of cleanup responsibility.

Subsection (1) should simply state that the department will establish reasonable costs and require applicants to manage projects in a cost-effective manner. Local governments are already given an incentive to pursue viable and cost-effective contribution claims, as they are permitted to retain a *pro rata* share of any recoveries, thereby lowering their net cleanup costs. Decisions regarding contribution claims should be left to the local government entity involved.

Subsection (8), Financial Responsibility: Subsection (8) starts with an overbroad statement concerning MTCA and its implementing regulations: "As established by [MTCA], and implementing regulations, the potentially liable persons (PLPs) bear financial responsibility for remedial action costs." MTCA creates liability. Financial responsibility only attaches when that liability is converted into agreements or orders or decrees that require on-the-ground remedial action. The effect of MTCA, if implemented in full against every PLP at a site, is that each would bear financial responsibility for some portion of remedial action costs. However, this is rarely the case. So as a descriptive statement, the first sentence is incorrect. If it were written strictly as an aspirational goal, that might cause less confusion, but it would then provide no guidance as to how to implement a grant program. As written, it implies a legal conclusion that is incorrect (that all PLPs *must* under MTCA take on financial responsibility for the cleanups for which they are legally liable). The first sentence of this subsection should be deleted.

The second sentence of subsection (8) is unclear as to its goal and effect: "The remedial action grant and loan programs may not be used to circumvent the responsibility of a PLP." What does "circumvent the responsibility of a PLP" mean in the context of a statutory program that makes use of joint and several liability? If a myriad of parties, one of which is a local government, are liable at a site and only half of them (including the local government) settle and carry out the cleanup, is it "circumventing the responsibility of a PLP" to fund the local government's share when there are parties who are arguably PLPs who have not contributed to the remedial action? The second sentence of subsection (8) implies that grant funds will not be available at multiparty sites unless each and every PLP has been identified and has agreed to fund its fair share of the remedial action costs. Otherwise, the local government's efforts to move forward with the cleanup would be "circumventing the responsibility of a PLP." This sentence should be deleted. Ecology can decide on a case-by-case basis whether a local government is taking on too large a share of cleanup responsibility given the existence of other PLPs at the site. In those cases, Ecology can fund the request at a lower level or not at all. Sweeping statements such as the second sentence of this subsection give little guidance and will invariably cause confusion concerning the actions that will be required of local governments with respect to other PLPs.

**173-322-070, Oversight Remedial Action Grants**

Subsection (2)(c)(iii): Subsection (2)(c)(iii) requires applicants at multi-party sites to be one of the parties that signs the order or decree for remedial action work. However, in some instances a third party may have signed the order or decree and the local government may be contributing to the cleanup through a separate allocation agreement with that party. Remedial action costs paid by local governments under that type of arrangement should be eligible for grant funding, as Ecology has approved the remedial action measures and the local government is paying for a portion of those costs. This subsection should be changed to read:

> "The applicant is financially responsible under an agreement with a PLP other than the applicant for remedial action carried out under an order or decree issued under either chapter 70.105D RCW or the federal cleanup law. The applicant must have entered into the agreement to reimburse another PLP for a portion of the remedial action costs incurred under the order or decree for the purpose of providing relief to ratepayers and/or taxpayers from remedial action costs."

Note that the word "sole" in the second sentence has been deleted in the suggested rewording of this subsection (so it no longer says the "sole purpose of providing relief . . ."). Divining whether a particular purpose is the *sole* reason for an action is fraught with difficulty. Ultimately, many purposes can be said to underlie most actions to at least some extent. If Ecology believes that a grant applicant is trying to game the system for motives other than reducing local government remedial action costs, Ecology has the discretion to prioritize funds to other grant applications. An absolute prohibition based on impure motives is unimplementable.

Subsection (4), Application Process: Subsection (4) requires that grant applications be submitted within 60 days of the effective date of a decree or order. This may be sufficient time with respect to grants for remedial actions that are planned out well in advance. However, some remedial actions are begun under emergency orders or enforcement orders, and in those circumstances 60 days may be extremely tight for a small local government entity to get a grant application together and submitted. Changing the requirement to 90 or 120 days seems more appropriate in order to account for unusual situations that are difficult to foresee.

Subsection (5), Application Evaluation and Prioritization: Subsection (5) lists relative hazard ranking on EPA's National Priorities List as a basis for prioritization of grant applications, stating that "[h]igher ranked sites will receive a higher funding priority." This statement is based on a common misperception concerning EPA's National Priorities List. Sites that meet the scoring minimum of 28.5 under EPA's Hazard Ranking System are eligible for inclusion on the NPL, but the HRS itself is not constructed to give a relative hazard ranking. It's purpose is to determine if certain risks are present and assign a score based on presence or absence of those risks. Relative risk associated with the *degree* of exposure is generally not accounted for in a meaningful way in the current HRS process. Further, EPA commonly scores some of the most hazardous sites with respect to a subset of the possible exposure pathways, and stops the process once the requisite 28.5 score has been attained. Finally, the HRS has changed over time. Sites listed in 1983, such as Harbor Island and its waterways, were scored using a different HRS than sites listed in the 90's and later (such as the adjacent Duwamish Waterway). Due to these

factors, HRS scores vary widely and cannot be correlated to relative risk between sites. This is in contrast to the MTCA approach, which assigns sites to tiered categories based on risk. For the NPL, a site is either a "National Priority" deserving of EPA's full attention, or it isn't. There is no need and no desire to rank sites within the NPL itself. Because of this lack of correlation between HRS score and site risk (relative to other NPL sites), a federal Superfund site's HRS "score" should not be employed to rank it relative to other Superfund sites. It is generally safe to assume that any site that is on the NPL would rank very highly in comparison to most MTCA sites. This evaluation criterion (subsection (5)(b)(i)) should be struck. Ecology should use its best professional judgment with respect to prioritizing grant funding for work at multiple NPL sites, not HRS scores.

Subsection (6), Cost Eligibility: Subsection (6) addresses cost eligibility by stating that costs must be eligible and approved by the department in order to be eligible for reimbursement. The requirement of approval and eligibility are obvious prerequisites for any approval process. In essence, this subsection says "Your costs have to be eligible for reimbursement before I approve them for reimbursement." That requirement truly goes without saying. The introductory language in Subsection (6) should be deleted for the sake of clarity – regulatory language that adds nothing has a bad habit of being imbued with meaning by subsequent implementers of the regulations. Better to eliminate such language than risk mischief at a later date. Identical language appears with respect to independent remedial action grant eligibility at 173-322-080(5) and should be eliminated there as well.

Subsection (8)(a) and (e), Funding and Reimbursement: Subsection (8)(a) adjusts eligible costs to deduct proceeds from contribution claims and claims for insurance coverage. Local governments should not be entitled to recover more than they have spent on remedial action. However, local governments should be entitled to use insurance proceeds for the matching funds that must be provided by the local government. Insurance proceeds are not "found" money or "free" funds. Local governments paid insurance premiums for the right to be reimbursed on any subsequent claims that are covered by the policy that was purchased with the premiums. In essence, the local government is being reimbursed for premiums paid in the past when it settles a claim with an insurer. Local governments who had the foresight to purchase large policies that covered environmental damage should not be disadvantaged due to their foresight and due to the costs they incurred at that time to protect themselves from future liability. Local governments should not be empowered to apply for or retain grant funds that, when combined with insurance recoveries, would result in a profit to the local government. However, they should not be required to reimburse the department unless the insurance recovery exceeds the local remedial action cost share, taking into account the legal and other costs required to obtain the insurance settlement funds.

Contribution claims against other PLPs do not raise the same issues as payments on insurance claims, as local governments have not paid years of premiums to those PLPs for the right to later recover claims costs. As such, contribution claim proceeds should be deducted from the funds eligible for grant funding, once legal fees and other costs of pursuing those actions have been taken into account.

Based on the above considerations, the last sentence of (8)(a) should be replaced with the following:

> "If the applicant has successfully pursued a contribution claim against other PLPs, then the department shall deduct the net receipts from that claim from the amount eligible for grant funding, taking into account the local government's legal fees and other costs in pursuing the contribution claim. If the local government has received payments from claims under previously-purchased insurance policies, then the department shall subtract from the amount eligible for grant funding all proceeds in excess of the local government's portion of remedial action costs, after subtracting legal fees and other costs incurred by the local government in obtaining the insurance claim payments."

In order to implement the proposed distinction between contribution claim receipts and insurance payment of indemnity claims, subsection (8)(e) on the reimbursement of grant funds must also be changed. The following language would accomplish the recommended adjustment:

> "If the applicant successfully pursues a contribution claim against other PLPs, then the department shall be reimbursed for a proportional share of the moneys received, after the local government's legal fees and other costs in pursuing such actions have been deducted. If the applicant receives payments from claims for coverage for site liability under previously-purchased insurance policies, the applicant shall reimburse the department for all moneys received in excess of the local government's share of remedial action costs at the site."

**173-322-080, Independent Remedial Action Grants**

Subsection 2(c), No Further Action Determinations: Subsection 2(c) requires local governments to obtain a no further action (NFA) determination from Ecology in order to be eligible for an independent remedial action grant. Recent developments in the Voluntary Cleanup Program have made NFA determinations more difficult to obtain. At this time, an NFA is *only* available if cleanup standards are met throughout the site in all media. "Conditional" and "media specific" NFAs that were formerly available have been disallowed by the Attorney General's office, which is now working with Ecology on replacing those tools with "guidance letters." As a result, NFAs will not be available at sites where actual cleanup construction is complete, but contamination remains at the site (such as marginal groundwater exceedences at the property boundary that may be essentially impossible to remediate). In other words, independent cleanups that are sufficient for Ecology to conclude that no further cleanup work is necessary beyond monitoring will now frequently not qualify for an NFA through the Voluntary Cleanup Program.

Additionally, requiring an NFA for independent cleanup grant eligibility ignores the very real benefits that can come from interim cleanup measures. An interim cleanup may be the only option available to a local government due to a variety of circumstances. Substantial environmental benefits can, of course, accrue from interim cleanup actions. When a truly final cleanup may be many many years in the future, such as with groundwater plumes of certain types, interim actions can be the only realistic approach to take to a site. Local governments that are saddled with contamination issues for which one or more interim actions make sense should

not be penalized by being ineligible for LTCA grant funding. Subsection 2(c) of this section should state: "The applicant must have completed interim or final independent remedial actions at the hazardous waste site that are acknowledged in writing by Ecology as providing a sufficient basis for grant funding." This language parallels the standard that must be met for grant funding of work under the federal cleanup law. Note that very few final cleanup actions under the federal cleanup law would meet the current requirements for an Ecology NFA (e.g., cleanup standards are met throughout the site in every medium). Ecology should be willing to evaluate the merits of independent cleanups in the context of grant eligibility just as it will be evaluating the merits of cleanups performed under federal authorities.

Subsection 2(d), Eligible Costs Limit: Subsection 2(d) limits eligible project costs to $400,000. This limitation should instead be written as a maximum grant award of $200,000. That will avoid local governments having to specify which $400,000 of costs are the subject of the grant request.

Subsection (3)(a), Submittal Deadline: Subsection (3)(a) links the submittal deadline to the issuance of an NFA. Due to the current issues with NFA's, this trigger for grant submissions should not be used. Instead, Ecology should consider requiring that grant applications be submitted within 90 or 120 days of the filing of the independent cleanup action report required by MTCA.

Subsection 3(b), Application Contents: Subsection 3(b) contains a list of requirements regarding grant application contents. Certain of those relate to an NFA determination. Those references should be changed or deleted. For example, subsection 3(b)(v) should state: "A copy of Ecology's written acknowledgement that the independent remedial actions form a sufficient basis for grant funding."

Subsection 4(a), Application Evaluation and Prioritization: Subsection 4(a) states that Ecology and the applicant will negotiate the scope of work and budget for the grant. In the context of independent cleanups that may have been completed before submission of the grant application, this requirement is out of place. The department may negotiate the amount of the work already completed that will be grant eligible, and it may negotiate the funding level, but not the scope of the work that may have already been completed. A requirement for pre-approval is inconsistent with independent remedial actions.

Subsection (6), Application Deadline: Subsection (6) sets a five year deadline for grant funding of independent remedial action costs. This seems reasonable provided the NFA requirement is deleted. With Ecology's current approach to NFA's, it could easily take more than five years for an independent cleanup to be awarded an NFA. If the NFA requirement stays in place, there should be no time limit for the application.

Subsection (7)(a) and (e), Eligible Costs Adjustments: The distinction between contribution claims and insurance claim receipts should be carried through to grants for independent cleanups. Also, the legal fees and other costs incurred in obtaining contribution and insurance claim funds should be netted out beforehand. This subsection should read as follows:

"If the applicant has successfully pursued a claim for contribution, then the department shall deduct the net amount received, taking into account the applicant's legal fees and other costs in obtaining the contribution funds, from the amount eligible for grant funding to the applicant. If the applicant has received payments from claims under previously-purchased insurance policies, then the department shall subtract from the amount eligible for grant funding all proceeds in excess of the local government's portion of remedial action costs, after subtracting legal fees and other costs incurred by the applicant in obtaining the insurance claim payments."

The same change should be made with respect to subsection 7(e) addressing reimbursement of grant funds. This subsection should read as follows:

"If the applicant successfully pursues a claim for contribution, then the department shall be reimbursed for a proportional share of the moneys received, after the local government's legal fees and other costs in obtaining the contribution funds have been deducted. If the applicant receives payments from claims under previously-purchased insurance policies, then the department shall be reimbursed for all such funds in excess of the local government's portion of remedial action costs, after subtracting legal fees and other costs incurred by the applicant in obtaining the insurance claim payments."

**173-322-090, Area-Wide Ground Water Remedial Action Grants**

Subsection (2)(f), Applicant Eligibility: Subsection (2)(f) requires applicants to have entered into a reimbursement agreement with PLPs, PRPs and affected property owners for costs incurred implementing the area-wide ground water action specified in the grant agreement. This requirement puts a potentially huge burden on local governments to identify additional solvent PLPs who are willing to enter into a voluntary agreement to investigate or remediate an area-wide problem. Other aspects of the grant regulations allow local governments to carry out remediation first and pursue contribution claims later (subject to grant program reimbursement). There is no valid reason to take a different approach with area-wide ground water problems. In fact, these problems are precisely the kind of issue that lends itself to local government taking a leadership role and then seeking cost recovery when they have more fully defined the scope and nature of the problem, the role of various parties in causing it, and the type of remedy that will work best. It is much easier to seek contribution once those issues are fully fleshed out than to go hat-in-hand to parties who will generally deny that they are even PLPs at all. This requirement should be eliminated. If Ecology wants to look more favorably on grant applications that leverage Ecology funds with PLP contributions, then Ecology is free to do so. But an absolute requirement for a reimbursement agreement to be in place prior to funding will discourage actions that Ecology should instead be encouraging.

Subsection (3)(b)(vii), Contribution Claim Terminology: The words "for contribution" should be inserted after "contributions from private rights of action . . ." Private rights of action can be for contribution or any number of other claims. In fact, a less ungainly way to phase this would be to refer throughout the regulation to "claims for contribution" rather than "private rights of action for contribution." They are the same thing. Using that approach, (3)(b)(vii) would read: "A

description of all current or potential sources of funding including, but not limited to, other grants or loans and proceeds from insurance and contribution claims."

Subsection (3)(b)(ix), Reimbursement Commitment: Subsection (3)(b)(ix) requires a commitment from the applicant to reimburse Ecology from funds obtained from affected property owners. If this requirement means that funds from affected property owners must be committed to prior to grant funding then the requirement will unnecessarily impede local government investigation and remediation of area-wide problems. The words "any current or future" should be added before the term "funds" to make it clear that obtaining such funds is not an absolute pre-requisite to grant funding.

## Payne, Michelle (ECY)

**From:** SMTP@www.ecy.wa.gov
**Sent:** Thursday, December 23, 2004 4:02 PM
**To:** Payne, Michelle (ECY)
**Subject:** Form results from http://www.ecy.wa.gov/programs/swfa/grants/ragcommentform.html

**********

| | |
|---|---|
| Username: | Stephen Karbowski |
| UserOrg: | City Attorney's Office - City of Seattle, City Hall - 600 Fourth Ave., 4th Floor, PO Box 94769, Seattle, WA, 98124-4769 |
| UserEmail: | stephen.karbowski@seattle.gov |
| UserTel: | (206) 684-8245 |
| UserFAX: | (206) 684-8284 |
| FormatMessageType: | Yes |
| CommentMessageType: | Change |
| Subject: | Rule language |
| Comments2: | Proposed Rule Change Language Document: Definitions, Page 2; Fiscal Controls, Capping On-site funding, pp.11-12; Oversight Remedial Action grants, pp. 16-17; Independent Remedial Action Grants, p. 20 |
| Comments3: | Comments on MTCA Grant Rule Revision Submitted by Stephen Karbowski, Assistant City Attorney for the City of Seattle, and Jeff Stern, Dept. of Natural Resources, King County 12/23/2004 1) Page 2: Amendatory Sec. WAC 173-322-020 Definitions. "Federal cleanup law" is defined as "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." We recommend that the language be modified to change "federal cleanup law" to "federal cleanup laws" and include the Resource Conservation and Recovery Act (RCRA), as under RCRA remedial actions similar to CERCLA remedial actions occur. Suggested new language: ""Federal cleanup laws" 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., or the Resource Conservation and Recovery Act, 42 U.S.C. 6901 et seq., as amended." 2) Amendatory Sec. WAC 173-322-050 Fiscal controls. (3) Cap on-site funding.(a) Capping on-site funding based on cleanup estimates could be problematic, as cost frequently change based upon new information, or change in department or EPA requirements. It is almost impossible to estimate final cleanup costs that closely and such a requirement may encourage over-estimations, which would not be good for spreading around the available grant funds. We recommend that the language be modified to allow some revision at the same priority. Suggested new language: "(3) Cap on-site funding. (a) For oversight remedial actions, after the remedial investigation and feasibility study have been completed and a final redial action plan has been developed, the department and the applicant will establish a cleanup budget and negotiate grant and/or loan agreements. The funding provided under these agreements |

will be the department's remedial action fund commitment for cleanup at that hazardous waste site. Grant and loan agreements may be amended as needed, subject to the discretion of the department." 3) Amendatory Sec. WAC 173-322-050 Fiscal controls. (3) Cap on-site funding. (b) Capping the grant amount at $200K for independent remedial actions seems very low, especially when most remedial actions cost considerably more. This cap provides disincentives for a party considering a voluntary cleanup. It also would give a party greater incentive to seek an order or decree from the department, as those projects would not be limited to a specific dollar amount, only a specific percentage (50%) of total project cost. This would drive up oversight costs of the department and EPA, and overall project costs. We recommend making oversight and independent cleanups consistent in terms of eligible costs. Suggested new language: "(3) Cap on-site funding. (b) For independent remedial actions where a no further action (NFA) determination is issued after the cleanup has been completed, the grant amount shall not exceed 50% of eligible project costs." 4) Amendatory Sec. WAC 173-322-070 Oversight Remedial Action Grants. Under the proposed language, it appears that only local governments that have actually signed an order or decree from the department or the U.S. EPA are eligible to apply for MTCA grant funds. There are instances where a local government is a PRP and has not signed an order or decree, but is a cost share partner to a cleanup with another government that has signed an order or decree for that cleanup. Since 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, local governments should be eligible for MTCA grant funds whether or not they are a signatory to an order or decree as long as the cleanup is pursuant to an order or decree issued by the department or EPA. Suggested new language: Add two sections to (2) Applicant eligibility.(c)(iv)& (v): "(c) (iv) The applicant has incurred costs or expenditures for a remedial action that another PLP is required by the department to conduct under an order or decree issued under chapter 70.105D RCW; and the applicant has entered into an agreement with the PLP to reimburse the PLP for a portion of the remedial action costs incurred under the order or decree for the sole purpose of providing relief to ratepayers and/or taxpayers from remedial action costs." "(c) (v) The applicant has incurred costs or expenditures for a remedial action that another PRP is required by the U.S. Environmental Protection Agency to conduct under the federal cleanup laws; the order or decree has been signed or acknowledged by the department as a sufficient basis for remedial action grant funding; and the applicant has entered into an agreement with the PRP to reimburse the PRP for a portion of the remedial action costs incurred under the order or decree for the sole purpose of providing relief to ratepayers and/or taxpayers from remedial action costs." 5) Amendatory Sec. WAC 173-322-070 Oversight Remedial Action Grants. (3) Retroactive applicant eligibility. The proposed language as written appears to open up all past CERCLA cleanups to eligibility for MTCA grant funds. That could place a large financial burden on the program, and limit the funds available for current, ongoing and future projects. We recommend limiting the eligible costs to within the last five years. This would make the section consistent with the proposed retroactive cost language for the section on Independent Remedial Action Grants (WAC-322-080). Suggested new language: Add a new paragraph (e) to section (3) Retroactive applicant eligibility.: "(e) The applicant's remedial action costs

were incurred no earlier than five years prior to the effective date of the 2005 amendments to this chapter." 6) Amendatory Sec. WAC 173-322-070 Oversight Remedial Action Grants. (4) Application process. (a) Submittal. If non-signers of an order or decree are made eligible for grants by incorporating the same or similar language as we recommend in Item 4) above, then the language on time for submittal should be modified accordingly to take into account the timing of the execution of the cost sharing agreement between the applicant and the PLP/PRP, which usually occurs after the date of the order or decree. Suggested new language: Modify the "(a) Submittal." Paragraph as follows: "(a) Submittal. Except as provided under subsection (3) of this section, the application for an oversight remedial action grant must be submitted to the department within sixty days of the effective date of the order or decree if the applicant has signed the order of decree. If applicant has not signed the order or decree, but has signed an agreement with a PLP/PRP for reimbursement of cleanup costs on a remedial action being conducted pursuant to an order or decree, the application for an oversight remedial action grant must be submitted to the department within 60 days of the effective date of applicant's agreement with the PLP/PRP for reimbursement of cleanup costs." 7) Amendatory Sec. WAC 173-322-080 Independent Remedial Action Grants. Capping eligible project cost at less than four hundred thousand provides disincentive for a party to engage in a voluntary cleanup. We recommend, in light of our comments in Item 3 above, changing the language to allow for up to 50% of the project costs to be eligible. Suggested new language: Modify Independent Remedial Action Grants, (2)(d) as follows: "(2)(d) The applicant shall be eligible to receive funding for up to fifty percent of eligible project costs." 8) General Comment: For ongoing AOCs, is one application enough to cover both retroactive costs (costs incurred prior to the rule change date) and costs incurred after the rule change date, both actual and prospective? It is not clear from the proposed language if the six month application window applies to ongoing AOCs. Please clarify.

PORT OF BELLINGHAM
Washington State

December 17, 2004

Diane Singer
Grants Manager
Remedial Action Grants/Loans
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Re: Remedial Action Grant Rule Revision

Dear Ms. Singer:

This letter is provided in comment to the proposed rule revision for Ecology's Remedial Action Grants and Loans state rule (Chapter 173-322 WAC). Specifically, the Port of Bellingham strongly encourages a rule-making change to clarify and provide for the ability to use proceeds recovered from insurance claims and settlements, as matching funds in remedial action grants between local governments and Ecology.

As you know from our meeting with you and Assistant Attorney General, Steve Thiele, on October 12, 2004, the benefits of such a rule-making would be considerable to both the Ecology and local governments in their effort to cleanup historical contamination under MTCA. Environmental remediation is expensive and complicated. The process typically involves years of investigation and coordination with regulatory agencies. Funding is a very key issue.

As described in attachment, the Port concluded an insurance recovery settlement with two carriers, Travelers and Lloyds of London during the summer of 2003. (See Attachment) After years of effort, the settlement resulted in the recovery of $15.5 million at a cost of approximately $2.3 million in attorney and consulting fees. The net proceeds were placed into a dedicated environmental fund, directed at cleanup activities at 15 different state-listed sites. The Port has allocated the settlement proceeds to each of the sites.

Since the settlement, the Port has referenced the settlement proceeds in remedial action grant applications for each of the active sites. To date, the allocated insurance proceeds have not been claimed as part of the local match in these grant applications. However, this approach seems to penalize the Port for the insurance recovery project and creates a disincentive for other Ports to pursue similar action.

As we discussed during our meeting in October, the Port of Bellingham strongly recommends changes to the state rule on Remedial Action Grants to encourage recovery of insurance proceeds to help fund environmental cleanup actions under MTCA. The

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benefits of allowing local governments to use money recovered from successful insurance recovery projects as match for state grants include the following:

- Funding leverage – Local governments typically operate on a very tight budget. This change would allow Ports, Cities and Counties to leverage their funding toward more comprehensive cleanup projects.
- Potentially Liable Parties (PLPs) – Working with the insurance carriers on a claim, particularly through litigation, demands and intense and very rigorous investigation of records, historical uses, technical documents, and ownership at the sites in question. In our case, over 400,000 documents were produced to the carriers and discussed in deposition. As a result, the Port has developed a very thorough understanding of who did what at each of the sites. That information has been provided to Ecology to identify other Potentially Liable Parties (PLPs). This is a clear benefit to Ecology in the management of these sites.
- Funding sources – The Port has used the PLP information to negotiate cost shares for private parties at the sites in question. This supports Ecology's "polluter pay" policy and reduces the cost to both the state and local governments.
- Site Discovery and Remedial Investigations – The information obtained during insurance recovery projects also contributes directly to investigative work at each site. Historical records, interviews and technical documents are used to ensure that remedial investigations are comprehensive, thorough, and efficient.
- Technology transfer – The approach used in insurance recovery cases has been improved over the past ten years through cooperative efforts among Ports, Cities and Counties. The benefit to the state is a more sophisticated coalition of local governments that is committed to achieving Ecology's goals for environmental cleanup under MTCA.

Thank you for considering our recommended changes to state rule Chapter 173-322 WAC on Ecology's Remedial Action Grants and Loans. If implemented, these changes will result in more efficient us of state and local tax dollars toward more timely and comprehensive cleanup of historical contamination problems in our state.

Feel free to call with any questions. The Port of Bellingham very much appreciates Ecology's ongoing support of our efforts to clean up state-listed sites in Whatcom County.

Sincerely,

Michael G. Stoner
Environmental Director

## Overall strategy

Since the early 1990's the Port Commission has pursued an aggressive strategy for cleaning up historical contamination on Port-owned property. The Commission has also recognized that this commitment to environmental stewardship would require a forward-thinking approach to regulatory requirements and a sound financial framework. The overall objective of this strategy is to ensure that the Port's publicly-owned assets are unencumbered and fully available for the citizens of Whatcom County

## Costs

Environmental remediation is expensive and complicated. The process typically involves years of investigation, coordination with regulatory agencies, and negotiation among potentially liable parties. Funding is a very key issue.

The Port has **identified 15 sites** that require investigation and cleanup of contamination from past industrial practices. Other sites are under investigation. While the Port faces potential liability at these sites, several other public and private parties also appear to share the liability. The sites range in size from the high priority sites under the Bellingham Bay cleanup, including Whatcom Waterway, the Harris Avenue Shipyard, and the Cornwall Avenue Landfill, to the inactive tide grid in Blaine Harbor.

The Port's objective is to work cooperatively with other liable parties and contribute a fair share to help fund cleanup. In many circumstances, the Port has taken the lead to move the cleanup process forward. Generally the cost of the cleanup is expected to be shared among the Port, the other liable parties, and state agency grants. During the past decade, the Commission has dedicated a portion of tax revenues to fund ongoing environmental projects.

Currently, it is estimated that **the Port's fair share of total cleanup costs at all 15 sites may exceed $20 million**.

## Insurance Project

In 1995, the Port launched a project to explore potential insurance coverage for environmental damage on Port property that might be available under old policies. (In 1986, insurance companies began excluding coverage for any new pollution-related liabilities.) Research identified old policies with two carriers, Travelers and Lloyds of London, that appeared to apply. The Port made a formal claim of these carriers in 1998, however, discussions were not fruitful. In September 2000, therefore, the Port filed a lawsuit against each carrier for coverage. Since then, the Port has been engaged in litigation that has required a very high level of commitment and effort. Insurance carriers are vigorous in their objections to this type of claim and aggressively dispute both the Port's liability and any particular share of responsibility for costs at each site.

During the "discovery" phase of the lawsuit, the Port was required to produce over 400,000 documents to the carriers. Members of the current Port staff were deposed for

over 60 days. Many other past employees and Whatcom County residents were also deposed. As part of the process, 15 other carriers were ultimately included in the litigation.

Last fall (2002), following over two years of very involved litigation regarding the Port's coverage claim, Travelers and Lloyds each independently offered to engage in settlement negotiations. **Those negotiations were concluded this summer.** It was the Port attorney's judgment that the Commissioners and Port staff should hold off on any public announcements until the funds had arrived and certain other aspects of the litigation could be arranged. The Port is now able to announce that **settlement negotiations resulted in the recovery of $15.5 million** in total from Travelers, Lloyds of London, and the Chubb Group (another insurance carrier).

The cost of litigation to date is just under 15% of the current settlement total. Litigation is ongoing with the 15 other insurance carriers with a trial date set for February of 2004 in Whatcom County Superior Court.

## Dedicated Environmental Fund

The Commission has established a dedicated environmental fund to ensure that the net proceeds of the insurance settlement are directed toward specific environmental cleanup projects. This fund will go a long way toward financing **the Port's share** of the ongoing effort to cleanup up historical contamination in Bellingham Bay and other Port facilities.

However, full funding of the cleanup costs for all sites will require further attention. Litigation against the remaining insurance carriers will continue. Full funding of **the Port's share** will likely require limited support from tax revenues and from state environmental grants. In order to ensure fully funded cleanup at all sites, it will also be important for the Port to continue to negotiate fair share contributions from other liable parties at each site.

## Policy in Action

The Port Commission has wasted little time in putting the insurance recovery proceeds to work. This month the Port begins work on a $2.5 million project at Squalicum Harbor that combines an environmental cleanup of residual contamination from boatyard operations with new habitat creation on the waterfront. The environmental cleanup activities will be funded in part by tax revenues, $755,000 in insurance recovery proceeds, and a $910,294 grant from the Department of Ecology.

The project at Gate 2 includes dredging of contaminated sediment, removal of dilapidated creosote-treated structures, and construction of about two acres of marine habitat just outside of the Squalicum Harbor breakwater.

This project is a great example of the Port's commitment to environmental stewardship, regulatory obligations, and supporting Whatcom County by returning an under-utilized public asset to productive use.

# Port of Bellingham – site status

9/3/03

## Priority sites in RI/FS completion phase

1. Whatcom Waterway
2. Cornwall Avenue Landfill
3. Harris Avenue Shipyard
4. Olivine Site
5. Marine Services Northwest
6. Roeder Avenue Landfill

## Interim action sites (cleanup in progress)

7. Mt. Baker Plywood
8. Weldcraft Shipyard
9. Blaine Marina Tank Farm

## Construction complete (O&M)

10. 4th and Harris
11. Airport Woodwaste Landfill

## Preliminary Investigations

12. Murray Chris-Craft
13. Squalicum Tide Grid
14. Westman Marine
15. Blaine Harbor Tide Grid

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December 29, 2004

Diane Singer
Grants Manager
Remedial Action Grants/Loans
Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

***Re: Remedial Action Grant Rule Revision***

Dear Ms. Singer:

This letter provides the Port of Anacortes' comments on Ecology's proposed revisions to the Remedial Action Grants and Loans rule, WAC Chapter 173-322. The most significant issue for the Port of Anacortes (Port) with respect to these regulations is the ability of local governments to use amounts recovered from insurance claims and settlements as matching funds for remedial action grants.

Insurance recoveries are an integral part of how many ports approach environmental remediation, including the Port of Anacortes. The Port of Anacortes owns a number of properties that have contamination issues from past owners and operators. Remediation of a significant number of these parcels at one time would be impossible for a small port district such as Anacortes. However, the Port of Anacortes had paid for insurance policies in the past that give coverage for many of the needed cleanup actions. By combining funds recovered from claims on these policies with MTCA grants, the Port will potentially be able to address all of its major contaminated sites over the relatively near term. Allowing the matching funds to be provided from insurance claim recoveries will permit the Port to be very aggressive in addressing contaminated sites issues. In other words, more cleanup will happen and it will happen a lot faster.

The proposed regulations address insurance recoveries and contribution claim recoveries together, and reduce grant availability to the extent funds have been recovered from either source. However, the two sources of cleanup funds are fundamentally different in ways that should make a difference in how they are treated in the regulations. Insurance claims are based on a contractual relationship between an insurer and its insured. The insured pays the insurer for coverage that may or may not be needed in the future. For instance, the Port of Anacortes paid substantial premiums over the course of years to multiple insurers for property damage coverage. The Port has now filed claims under those policies and has received some funds in partial settlement of certain of those claims. Those funds are available only because the Port had, in the past, paid for coverage that was triggered by cleanup liability.

In contrast to the contractual nature of insurance coverage, contribution claims involve use of a statutory right of action to allocate liability for cleanup among parties that are jointly and severally liable under MTCA for cleanup costs. Funds are recovered not based on a previously-

purchased contractual right, but rather because more than one party is legally responsible for the cleanup and the law gives the party carrying out the cleanup the right to recover an equitable portion of its costs from the others. Unlike the insurance situation, that right has not been purchased with premiums paid out in the past. Contribution claims exist for PLPs that incur cleanup costs as a matter of statutory right.

Due to the fundamental difference between insurance and contribution claims, Ecology should allow insurance recoveries to be used for local matching funds. This use of insurance recoveries is not a windfall for the insured local government, as payment from the insurer is only available due to premium payments that have already been made by the local government entity. In effect, the premium payments purchased the right to have the insurer pay that portion of the cleanup costs representing the local match.

An additional consideration is the difficulty of obtaining insurance recoveries. Claims for cleanup costs frequently raise many factual and legal issues. Settlement of those claims is invariably a compromise due to the uncertainties and high costs surrounding a trial on the merits. If local governments cannot use insurance settlement amounts as matching funds for MTCA grants, local governments will have little incentive to pursue any claims other than those few where coverage is obviously and unequivocally present. Also, because claims invariably settle for compromise amounts, there is little risk that insurers will be the main beneficiaries of grant awards to local governments that use insurance claim recoveries for their local matching funds. Ports and other local governments will still have an incentive to maximize recovery from insurers, as the final cleanup cost bill is always uncertain and is frequently much higher than originally anticipated. As such, local governments will have no interest in settling for less from insurers due to the prospect of grant availability.

The Port of Bellingham has submitted comments giving additional reasons why insurance funds should be available for use as the local government contribution towards grant-funded remedial action. The Port of Anacortes supports those comments, as well as those of the Port of Seattle on this subject and on a variety of other issues in the proposed rule amendments.

Thank you for considering our views on the proposed amendments to Ecology's Remedial Action Grants and Loans Program regulations. We appreciate Ecology's efforts to improve the regulations, which are an extremely important component of local government efforts to clean up historic contamination in Washington. Please feel free to contact me at 360-299-1822 with any questions.

Sincerely,

Robert C. Elsner

PORT OF ANACORTES

Robert Elsner
Director of Projects and Environmental Planning

Cc: Eric Johnson, Washington Public Ports Association

Public Health
Seattle & King County

HEALTHY PEOPLE. HEALTHY COMMUNITIES.

**Alonzo L. Plough, Ph.D., MPH,** *Director and Health Officer*

December 14, 2004

Michelle Payne
Department of Ecology
P. O. Box 47600
Olympia, WA 98504-7600

RE: **Remedial Action Grant rule revision proposed language change regarding methamphetamine labs**

Dear Ms Payne:

We appreciate the opportunity to comment on the state's Remedial Action Grants and Loans rule revision. Overall, the revisions add clarity that will facilitate better understanding of how local governments can use the money that the rule makes available.

Recent trends in illegal drug manufacturing include the manufacturing of methcathinone and MDMA in addition to methamphetamine. Therefore, we would like to encourage the state to use "illegal drug" instead of "methamphetamine" in the rule. This language change would more accurately reflect the types of illegal drug activity that are creating hazardous contamination. It is also consistent with RCW 64.44 which identifies local health officer duties in responding to property used for illegal drug manufacturing.

Thank you and we look forward to your continued support. If you have any questions regarding our comments, please contact Terry Clements at (206) 296-3993.

Sincerely,

Ngozi T. Oleru, Ph.D., MPH
Division Director, Environmental Health Services Division

NTO:mg

cc: Bill Lawrence, Manager, Environmental Hazards Section
Paul Shallow, Health & Environmental Investigator III
Terry Clements, Health & Environmental Investigator III

## Payne, Michelle (ECY)

**From:** SMTP@www.ecy.wa.gov
**Sent:** Thursday, October 14, 2004 2:58 PM
**To:** Payne, Michelle (ECY)
**Subject:** Form results from http://www.ecy.wa.gov/programs/swfa/grants/ragcommentform.html

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| | |
|---|---|
| Username: | Art McEwen |
| UserOrg: | Yakima Health District, 104 N. 1st Street, Suite 204, Yakima, WA, 98901 |
| UserEmail: | art.mcewen@co.yakima.wa.us |
| UserTel: | 509-249-6543 |
| UserFAX: | 509-249-6643 |
| FormatMessageType: | No |
| CommentMessageType: | Change |
| Subject: | Methamphetamine Lab Cleanup Grants |
| Comments2: | page 32 of the rule text |
| Comments3: | 173-322-110 Methamphetamine Lab site assessment and cleanup grants. "Chapter 246-205 WAC DECONTAMINATION OF ILLEGAL DRUG MANUFACTURING OR STORAGE SITES" is the code which sets the criteria for these sites. Since this applies to more then Methamphetamine labs the grant language should also reflect that. Other types of labs create conditions equal to or more dangerous then Methamphetamine labs. |

## Payne, Michelle (ECY)

**From:** SMTP@www.ecy.wa.gov
**Sent:** Thursday, October 28, 2004 1:59 PM
**To:** Payne, Michelle (ECY)
**Subject:** Form results from http://www.ecy.wa.gov/programs/swfa/grants/ragcommentform.html

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| | |
|---|---|
| Username: | Gary Callison |
| UserOrg: | Wenatchee School District, 235 Sunset Ave, Wenatchee, WA, 98801 |
| UserEmail: | callison.g@mail.wsd.wednet.edu |
| UserTel: | 509/663-8161, ext. 225 |
| UserFAX: | 509/663-3082 |
| FormatMessageType: | Yes |
| CommentMessageType: | Change |
| Subject: | Rule language |
| Comments2: | |
| Comments3: | Given the present funding for education, public schools will need to recieve dollars in order to do "clean up" of our fields and grounds. There are no other dollars available for this work!! I have reviewed the Remedial Action Grant Proposed Rule and propose that public schools be eligible for increased grant funding. Specifically, I suggest the following proposed language and options for increasing grant amounts eligible to public schools: a. Modify WAC 173-322-070, Oversight remedial action grants, and WAC 173-322-080, Independent remedial action grants, to allow higher percentage reimbursement for public school areawide cleanups. A proposed section 173-322-070.8(c)(iii) would read: (c) Additional funding. The applicant shall be eligible to receive funding in excess of the limit set forth in (b) of this subsection under the following circumstances: (iii) A public school. If the applicant is a public school then the applicant shall be eligible to receive additional funding up to twenty-five percent of eligible project costs. A proposed section 173-322-080.7(c) would read: (c) Additional funding. The applicant shall be eligible to receive funding in excess of the limit set forth in (b) of this subsection under the following circumstances: (i) The county is economically disadvantaged. If the applicant is a county, or is located within a county, that is economically disadvantaged, as defined in WAC 173-322-020, then the applicant shall be eligible to receive additional funding up to twenty-five percent of eligible project costs. (ii) A public school. If the applicant is a public school then the applicant shall be eligible to receive additional funding up to twenty-five percent of eligible project costs. b. Modify WAC 173-322-090, Area-wide ground water remedial action grants, to remove reference to groundwater throughout section OR create another section titled, Area-wide soil remedial action grants. |

## Payne, Michelle (ECY)

**From:** SMTP@www.ecy.wa.gov
**Sent:** Monday, November 01, 2004 8:22 AM
**To:** Payne, Michelle (ECY)
**Subject:** Form results from http://www.ecy.wa.gov/programs/swfa/grants/ragcommentform.html

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Username: Jon De Jong
UserOrg: Wenatchee School District, 235 Sunset, Wenatchee , WA, 98801
UserEmail: dejong.j@mail.wsd.wednet.edu
UserTel:
UserFAX:
FormatMessageType: Yes
CommentMessageType: Comment
Subject: Increase to the funding cap for voluntary cleanups
Comments2:
Comments3: I have reviewed the Remedial Action Grant Proposed Rule and propose that public schools be eligible for increased grant funding. Specifically, I suggest the following proposed language and options for increasing grant amounts eligible to public schools: a. Modify WAC 173-322-070, Oversight remedial action grants, and WAC 173-322-080, Independent remedial action grants, to allow higher percentage reimbursement for public school areawide cleanups. As a district that has recently discovered that we have soil remediation needs and are also going through a bond project, I would like to support the language below. Passing bonds is extremely difficult and with the increases in construction costs, we have had a difficult time even accomplishing the remodernization that we intended. If we were to take money from the bond projects to remediate the soil, we would have safer fields and substandard buildings. Please give the language below your careful consideration. A proposed section 173-322-070.8(c)(iii) would read: (c) Additional funding. The applicant shall be eligible to receive funding in excess of the limit set forth in (b) of this subsection under the following circumstances: (iii) A public school. If the applicant is a public school then the applicant shall be eligible to receive additional funding up to twenty-five percent of eligible project costs. A proposed section 173-322-080.7(c) would read: (c) Additional funding. The applicant shall be eligible to receive funding in excess of the limit set forth in (b) of this subsection under the following circumstances: (i) The county is economically disadvantaged. If the applicant is a county, or is located within a county, that is economically disadvantaged, as defined in WAC 173-322-020, then the applicant shall be eligible to receive additional funding up to twenty-five percent of eligible project costs. (ii) A public school. If the applicant is a public school then the applicant shall be eligible to receive additional funding up to twenty-five percent of eligible project costs. b. Modify WAC 173-322-090, Area-wide ground water remedial action grants, to remove reference to groundwater throughout section OR create another section titled, Area-wide

soil remedial action grants.

## Payne, Michelle (ECY)

**From:** SMTP@www.ecy.wa.gov
**Sent:** Friday, November 05, 2004 11:07 AM
**To:** Payne, Michelle (ECY)
**Subject:** Form results from http://www.ecy.wa.gov/programs/swfa/grants/ragcommentform.html

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|---|---|
| Username: | James D Kelly |
| UserOrg: | Brewster School District, PO Box 97, Brewster, WA, 98812 |
| UserEmail: | jkelly@brewster.wednet.edu |
| UserTel: | 509-689-3418 |
| UserFAX: | 509-689-2892 |
| FormatMessageType: | Yes |
| CommentMessageType: | Change |
| Subject: | Rule language |
| Comments2: | |
| Comments3: | A majority of Brewster School District properties are former apple/pear orchards. Without assistance from remedial action grants, the district would be unable to clean up the site in a timely manner. As a participant in the Volunatry Cleanup Program and an advocate for other school districts in similiar situations, we strongly encourge Ecology to consider the following: 1. Modify WAC 173-322-070, Oversight remedial action grants, and WAC 173-322-080, Independent remedial action grants, to allow higher percentage reimbursement for public school areawide cleanups. 2. Modify WAC 173-322-090, Area-wide ground water remedial action grants, to remove reference to groundwater throughout section OR create another section titled, Area-wide soil remedial action grants. A proposed section 173-322-070.8(c)(iii) would read: (c) Additional funding. The applicant shall be eligible to receive funding in excess of the limit set forth in (b) of this subsection under the following circumstances: (iii) A public school. If the applicant is a public school then the applicant shall be eligible to receive additional funding up to twenty-five percent of eligible project costs. A proposed section 173-322-080.7(c) would read: (c) Additional funding. The applicant shall be eligible to receive funding in excess of the limit set forth in (b) of this subsection under the following circumstances: (i) The county is economically disadvantaged. If the applicant is a county, or is located within a county, that is economically disadvantaged, as defined in WAC 173-322-020, then the applicant shall be eligible to receive additional funding up to twenty-five percent of eligible project costs. (ii) A public school. If the applicant is a public school then the applicant shall be eligible to receive additional funding up to twenty-five percent of eligible project costs. |

**Payne, Michelle (ECY)**

**From:** SMTP@www.ecy.wa.gov
**Sent:** Monday, November 29, 2004 10:15 AM
**To:** Payne, Michelle (ECY)
**Subject:** Form results from http://www.ecy.wa.gov/programs/swfa/grants/ragcommentform.html

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| | |
|---|---|
| Username: | Jim Kerns |
| UserOrg: | Educational Service District 101, 4202 S. Regal st., Spokane, WA, 99223 |
| UserEmail: | jkerns@esd101.net |
| UserTel: | 509-789-3517 |
| UserFAX: | 509-456-2999 |
| FormatMessageType: | Yes |
| CommentMessageType: | Change |
| Subject: | Rule language |
| Comments2: | General |
| Comments3: | Our public agency assists 59 local school districts in the seven northeast counties of Washington State through an insurance cooperative. (There are nine ESD's in the state) In the past we have participated with Ecology and assisted our districts utilizing DOE grant funding for groundwater remediation projects, underground storage tank removal, site study remediation and, most recently, science laboratory hazardous chemical removal and disposal. Previously we have been able to obtain the grants directly for the school districts and then provide technical assistance to them as a routine service. Alternatively, we obtain a grant for several of our districts and then manage the entire process for each of them. WE CAN NO LONGER AFFORD TO ABSORB THESE OVERHEAD ADMINISTRATIVE COSTS IN OUR LIMITED FUNDING. State and federal grants will have to include some administrative funding for our overhead costs or we will not be able to assist our local school districts in the future. The costs I am referring to include grant writing, contract assistance, bidding documents, billing, etc. Our technical expertise will, at this time, still be available to the districts IF OR WHEN THEY WRITE A GRANT AND RECEIVE FUNDING. Our experience is that this is often too little and too late. Either they don't know about the grant, do not have local expertise to write a successful grant application or simply do not have time to meet the grant application deadlines with their limited staffs. Another concern is that sometimes a local school district does obtain a grant, hire a contractor and then determine that they have the wrong contractor or a poorly written contract. Then they call us to bail them out. As you can imagine, it is often too late to help them efficiently use the grant. We are not a contractor. We are not trying to "get a piece of the money." Our mission is to assist public school districts -- BUT, LIKE OTHER PUBLIC ENTITIES, WE NEED THE FUNDING TO COVER OUR COSTS OR WE WILL NO LONGER BE ABLE TO CONTINUE TO SERVE OUR DISTRICTS IN THIS MANNER. Earlier this year we wrote an Ecology grant for sixteen local |

school districts to clean-out the hazardous chemicals in their science labs. It was an extremely successful project. We partnered with Spokane Solid Waste Management on the disposal portion. (SSWM obtained a grant for nine districts in Spokane County and partnered with us on the audits and educational portion of the grant.) Two local agencies assisting local school districts with a grant from Ecology. What a concept! My supervisor has already informed me that this will not happen in the future unless we can include our indirect costs into the grant formulae. Our agency absorbed all of the indirect and administrative costs on that project but we will no longer be able to perform those functions without compensation to cover our costs. YOUR GRANT RULES DID NOT ALLOW US TO DO THAT! PLEASE CHANGE THOSE RULES SO THAT WE CAN CONTINUE TO LOCATE AND OBTAIN GRANTS FOR OUR LOCAL SCHOOL DISTRICTS AND CONTINUE TO ASSIST THEM WITH THE ADMINISTRATIVE AND TECHNOLOGICAL REQUIREMENTS OF THE GRANTS.

# Appendix B

# Changes to the Proposed Rule Amendments

AMENDATORY SECTION (Amending WSR 93-24-047, filed 11/23/93, effective 12/24/93)

**WAC 173-322-010 Purpose and authority.** This chapter recognizes that the state contains hundreds of hazardous waste sites which threaten the state's water resources, including those used for public drinking water; that many of our municipal landfills are current or potential hazardous waste sites and present serious threats to human health and the environment; and that the costs of eliminating these threats in many cases are beyond the financial means of local governments and ratepayers.

This chapter establishes requirements for a program of grants and loans to local governments for remedial action pursuant to RCW 70.105D.070 (3)(a) and (7). ((~~The department may provide grants to local governments for remedial actions including site hazard assessments, site studies and remediations, and safe drinking water actions.~~)) The intent of the remedial action grants and loans is to encourage and expedite the cleanup 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*.

Deleted: required remedial action

AMENDATORY SECTION (Amending Order 97-09A, filed 2/12/01, effective 3/15/01)

**WAC 173-322-020 Definitions.** Unless otherwise defined in this chapter, words and phrases used in this chapter shall be defined according to WAC 173-340-200.

((~~"Act" means the "Model Toxics Control Act," chapter 70.105D RCW.~~

~~"Agreed order" means an order issued under WAC 173-340-530.~~)) "Abandoned or derelict vessels" means vessels that have little or no value and either have no identified owner or have an identified owner lacking financial resources to clean up and dispose of the vessel.

"Area-wide ground water contamination" means multiple adjacent properties with different ownership affected by hazardous substances from multiple sources that have resulted in commingled plumes of contaminated ground water that are not

practicable to address separately.

"Cleanup action" means any remedial action, except interim actions, taken at a site to eliminate, render less toxic, stabilize, contain, immobilize, isolate, treat, destroy, or remove a hazardous substance that complies with ((~~cleanup standards, utilizes permanent solutions to the maximum extent practicable, and includes adequate monitoring to ensure the effectiveness of the cleanup action.~~

~~"Consent order" means an order issued under chapter 90.48 or 70.105B RCW~~)) WAC 173-340-350 through 173-340-390.

"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.

"Decree" or "consent decree" means a consent decree issued under WAC 173-340-520 or the federal cleanup law. ((~~"Consent decree" is synonymous with decree.~~))

"Department" means the department of ecology.

((~~"Disposal" means a remedial action which removes hazardous substances from the site and places the hazardous substances in an engineered, regulatory complaint facility as a final destination.~~

~~"Enforcement order" means an order issued under WAC 173-340-540.~~)) "Economically disadvantaged county" means a county that meets the following criteria:

- The per capita income of the county, as measured by the latest official estimate of the Washington state office of financial management, is in the lower twenty counties in the state; and
- The county is economically distressed, as defined by chapter 43.165 RCW.

The department will include a list of counties which are economically disadvantaged in the following publication: Washington state department of ecology, "*Remedial Action Program Guidelines*," Publication No. 99-505.

"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.

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

"Hazard ranking" means the ranking for hazardous waste sites used by the department pursuant to ((~~chapter 70.105D~~)) RCW 70.105D.030 (2)(b) and WAC 173-340-330.

"Hazardous substances" means any hazardous substance((~~s~~))

as defined in WAC 173-340-200.

"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.

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

"Initial containment of methamphetamine lab sites" means the first location where hazardous substances are confined by a container, vessel, barrier, or structure, whether natural or constructed, with a defined boundary, and that prevents or minimizes its release into the environment.

"Innovative technology" means new technologies that have been demonstrated to be technically feasible under certain site conditions, but have not been widely used under different site conditions. Innovative technology also means the innovative use of existing technologies that have been established for use under certain site conditions, but not the conditions that exist at the hazardous waste site for which a remedial action grant is sought. Innovative technology has limited performance and cost data available.

"Interim action" means a remedial action conducted under WAC 173-340-430 ((~~that partially addresses the cleanup of a site~~)).

"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.

"Local government" means any political subdivision, regional governmental unit, district, municipal or public corporation, including cities, towns, and counties. The term encompasses but does not refer specifically to the departments within a city, town, or county.

((~~"Minimum functional standards" means the requirements of chapters 173-304 and 173-351 WAC, the minimum functional standards for solid waste handling.~~)) "Methamphetamine lab site assessment" means the actions taken by a local health department or district under WAC 246-205-520 through 246-205-560, including posting the property, inspecting the property, determining whether the property is contaminated, posting contaminated property, and notifying occupants, property owners, and other persons with an interest in the contaminated property.

"Model Toxics Control Act" or "act" means chapter 70.105D RCW, first passed by the voters in the November 1988 general election as Initiative 97 and as since amended by the legislature.

"National Priorities List ((~~(NPL)~~))" or "NPL" means a list

of hazardous waste sites at which the ((~~United States~~)) U.S. Environmental Protection Agency intends to proceed with enforcement or cleanup action.

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

"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).

"Oversight costs" are remedial action costs of the department or the ((~~United States~~)) U.S. Environmental Protection Agency reasonably attributable to the administration of an order or decree for remedial action at a hazardous waste site.

"Oversight remedial actions" means remedial actions conducted under an order or decree.

"Partial funding" means funding less than the maximum percentage of eligible costs allowed under this chapter.

"Pilot study" means an experiment in remedial action method, with the purpose of testing the suitability of a particular cleanup technology or process for remedial action at a particular site.

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

"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)).

"Public water system" means any system, excluding a system serving only one single-family residence and a system with four or fewer connections all of which serve residences on the same farm, providing piped water for human consumption, including any collection, treatment, storage, or distribution facilities under control of the purveyor and used primarily in connection with the system and collection or pretreatment storage facilities not under control of the purveyor but primarily used in connection with such system.

"Purveyor" means an agency or subdivision of the state or a municipal corporation, firm, company, mutual or cooperative association, institution, partnership, or person or any other entity that owns or operates a public water system, or the authorized agent of such entities.

**Deleted:** "Private right of action" means a legal claim authorized by RCW 70.105D.080 under which a person may recover costs of remedial action from other persons liable under the act.¶

"Recycling" means a remedial action which permanently removes hazardous substances from the site and successfully directs the material into a new product suitable for further industrial or consumer use.

"Remedial action" means any action or expenditure consistent with the purposes of chapter 70.105D RCW to identify, eliminate, or minimize any threat ((~~or potential 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.

"Remedial design (RD)" means an engineering study during which technical plans and specifications are developed to guide subsequent cleanup action at a hazardous waste site.

"Remedial investigation/feasibility study ((~~(RI/FS)~~))" or "RI/FS" means a ((~~study~~)) remedial action that consists of activities conducted under WAC 173-340-350 intended to collect, develop, and evaluate sufficient information regarding a site to enable the selection of a cleanup action under WAC 173-340-360 through 173-340-390.

"Retroactive costs" means costs incurred *before* the date of the grant agreement.

Deleted: prior to

"Safe drinking water" means water meeting drinking water quality standards set by chapter 246-290 WAC.

"Safe drinking water action" means an action by a local government purveyor or other purveyor to provide safe drinking water through public water systems to areas contaminated by or threatened by contamination from hazardous waste sites.

"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.

"Site hazard assessment" means a remedial action that consists of an investigation performed under WAC 173-340-320.

((~~"Site study and remediation" means remedial investigation, feasibility study, pilot study, remedial design, interim action or cleanup action at hazardous waste sites.~~))

"Treatment" means a remedial action which permanently destroys, detoxifies, or recycles hazardous substances.

AMENDATORY SECTION (Amending Order 97-09A, filed 2/12/01, effective 3/15/01)

**WAC 173-322-030 Relation to other legislation and administrative rules.** (1) Nothing in this chapter shall influence, affect, or modify department programs, regulations, or enforcement of applicable laws relating to hazardous waste investigation and cleanup.

(2) Nothing in this chapter shall modify the ((~~legal settlements and~~)) order((~~s~~)) or decree the department has secured with potentially liable persons for remedial action. The execution of remedies pursuant to ((~~court~~)) the order or decree shall in no way be contingent upon the availability of grant funding.

(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 ((~~funds~~)) and loans.

AMENDATORY SECTION (Amending Order 97-09A, filed 2/12/01, effective 3/15/01)

**WAC 173-322-040 ((~~Applicant eligibility.~~)) Administration.** ((~~(1) All applicants must be local governments as defined in this chapter.~~

~~(2) Site study and remediation grants. Eligibility for site study and remediation grants is limited to applicants that meet the following standards:~~

~~(a) The applicant must be a local government that is a potentially liable person (PLP) at a hazardous waste site; or owns a site but is not a PLP; or applies for a remediation grant for area-wide ground water contamination. The local government may be the sole PLP, or there may be other PLPs at the site.~~

~~(b) The local government must meet one of the following standards:~~

~~(i) The department must have required the local government to perform some phase of remedial action, or have approved or reviewed a completed remedial action. That requirement, approval or review shall take one of the following forms:~~

~~(A) A consent decree under chapter 70.105D or 70.105B RCW requiring remedial action at the site; or~~

~~(B) An enforcement order or an agreed order under chapter 70.105D or 70.105B RCW prior to March 1, 1989, requiring remedial action at the site; or~~

~~(C) An enforcement order, consent order or consent decree under chapter 90.48 RCW requiring remedial action at the site or an amendment to such an order subsequent to March 1, 1989; or~~

~~(D) An underground storage tank (UST) compliance order; or~~

~~(E) A no further action (NFA) determination issued after completion of an independent remedial action.~~

~~(ii) The local government which is also a potentially responsible party under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA) must have entered into a decree requiring remedial action at a hazardous waste site with the United States Environmental Protection Agency, provided that such agreement has been signed or acknowledged by the department in writing as a sufficient basis for remedial action grant funding.~~

~~(iii) The local government must have signed an agreement with the department requiring another PLP to perform remedial action at a landfill site and that agreement must take one of the forms specified in (b)(i) of this subsection. The local government must also have entered into an agreement with that PLP to reimburse the PLP for a portion of incurred remedial action costs with the sole purpose of providing relief to ratepayers and/or taxpayers from some remedial action costs.~~

~~(3) Safe drinking water action grants. Eligibility for safe drinking water action grants is limited to applicants who meet the following standards:~~

~~(a) The applicant must be a local government purveyor as defined in WAC 173-322-020 or be a local government applying on behalf of a purveyor.~~

~~(b) The subject water system must be in an area determined by the department of ecology to be a hazardous waste site or threatened by contamination from a hazardous waste site.~~

~~(c) The subject water system must exhibit levels of contamination which exceed the primary maximum contaminant levels (MCLs) set by WAC 246-290-310 or EPA standards as determined by the department of health, or exhibit levels of contamination which exceed the standards set by WAC 173-340-700 through 173-340-760 as determined by the department of ecology, or be certified by the state department of health that a contaminant threatens the safety and reliability of a public water system which cannot be remedied solely by operational solutions. Contaminants must include at least one hazardous substance. If the contaminant is a nitrate or a trihalomethane, it must be determined to have originated from a hazardous waste site.~~

~~(d) An order or decree must be issued to the identified~~

~~potentially liable persons requiring that safe drinking water be provided to the contaminated area as part of a remedial action. The department may waive this requirement if it has determined that no viable potentially liable persons exist, or if public health would be threatened from unreasonable delays associated with the search for potentially liable persons, or the order or decree process.~~

~~(c) If water line extensions are included in the proposed projects, such extensions must be consistent with the coordinated water system plan and growth management plan for the geographic area containing the affected water supplies.~~

~~(f) The applicant must be in substantial compliance, as determined by the department of health, with applicable rules of the Washington state board of health or the department of health, as contained in chapter 246-290 WAC (Public water supplies), chapter 246-292 WAC (Water works operator certification), chapter 246-293 WAC (Water System Coordination Act), and chapter 246-294 WAC (Drinking water operating permits).~~

~~(4) Site hazard assessment grants. The purpose of site hazard assessment grants is to involve local health districts and departments in assessing the degree of contamination at suspected hazardous waste sites according to WAC 173-340-320. While enabling local health districts or departments to participate in the scoring and ranking process, the department retains the authority to review and verify the results of a site hazard assessment and to establish the hazard ranking of the site. Eligibility for site hazard assessment grants is limited to applications that meet the following standards:~~

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

~~(b) The scope of work for a site hazard assessment must conform to WAC 173-340-320 and prescribed guidelines issued by the department.~~

~~(c) The assessment must be for sites agreed to by the department.~~)) (1) **Notice of availability.** Local governments will be periodically informed of the availability of remedial action grant and loan funding.

(2) **Application package.** An application package will be sent to all parties expressing interest in remedial action grants or loans and to all local governments that have been required by decree or order to perform remedial actions. Application packages will include guidelines and application forms.

(3) **Application guidance.** The department will prepare a guidance manual on a biennial basis to assist grant and loan applicants and to facilitate compliance with this regulation.

(4) **Application period.** The application for a remedial action grant or loan must be submitted to the department within

the period specified in this chapter for the particular type of grant or loan.

(5) **Application form.** The application for a remedial action grant or loan must be completed on forms provided by the department.

(6) **Appropriation of funds.** Grants and loans will be awarded within the limits of available funds. The obligation of the department to make grant payments or provide loans is contingent upon the availability of funds through legislative appropriation and allotment, and such other conditions not reasonably foreseeable by the department rendering performance impossible. When the grant or loan crosses over bienniums, the obligation of the department is contingent upon the legislative appropriation of funds for the next biennium.

(7) **Allocation of funds.** In conjunction with the biennial program report and program plan required by WAC 173-340-340, the department will prepare an administrative allocation from the legislative appropriation of the local toxics control account for funding remedial action grants and loans. Within that administrative allocation, the department will allocate subamounts for each type of remedial action grant or loan. The allocations shall be based on estimated costs for work on eligible sites which are identified in the program plan for the biennium.

(8) **Funding.** Remedial action grants and loans shall be used to supplement local government funding and funding from other sources to carry out required remedial action.

(9) **Department discretion.** The department may fund all or portions of eligible grant or loan applications.

(10) **Indemnification.** To the extent that the Constitution and laws of the state of Washington permit, the grantee or loan recipient shall indemnify and hold the department harmless, from and against, any liability for any or all injuries to persons or property arising from the negligent act or omission of the grantee or loan recipient arising out of a grant or loan contract.

(11) **Administrative requirements.** All grants and loans administered by the department under this chapter shall comply with the requirements set forth in the following publication: Washington state department of ecology, "*Administrative Requirements for Ecology Grants and Loans,*" Publication No. 91-18.

AMENDATORY SECTION (Amending Order 97-09A, filed 2/12/01, effective 3/15/01)

**WAC 173-322-050 ((~~Project and cost eligibility.~~)) Fiscal controls.** ((~~(1) Costs for site study and remediation.~~

~~(a) Eligible costs include reasonable costs, including sales tax, incurred in performing:~~

~~(i) Remedial investigations;~~

~~(ii) Feasibility studies;~~

~~(iii) Remedial designs;~~

~~(iv) Pilot studies;~~

~~(v) Interim actions;~~

~~(vi) Landfill closures as required by chapters 173-304 and 173-351 WAC if included in the order or decree for remedial action;~~

~~(vii) Other remedial action included in the order or decree for remedial action, or included as part of the independent remedial action for which a no further action (NFA) determination is issued;~~

~~(viii) Capital costs of long-term monitoring systems; and~~

~~(ix) Operating and maintenance costs incurred during the first year of accomplishing the cleanup action after facilities and equipment have been installed or constructed.~~

~~(b) Ineligible costs:~~

~~(i) Retroactive costs except as limited by WAC 173-322-100;~~

~~(ii) Legal fees and penalties;~~

~~(iii) Oversight costs;~~

~~(iv) Operating and maintenance costs after the first year of accomplishing the remedial action;~~

~~(v) Operating and maintenance costs of long-term monitoring; and~~

~~(vi) At sites other than landfills, additional ineligible costs will include costs incurred to meet departmental requirements for source control and prevention.~~

~~(2) Costs for safe drinking water actions.~~

~~(a) Eligible costs include reasonable costs, including sales tax, incurred for:~~

~~(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 inter-ties with other water systems;~~

~~(iii) Treatment equipment and facilities;~~

~~(iv) Distribution lines from major system components to~~

~~system customers or service connections;~~

~~(v) Fire hydrants;~~

~~(vi) Service meters;~~

~~(vii) Project inspection, engineering, and administration;~~

~~(viii) Other costs identified by the state department of health as necessary to provide a system that operates in compliance with federal and state standards, or by the coordinated water system plan as necessary to meet required standards;~~

~~(ix) Other costs identified by the department of ecology as necessary to protect a public water system from contamination from a hazardous waste site or to determine the source of such contamination;~~

~~(x) Individual service connections, including any fees and charges, provided that property owners substantially participate in financing the cost of such connections;~~

~~(xi) Drinking water well abandonment for wells identified by the department as an environmental safety or health hazard according to WAC 173-160-415; and~~

~~(xii) Interim financing where necessary as a prerequisite to local government issuance of revenue bonds.~~

~~(b) Ineligible costs include:~~

~~(i) Legal fees and penalties;~~

~~(ii) Ecology oversight costs;~~

~~(iii) Operating and maintenance costs;~~

~~(iv) Retroactive costs except as limited by WAC 173-322-100;~~

~~(v) Natural resource damage assessment; and~~

~~(vi) Costs for source control or pollution prevention activities at sites other than landfills.~~

~~(3) Costs for site hazard assessments. Eligible costs include costs for activities performed pursuant to WAC 173-340-320 and enabling local health districts or departments to participate in the department's site ranking and priority-setting process.~~

~~(4) Costs must be eligible under this section and must be approved by the department in order to be eligible for reimbursement.~~)) (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.

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(2) **Partial funding.** The department retains the authority to issue grants or loans which reimburse the *local government* for less than the maximum percentage allowable under WAC 173-322-060 through 173-322-130.

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(3) ***Limit on funding for a hazardous waste site.***

Deleted: Cap on-site funding

(a) *For hazardous waste sites where oversight remedial actions are being conducted, the department and the local*

*government will establish a final cleanup budget and negotiate grant and loan agreements after the remedial investigation and feasibility study have been completed and a final remedial action plan has been developed by the local government.* The funding provided under these agreements will be the final department remedial action fund commitment for cleanup at that hazardous waste site. Grant and loan agreements may be amended, but requests to increase the remedial action budget at that site will receive a lower priority than other applications.

(b) *For hazardous waste sites where independent remedial actions have been conducted, the remedial action costs eligible for grant funding at a hazardous waste site shall not exceed four hundred thousand dollars.*

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

*(5) **Consideration of contribution claims.** The local government may not use proceeds from contribution claims to meet the match requirement for the grant. If the local government receives proceeds from a contribution claim before the effective date of the grant agreement, then the department shall deduct those proceeds from the amount eligible for grant funding, after subtracting from those proceeds the legal costs incurred by the local government pursuing the contribution claim. If the local government receives proceeds from a contribution claim after the effective date of the grant agreement, then the local government shall reimburse the department for a proportional share of those proceeds, after subtracting from those proceeds the legal costs incurred by the local government pursuing the contribution claim.*

*(6) **Consideration of insurance claims.** The local government may use proceeds from insurance claims to meet the match requirement for the grant. If those proceeds exceed the match requirement for the grant, then the department may reduce grant funding or require a reimbursement of grant funding by up to the amount that those proceeds exceed the match requirement, after subtracting from that amount the legal costs incurred by the local government pursuing the insurance claims.*

*(7)* **Repayment of *area-wide ground water remedial action* grant funds.** If the department provides the local government with an area-wide ground water remedial action grant for conducting remedial action on property owned by private parties, then the grant amount shall be partially repaid to the department. The terms and amount of repayment shall be included in the grant agreement between the local government and the department.

*(8)* **Financial reporting.**

*(a) **Grant application.** The local government shall specify in the grant application any proceeds it has received from*

**Deleted:** For oversight remedial actions, after the remedial investigation and feasibility study have been completed and a final remedial action plan has been developed by an eligible applicant, the department and the applicant will establish a final cleanup budget and negotiate grant and loan agreements.

**Deleted:** For independent remedial actions where a no further action (NFA) determination is issued after the cleanup has been completed, the grant amount shall not exceed two hundred thousand dollars per site.

**Deleted:** (5) Reimbursement of grant funds. If the department awards remedial action funds to a local government that successfully pursues a private right of action or a claim for insurance proceeds, then the department shall be reimbursed for a proportional share of the moneys received, after the local government's legal fees in pursuing such actions have been deducted.

**Deleted:** (6)

**Deleted:** (7)

**Deleted:** Where the department provides the local government with a remedial action grant or loan, the local government must submit a copy of its "Comprehensive Annual Financial Report" following its publication, for the year in which the grant is issued and for each year the grant is in effect.

*contribution claims. The local government shall also specify in the grant application any current or potential sources of local funding to meet the match requirement for the grant including, but not limited to, other grants or loans and proceeds from insurance claims.*

*(b) **Grant agreement.** If the department provides the local government with a remedial action grant or loan, then the local government shall:*

*(i) Submit a copy of the local government's "Comprehensive Annual Financial Report" following its publication, for the year in which the grant is issued and for each year the grant is in effect; and*

*(ii) Notify the department of any proceeds the local government receives from a contribution or insurance claim within ninety days of receipt of those proceeds.*

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

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AMENDATORY SECTION (Amending Order 97-09A, filed 2/12/01, effective 3/15/01)

**WAC 173-322-060 ((~~Application process.~~)) Site hazard assessment grants.** ((~~(1) Application period. The department shall determine appropriate application periods.~~

~~(2) Grant applications must:~~

~~(a) Include a commitment by the applicant for local funds to match grant funds according to the requirements of WAC 173-322-090.~~

~~(b) For site study and remediation projects include a scope of work which accomplishes the requirements of an order or decree.~~

~~(c) For safe drinking water action projects, include a scope of work necessary to provide safe drinking water to the area threatened or contaminated.~~

~~(d) For site hazard assessment projects, include a scope of work which conforms to the requirements of WAC 173-340-320(4).~~

~~(e) For independent remedial actions, include a description of the remedial action for which a no further action (NFA) determination was issued and include a copy of the NFA determination document.~~)) (1) **Purpose.** The purpose of the site hazard assessment grant program is to involve local health

districts and departments in assessing the degree of contamination at suspected hazardous waste sites according to WAC 173-340-320. While enabling local health districts or departments to participate in the scoring and ranking process, the department retains the authority to review and verify the results of a site hazard assessment and to establish the hazard ranking of the site.

(2) **Applicant eligibility.** To be eligible for a site hazard assessment grant, the applicant must meet the following requirements:

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

(b) The site must be located within the jurisdiction of the applicant;

(c) The department has agreed that the applicant may conduct the site hazard assessment; and

(d) The scope of work for the site hazard assessment must conform to WAC 173-340-320 and applicable department guidelines.

(3) **Application process.**

(a) **Submittal.** The application for a site hazard assessment grant may be submitted to the department at any time.

(b) **Content.** The grant application must be completed on forms provided by the department and include the following:

(i) Sufficient evidence to demonstrate compliance with the applicant eligibility requirements in subsection (2) of this section;

(ii) A description of the environmental benefits of the project;

(iii) A copy of the scope of work which conforms to the requirements of WAC 173-340-320 and applicable department guidelines;

(iv) A budget for the scope of work; and

(v) A description of all current or potential sources of funding, including other grants or loans.

(4) **Application evaluation and prioritization.**

(a) The grant application will be evaluated by the department for completeness and adequacy. After the application has been completed, the department and the applicant will negotiate the scope of work and budget for the grant. The department will consider cost eligibility and other sources of funding when negotiating the scope of work and budget for the grant.

(b) When pending grant applications or anticipated demand for site hazard assessment grants exceed the amount of funds available, the department may prioritize applications or limit grant awards based on the following:

(i) Potential public health or environmental threat from the sites;

(ii) Ownership of the sites. Publicly owned sites will

receive priority over privately owned sites; and

(iii) Relative readiness of the applicant to proceed promptly to accomplish the scope of work.

(5) **Cost eligibility.** Costs must be eligible under this section and must be approved by the department in order to be eligible for reimbursement. Eligible costs include costs for activities performed pursuant to WAC 173-340-320 and enabling local health districts or departments to participate in the department's site ranking and priority-setting process.

(6) **Retroactive cost eligibility.** Retroactive costs are not eligible for reimbursement unless:

(a) The department unreasonably delays the processing of the grant application; or

(b) The department provided only partial funding under a prior grant agreement because funds were not available.

(7) **Funding.** The applicant shall be eligible to receive funding for up to one hundred percent of eligible costs.

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AMENDATORY SECTION (Amending Order 97-09A, filed 2/12/01, effective 3/15/01)

**WAC 173-322-070 ((~~Application evaluation and prioritization.~~)) Oversight remedial action grants.** ((~~(1) When pending grant applications or anticipated demand for site study and remediation grants exceed the amount of funds available, the department may prioritize applications or limit grant awards based on the following:~~

~~(a) Relative hazard ranking as determined by the department in accordance with WAC 173-340-330 or the United States Environmental Protection Agency's National Priorities List ranking. Higher ranking sites will receive a higher funding priority.~~

~~(b) Evidence that the grant will expedite cleanup.~~

~~(c) Relative readiness of the applicant to proceed promptly to accomplish the scope of work.~~

~~(2) When pending grant applications or anticipated demand for safe drinking water action grants exceed the amount of funds available, the department may prioritize applications or limit grant awards based on the following:~~

~~(a) Relative risk to human health as jointly determined by the department of ecology, in accordance with WAC 173-340-330, and the department of health, in accordance with WAC 246-290-310. Sites with greater risk will receive higher funding priority.~~

~~(b) Relative readiness of the applicant to proceed promptly~~

~~to accomplish the scope of work.~~

~~(c) Ownership of the water system to be extended or improved. Local government-owned systems will receive higher funding priority than other systems.~~

~~(d) Number of people served by the water system and per capita cost of remediation.~~

~~(3) When pending grant applications or anticipated demand for site hazard assessment grants exceed the amount of funds available, the department may prioritize applications or limit grant awards based on the following:~~

~~(a) Potential public health or environmental threat from the sites.~~

~~(b) Ownership of the sites. Publicly owned sites will receive priority over privately owned sites.~~

~~(c) Relative readiness of the applicant to proceed promptly to accomplish the scope of work.~~)) (1) **Purpose.** The purpose of the oversight remedial action grant program is to provide funding to local governments that conduct remedial actions 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) **Applicant eligibility.** Except as provided under subsection (3) of this section, to be eligible for an oversight remedial action grant, the applicant must meet the following requirements:

(a) The applicant must be a local government, as defined in WAC 173-322-020;

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

(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 (PLP) other than the applicant to conduct remedial action at a landfill site and the applicant has entered into an agreement with the PLP to reimburse the PLP for a portion of the remedial action costs incurred under the order or decree for the sole purpose of providing relief to ratepayers and/or taxpayers from remedial action costs.

(3) **Retroactive applicant eligibility.** To be eligible to receive an oversight remedial action grant for an order issued

under the federal cleanup law *before* the effective date of the 2005 amendments to this chapter, the applicant must meet the following requirements:

(a) The applicant must be a local government, as defined in WAC 173-322-020;

(b) The applicant was required by the U.S. Environmental Protection Agency to conduct remedial action under an order issued under the federal cleanup law;

(c) The order has been signed or acknowledged in writing by the department as a sufficient basis for remedial action grant funding; and

(d) The applicant must submit to the department a grant application within six months after the effective date of the 2005 amendments to this chapter.

(4) **Application process.**

(a) **Submittal.** Except as provided under subsection (3) of this section, the application for an oversight remedial action grant must be submitted to the department within sixty days of the effective date of the order or decree.

(b) **Content.** The grant application must be completed on forms provided by the department and include the following:

(i) Sufficient evidence to demonstrate compliance with the eligibility requirements in subsection (2) of this section;

(ii) A description of the history of the site, the current status of the site, and the remedial actions to be performed at the site under the order or decree;

(iii) A description of the environmental benefits of the project;

(iv) A copy of the order or decree;

(v) A copy of the scope of work which accomplishes the requirements of the order or decree;

(vi) A budget for the scope of work;

(vii) A description of all current or potential sources of funding including, but not limited to, other grants or loans *and proceeds from contribution or insurance claims*;

(viii) A commitment by the applicant to provide the required matching funds and a description of the sources of those funds; and

(ix) If the applicant claims the use of innovative technology under subsection (7)(c)(i) of this section, a justification for the claim.

(5) **Application evaluation and prioritization.**

(a) The grant application will be evaluated by the department for completeness and adequacy. After the application has been completed, the department and the applicant will negotiate the scope of work and budget for the grant. The department will consider cost eligibility and other sources of funding when negotiating the scope of work and budget for the grant.

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(b) When pending grant applications or anticipated demand for oversight remedial action grants exceed the amount of funds available, the department may prioritize applications or limit grant awards based on the following:

(i) Relative hazard ranking as determined by the department in accordance with WAC 173-340-330 or the U.S. Environmental Protection Agency's National Priorities List ranking. Higher ranking sites will receive a higher funding priority;

(ii) Evidence that the grant will expedite cleanup;

(iii) Relative readiness of the applicant to proceed promptly to accomplish the scope of work.

(6) **Cost eligibility.** Costs must be eligible under this section and be approved by the department in order to be eligible for reimbursement.

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

(i) Remedial investigations;

(ii) Feasibility studies;

(iii) Remedial designs;

(iv) Pilot studies;

(v) Interim actions;

(vi) Cleanup actions;

(vii) Landfill closures required under chapters 173-304, 173-350 and 173-351 WAC, if also required as a remedial action under the order or decree;

(viii) Capital costs of long-term monitoring systems; and

(ix) Operating and maintenance costs incurred during the first year of accomplishing the cleanup action after facilities and equipment have been installed or constructed.

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

(i) Retroactive costs, except as provided under subsection (7) of this section;

(ii) Oversight costs;

(iii) Operating and maintenance costs of long-term monitoring systems;

(iv) Operating and maintenance costs incurred after the first year of accomplishing the cleanup action;

(v) Natural resource damage assessment costs and natural resource damages;

(vi) Legal costs including, but not limited to, the cost of pursuing *contribution* or insurance claims, the cost of administrative hearings, the cost of pursuing penalties or civil or criminal actions against persons, the cost of penalties incurred by the applicant, the cost of defending actions taken against the applicant, and attorney fees; and

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(vii) In-kind services.

(7) **Retroactive cost eligibility.** Retroactive costs are not eligible for reimbursement unless:

(a) The department unreasonably delays the processing of the grant application;

(b) The department provided only partial funding under a prior grant agreement because funds were not available;

(c) The costs were incurred conducting independent remedial actions and those actions are incorporated as part of the order or decree; or

(d) The applicant is eligible under subsection (3) of this section.

(8) **Funding and reimbursement.**

(a) **Adjustment of eligible costs.** If an order or decree requires a potentially liable person (PLP) or a potentially responsible party (PRP) other than a local government to conduct remedial action, then the department shall deduct the financial contribution of that PLP or PRP from the amount eligible for grant funding. *If the applicant receives proceeds from a contribution claim before the effective date of the grant agreement, then the department shall deduct those proceeds from the amount eligible for grant funding, after subtracting from those proceeds the legal costs incurred by the applicant pursuing the contribution claim.*

(b) **Funding of eligible costs.** Except as provided under (c) of this subsection, the applicant shall be eligible to receive funding for up to fifty percent of eligible costs.

(c) **Additional funding.** The applicant shall be eligible to receive funding in excess of the limit set forth in (b) of this subsection under the following circumstances:

(i) **The applicant used innovative technology.** If the applicant utilizes innovative technology, as defined in WAC 173-322-020, as part of the cleanup action and the eligible costs exceed four hundred thousand dollars, then the applicant shall be eligible to receive additional funding up to fifteen percent of eligible costs. The applicant must include justification for the innovative technology claim in the grant application.

(ii) **The county is economically disadvantaged.** If the applicant is a county, or is located within a county, that is economically disadvantaged, as defined in WAC 173-322-020, then the applicant shall be eligible to receive additional funding up to twenty-five percent of eligible costs.

(d) **Match requirement.** The applicant shall fund those eligible costs not funded by the department under the grant. The applicant may not use in-kind services or *proceeds from contribution claims* to meet the match requirement.

(e) **Reimbursement of grant funds.** *If the applicant receives proceeds from a contribution claim after the effective date of the grant agreement, then the applicant shall reimburse the department for a proportional share of those proceeds, after*

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*subtracting from those proceeds the legal costs incurred by the applicant pursuing the contribution claim.*

AMENDATORY SECTION (Amending WSR 93-24-047, filed 11/23/93, effective 12/24/93)

**WAC 173-322-080 ((~~Allocation of grant funding.~~)) Independent remedial action grants.** ((~~In conjunction with the biennial program report and program plan required by WAC 173-340-340, the department will prepare an administrative allocation from the legislative appropriation of the local toxics control account for funding remedial action grants. Within that administrative allocation, the department will allocate subamounts for site study and remediation grants, safe drinking water action grants, and site hazard assessment grants. The allocations shall be based on estimated costs for work on eligible sites which are identified in the program plan for the biennium.~~)) (1) **Purpose.** The purpose of the independent remedial action grant program is to provide funding to local governments that have successfully cleaned up hazardous waste sites through independent remedial action. Independent remedial actions are remedial actions that are voluntarily initiated and conducted without department oversight or approval. 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) **Applicant eligibility.** To be eligible for an independent remedial action grant, the applicant must meet the following requirements:

(a) The applicant must be a local government, as defined in WAC 173-322-020;

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

(c) The applicant must have completed independent remedial actions at the hazardous waste site and received from the department a no further action (NFA) determination.~~,~~

(3) **Application process.**

(a) **Submittal.** The application for an independent remedial action grant must be submitted to the department within sixty days of receipt of the no further action (NFA) determination.

(b) **Content.** The grant application must be completed on forms provided by the department and include the following:

(i) Sufficient evidence to demonstrate compliance with the eligibility requirements in subsection (2) of this section;

**Deleted:** ; and

**Deleted:** (d) The eligible project costs are less than four hundred thousand dollars.¶

(ii) A description of the independent remedial action for which the department issued a no further action (NFA) determination;

(iii) A description of the environmental benefits of the project;

(iv) A copy of the independent remedial action report required under WAC 173-340-515(4);

(v) A copy of the document containing the no further action (NFA) determination;

(vi) A description of the costs incurred in performing the independent remedial actions;

(vii) A description of all current or potential sources of funding including, but not limited to, other grants or loans *and proceeds from contribution or insurance claims*; and

(viii) A commitment by the applicant to provide the required matching funds and a description of the sources of those funds.

(4) **Application evaluation and prioritization.**

(a) The grant application will be evaluated by the department for completeness and adequacy. After the application has been completed, the department and the applicant will negotiate the budget for the grant. The department will consider cost eligibility and other sources of funding when negotiating the budget for the grant.

(b) When pending grant applications or anticipated demand for independent remedial action grants exceed the amount of funds available, the department may prioritize applications or limit grant awards based on the date the department receives completed applications.

(5) **Cost eligibility.** Costs must be eligible under this section and be approved by the department in order to be eligible for reimbursement.

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

(i) Remedial investigations;

(ii) Feasibility studies;

(iii) Remedial designs;

(iv) Pilot studies;

(v) Interim actions;

(vi) Cleanup actions;

(vii) Capital costs of long-term monitoring systems;

(viii) Operating and maintenance costs incurred during the first year of accomplishing the cleanup action after facilities and equipment have been installed or constructed; and

(ix) Development of the independent remedial action report required under WAC 173-340-515(4).

(b) **Ineligible costs.** Ineligible costs for independent remedial action grants include, but are not limited to, the

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following:

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

(ii) Cost of technical consultations provided by the department under WAC 173-340-515(5), including any deposit for such consultations;

(iii) Operating and maintenance costs of long-term monitoring systems;

(iv) Operating and maintenance costs incurred after the first year of accomplishing the cleanup action;

(v) Natural resource damage assessment costs and natural resource damages;

(vi) Legal costs including, but not limited to, the cost of pursuing *contribution* or insurance claims, the cost of administrative hearings, the cost of pursuing penalties or civil or criminal actions against persons, the cost of penalties incurred by the applicant, the cost of defending actions taken against the applicant, and attorney fees; and

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(vii) In-kind services.

(6) **Retroactive cost eligibility.** Retroactive costs are eligible for reimbursement if the costs were incurred within five years of the date of the grant application. Retroactive costs incurred more than five years before the date of the grant application are not eligible for reimbursement unless:

(a) The department unreasonably delayed the processing of the grant application; or

(b) The department provided only partial funding under a prior grant agreement because funds were not available.

(7) **Funding and reimbursement.**

(a) **Adjustment of eligible costs.** *If the applicant receives proceeds from a contribution claim before the effective date of the grant agreement, then the department shall deduct those proceeds from the amount eligible for grant funding, after subtracting from those proceeds the legal costs incurred by the applicant pursuing the contribution claim. If the eligible costs exceed four-hundred thousand dollars after the department has deducted any contribution claim proceeds, then the department shall limit the eligible costs to four-hundred thousand dollars.*

Deleted: If the applicant has successfully pursued a private right of action for contribution or a claim for insurance proceeds, then the department shall deduct the moneys received from the amount eligible for grant funding to the applicant.

(b) **Funding of eligible costs.** Except as provided under (c) of this subsection, the applicant shall be eligible to receive funding for up to fifty percent of eligible costs.

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(c) **Additional funding.** If the applicant is a county, or is located within a county, that is economically disadvantaged, as defined in WAC 173-322-020, then the applicant shall be eligible to receive funding for up to seventy-five percent of eligible costs.

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(d) **Match requirement.** The applicant shall fund those eligible costs not funded by the department under the grant.

The applicant may not use in-kind services or *proceeds from contribution claims* to meet the match requirement.

(e) **Reimbursement of grant funds.** *If the applicant receives proceeds from a contribution claim after the effective date of the grant agreement, then the applicant shall reimburse the department for a proportional share of those proceeds, after subtracting from those proceeds the legal costs incurred by the applicant pursuing the contribution claim.*

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AMENDATORY SECTION (Amending Order 97-09A, filed 2/12/01, effective 3/15/01)

**WAC 173-322-090 ((~~State assistance share, local cash match, economic disadvantage, and role of potentially liable persons.~~)) Area-wide ground water remedial action grants.** ((~~(1) Except as otherwise provided in this section, costs eligible for site study and remediation and safe drinking water action grants will be considered for grant funding at up to fifty percent, except in the case of site study and remediation grants with eligible costs of over two hundred thousand dollars, local governments who utilize treatment, recycling and/or disposal as part or all of the cleanup action shall be eligible to receive an additional fifteen percent. Independent remedial action grant funds are available only for projects with eligible costs of less than two hundred thousand. The additional fifteen percent funds do not apply to independent remedial actions.~~

~~(2) Costs for site hazard assessments which are eligible under WAC 173-322-050(3) will be considered for grant funding of up to one hundred percent.~~

~~(3) Costs for area wide ground water contamination remediation grants will be considered for grant funding of more than fifty percent. Local governments shall be required to obtain partial reimbursement from PLPs. Reasonable measures shall be taken by local governments to maximize reimbursement. The amount of grant funds and how much to pay back will be determined by the department on a case-by-case basis.~~

~~(4) Grant funding for economically disadvantaged local governments.~~

~~(a) In addition to grant funding under subsection (1) of this section, economically disadvantaged local governments may apply for up to twenty-five percent supplemental funding. This additional funding will be contingent on satisfactory demonstration of extraordinary financial need.~~

~~(b) A local government is considered economically disadvantaged if it is a county, or a local government within a~~

~~county, which meets both of the following criteria:~~

~~(i) Per capita income, as measured by the latest official estimate of the Washington state office of financial management, is in the lower twenty counties in the state; and~~

~~(ii) It is economically distressed as defined by chapter 43.165 RCW.~~

~~(c) The department will include a list of counties which are economically disadvantaged as defined herein in the guidelines for remedial action grants to be published on a biennial basis.~~

~~(5) For applicants eligible for site study and remediation grants, if a decree or order requires a potentially liable person (PLP) other than a local government to conduct remedial action, the financial contribution of that PLP will be deducted from the amount eligible for grant funding to the local government.~~

~~(6) For applicants eligible for safe drinking water action grants, funding from either the local government or the PLP may be used to match remedial action grant funds.~~

~~(7) As established by the Model Toxics Control Act, chapter 70.105D RCW, and implementing regulations, the potentially liable persons bear financial responsibility for remedial action costs. The remedial action grant program may not be used to circumvent the PLP responsibility.~~)) (1) **Purpose.** The purpose of the area-wide ground water remedial action grant program is to provide funding to local governments that facilitate the cleanup and redevelopment of property within their jurisdictions where the ground water has been contaminated by hazardous substances from multiple sources. The grants are intended to encourage and expedite the investigation and cleanup of area-wide ground water contamination.

(2) **Applicant eligibility.** To be eligible for an area-wide ground water remedial action grant, the applicant must meet the following requirements:

(a) The applicant must be a local government, as defined in WAC 173-322-020;

(b) The hazardous waste site must involve area-wide ground water contamination, as defined in WAC 173-322-020;

(c) The applicant must be a potentially liable person or a potentially responsible party at the hazardous waste site, have an ownership interest in the hazardous waste site, or apply on behalf of property owners affected by the hazardous waste site to facilitate area-wide ground water action;

(d) The area-wide ground water action must be required under an order or decree or be approved by the department. If the action is required under an order or decree issued under the federal cleanup law, then the order or decree must have been signed or acknowledged in writing by the department as a sufficient basis for remedial action grant funding; *and*

(e) The applicant must agree to conduct or manage the area-wide ground water action specified in the grant agreement.

(3) **Application process.**

(a) **Submittal.** If the area-wide ground water remedial actions are required under an order or decree, then the grant application must be submitted to the department within sixty days of the effective date of the order or decree. If the area-wide ground water remedial actions are not required under an order or decree, then the grant application may be submitted to the department at any time.

(b) **Content.** The grant application must be completed on forms provided by the department and include the following:

(i) Sufficient evidence to demonstrate compliance with the eligibility requirements in subsection (2) of this section;

(ii) A description of the history of the site, the sources of the area-wide ground water contamination, the current status of the site, and the remedial actions to be performed at the site to address the area-wide ground water contamination;

(iii) A description of the environmental benefits of the project;

(iv) A copy of the order or decree, if applicable;

(v) A copy of the scope of work that specifies the remedial actions to be performed at the site to address the area-wide ground water contamination;

(vi) A budget for the scope of work;

(vii) A description of all current or potential sources of funding including, but not limited to, other grants or loans *and proceeds from contribution or insurance claims*;

(viii) A copy of *any* reimbursement agreement with affected property owners;

(ix) A commitment by the applicant to partially reimburse the department from *any current or future* funds obtained from affected property owners; and

(x) A commitment by the applicant to provide the required matching funds and a description of the sources of those funds.

(4) **Application evaluation and prioritization.**

(a) The grant application will be evaluated by the department for completeness and adequacy. After the application has been completed, the department and the applicant will negotiate the scope of work and budget for the grant. The department will consider cost eligibility and other sources of funding when negotiating the scope of work and budget for the grant.

(b) When pending grant applications or anticipated demand for area-wide ground water remedial action grants exceed the amount of funds available, the department may prioritize applications or limit grant awards based on the following:

(i) Relative hazard ranking as determined by the department in accordance with WAC 173-340-330 or the U.S. Environmental

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Deleted: (f) The applicant must have entered into a reimbursement agreement with potentially liable persons, potentially responsible parties, and affected property owners to partially reimburse the applicant for the costs incurred implementing the area-wide ground water action specified in the grant agreement.¶

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Protection Agency's National Priorities List ranking. Higher ranking sites will receive a higher funding priority;

(ii) Evidence that the grant will expedite cleanup; and

(iii) Relative readiness of the applicant to proceed promptly to accomplish the scope of work.

(5) **Cost eligibility.** Costs must be eligible under this section and be approved by the department in order to be eligible for reimbursement.

(a) **Eligible costs.** Eligible costs for area-wide ground water remedial action grants include, but are not limited to, the reasonable costs for the following:

(i) Remedial investigations;

(ii) Feasibility studies;

(iii) Remedial designs;

(iv) Pilot studies;

(v) Interim actions;

(vi) Cleanup actions;

(vii) Capital costs of long-term monitoring systems; and

(viii) Operating and maintenance costs incurred during the first year of accomplishing the cleanup action after facilities and equipment have been installed or constructed.

(b) **Ineligible costs.** Ineligible costs for area-wide ground water remedial action grants include, but are not limited to, the following:

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

(ii) Oversight costs;

(iii) Operating and maintenance costs of long-term monitoring systems;

(iv) Operating and maintenance costs incurred after the first year of accomplishing the cleanup action;

(v) Natural resource damage assessment costs and natural resource damages;

(vi) Legal costs including, but not limited to, the cost of pursuing *contribution* or insurance claims, the cost of administrative hearings, the cost of pursuing penalties or civil or criminal actions against persons, the cost of penalties incurred by the applicant, the cost of defending actions taken against the applicant, and attorney fees; and

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(vii) In-kind services.

(6) **Retroactive cost eligibility.** Retroactive costs are not eligible for reimbursement unless:

(a) The department unreasonably delays the processing of the grant application;

(b) The department provided only partial funding under a prior grant agreement because funds were not available; or

(c) The costs were incurred conducting independent remedial actions and those actions are incorporated as part of the order or decree.

(7) **Funding and reimbursement.**

(a) **Adjustment of eligible costs.** If an order or decree requires a potentially liable person (PLP) or a potentially responsible party (PRP) other than a local government to conduct remedial action, then the department shall deduct the financial contribution of that PLP or PRP from the amount eligible for grant funding. *If the applicant receives proceeds from a contribution claim before the effective date of the grant agreement, then the department shall deduct those proceeds from the amount eligible for grant funding, after subtracting from those proceeds the legal costs incurred by the applicant pursuing the contribution claim.*

(b) **Funding of eligible costs.** The applicant shall be eligible to receive funding for up to one hundred percent of eligible costs.

(c) **Match requirement.** The applicant shall fund those eligible costs not funded by the department under the grant. The applicant may not use in-kind services or *proceeds from contribution claims* to meet the match requirement.

(d) **Reimbursement of grant funds.** *If the applicant receives proceeds from a contribution claim after the effective date of the grant agreement, then the applicant shall reimburse the department for a proportional share of those proceeds, after subtracting from those proceeds the legal costs incurred by the applicant pursuing the contribution claim.*

(e) **Repayment of grant funds.** If the property impacted by the area-wide ground water contamination is owned by private parties, then the grant amount shall be partially repaid to the department. The terms and amount of repayment shall be included in the grant agreement between the applicant and the department. The applicant shall obtain partial reimbursement from potentially liable persons and potentially responsible parties. Reasonable measures shall be taken by the applicant to maximize reimbursement.

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AMENDATORY SECTION (Amending Order 97-09A, filed 2/12/01, effective 3/15/01)

**WAC 173-322-100 ((~~Fiscal controls.~~)) Safe drinking water action grants.** ((~~(1) The department will establish reasonable costs for all grants, require applicants to manage projects in a cost effective manner, and ensure that all potentially liable persons (PLPs) assume responsibility for remedial action.~~

~~(2) The department retains the authority to issue grants which reimburse the recipient for less than the maximum~~

~~percentage allowable under WAC 173-322-090.~~

~~(3) Cap on site funding. Except for independent remedial actions where a no further action (NFA) determination is issued after cleanup has been completed, after the remedial investigation and feasibility study have been completed and a final remedial action plan has been developed by an eligible applicant, the department and the applicant will establish a final cleanup budget and negotiate a grant agreement. The grant amount in this agreement will be the final department remedial action grant fund commitment for cleanup at that hazardous waste site. Grant agreements may be amended, but requests to increase the remedial action grant budget at that site will receive a lower priority than other applications.~~

~~(4) Retroactive funding. Grant funding of costs already incurred prior to the date of the grant agreement may be allowed to local governments where the order or decree with the department, if any, postdates March 1, 1989, and under one or more of the following circumstances:~~

~~(a) If the grant application period is closed when the order or decree becomes effective;~~

~~(b) If the department unreasonably delays the processing of a remedial action grant application;~~

~~(c) If there are inadequate funds in the local toxics control account to cover the entire scope of work required by decree or order; and/or~~

~~(d) If remedial actions not required by decree or order have proceeded, grants for this work may be made if the department later formally includes such work items in a decree or order, or for independent remedial actions conducted no earlier than five years before the date of application if a no further action (NFA) determination is given for that independent remedial action.~~

~~(5) Reimbursement of grant funds. If the department awards remedial action funds to a local government that successfully pursues a private right of action against a PLP who has not settled with the department or successfully pursues a claim for insurance proceeds, then the department shall be reimbursed for a proportional share of the moneys received, after the local government's legal fees in pursuing such actions have been deducted.~~

~~(6) Repayment of grant funds. Where the department provides a remediation grant for area wide ground water contamination to a local government, the grant amount shall be partially repaid to the department where ownership of property affected by the grant is held by private parties. The terms and amount of repayment will be included in the grant agreement between the local government and the department.~~)) (1) **Purpose.** The purpose of the safe drinking water action grant program 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) **Applicant eligibility.** To be eligible for a safe drinking water action grant, the applicant must meet the following requirements:

(a) The applicant must be a local government, as defined in WAC 173-322-020;

(b) The applicant must be a purveyor, as defined in WAC 173-322-020, or the applicant must be applying on behalf of a purveyor;

(c) The applicant 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, as contained in chapter 246-290 WAC (Public water supplies), chapter 246-292 WAC (Water works operator certification), chapter 246-293 WAC (Water System Coordination Act), and chapter 246-294 WAC (Drinking water operating permits);

(d) The public water system must be located in an area determined by the department to be a hazardous waste site or threatened by contamination from a hazardous waste site;

(e) The public water system must exhibit levels of contamination which exceed the primary maximum contaminant levels (MCLs) established by the state board of health and set forth in WAC 246-290-310, exhibit levels of contamination which exceed the cleanup standards established by the department of ecology under WAC 173-340-700 through 173-340-760, or be certified by the state department of health that a contaminant threatens the safety and reliability of a public water system which cannot be remedied solely by operational solutions. Contaminants must include at least one hazardous substance. If the contaminant is a nitrate or trihalomethane, it must be determined to have originated from a hazardous waste site;

(f) An order or decree must require safe drinking water action. The department may waive this requirement if it has determined that no viable potentially liable person (PLP) exists or that public health would be threatened from unreasonable delays associated with the search for PLPs or the development of an order or decree. If the safe drinking water action is required under an order or decree issued under the federal cleanup law, then the order or decree must have been signed or acknowledged in writing by the department as a sufficient basis for remedial action grant funding; and

(g) If the safe drinking water action includes water line extensions, then the extensions must be consistent with the coordinated water system plan and growth management plan for the geographic area containing the affected water supplies.

(3) **Application process.**

(a) **Submittal.** If the safe drinking water actions are

required under an order or decree, then the grant application must be submitted to the department within sixty days of the effective date of the order or decree. If the safe drinking water actions are not required under an order or decree, then the grant application may be submitted to the department at any time.

(b) **Content.** The grant application must be completed on forms provided by the department and include the following:

(i) Sufficient evidence to demonstrate compliance with the eligibility requirements in subsection (2) of this section;

(ii) A description of the history of the site, the current status of the site, the threat posed by the site to the public water system, and the remedial actions to be performed at the site to address that threat;

(iii) A description of the environmental benefits of the project;

(iv) A copy of the order or decree, if applicable;

(v) A copy of the scope of work that specifies the remedial actions to be performed at the site to address the threat to the public water system;

(vi) A budget for the scope of work;

(vii) A description of all current or potential sources of funding including, but not limited to, other grants or loans *and proceeds from contribution or insurance claims*; and

(viii) A commitment by the applicant to provide the required matching funds and a description of the sources of those funds.

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(4) **Application evaluation and prioritization.**

(a) The grant application will be evaluated by the department for completeness and adequacy. After the application has been completed, the department and the applicant will negotiate the scope of work and budget for the grant. The department will consider cost eligibility and other sources of funding when negotiating the scope of work and budget for the grant.

(b) When pending grant applications or anticipated demand for safe drinking water action grants exceed the amount of funds available, the department may prioritize applications or limit grant awards based on the following:

(i) Relative risk to human health as jointly determined by the department of ecology, in accordance with WAC 173-340-330, and the department of health, in accordance with WAC 246-290-310. Sites with greater risk will receive higher funding priority;

(ii) Relative readiness of the applicant to proceed promptly to accomplish the scope of work;

(iii) Ownership of the water system to be extended or improved. Local government-owned systems will receive higher funding priority than other systems; and

(iv) Number of people served by the water system and per capita cost of remediation.

(5) **Cost eligibility.** Costs must be eligible under this section and be approved by the department in order to be eligible for reimbursement.

(a) **Eligible costs.** Eligible costs for safe drinking water action grants include, but are not limited to, the reasonable costs for the following:

(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 inter-ties 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 fees and charges, provided that property owners substantially participate in financing the cost of such connections;

(x) Drinking water well abandonment for wells identified by the department as an environmental safety or health hazard *and decommissioned in accordance with WAC 173-160-381*;

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(xi) Interim financing where necessary as a prerequisite to local government issuance of revenue bonds;

(xii) Other costs identified by the department of health as necessary to provide a system that operates in compliance with federal and state standards, or by the coordinated water system plan as necessary to meet required standards; and

(xiii) Other costs identified by the department as necessary to protect a public water system from contamination from a hazardous waste site or to determine the source of such contamination.

(b) **Ineligible costs.** Ineligible costs *for safe drinking water action grants* include, but are not limited to, the following:

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

(ii) Oversight costs;

(iii) Operating and maintenance costs;

(iv) Natural resource damage assessment costs and natural resource damages;

(v) Legal costs including, but not limited to, the cost of pursuing *contribution*, or insurance claims, the cost of administrative hearings, the cost of pursuing penalties or civil or criminal actions against persons, the cost of penalties

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incurred by the applicant, the cost of defending actions taken against the applicant, and attorney fees; and

(vi) In-kind services.

(6) **Retroactive cost eligibility.** Retroactive costs are not eligible for reimbursement unless:

(a) The department unreasonably delays the processing of the grant application;

(b) The department provided only partial funding under a prior grant agreement because funds were not available; or

(c) The costs were incurred conducting independent remedial actions and those actions are incorporated as part of the order or decree.

(7) **Funding and reimbursement.**

(a) **Adjustment of eligible costs.** If an order or decree requires a potentially liable person (PLP) or a potentially responsible party (PRP) other than a local government to conduct remedial action, then the department shall deduct the financial contribution of that PLP or PRP from the amount eligible for grant funding. *If the applicant receives proceeds from a contribution claim before the effective date of the grant agreement, then the department shall deduct those proceeds from the amount eligible for grant funding, after subtracting from those proceeds the legal costs incurred by the applicant pursuing the contribution claim.*

(b) **Funding of eligible costs.** Except as provided under (c) of this subsection, the applicant shall be eligible to receive funding for up to fifty percent of eligible costs.

(c) **Additional funding.** If the applicant is a county, or is located within a county, that is economically disadvantaged, as defined in WAC 173-322-020, then the applicant shall be eligible to receive funding for up to seventy-five percent of eligible costs.

(d) **Match requirement.** The applicant shall fund those eligible costs not funded by the department under the grant. The applicant may not use in-kind services or *proceeds from contribution claims* to meet the match requirement.

(e) **Reimbursement of grant funds.** *If the applicant receives proceeds from a contribution claim after the effective date of the grant agreement, then the applicant shall reimburse the department for a proportional share of those proceeds, after subtracting from those proceeds the legal costs incurred by the applicant pursuing the contribution claim.*

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**Deleted:** If the applicant has successfully pursued a private right of action for contribution or a claim for insurance proceeds, then the department shall deduct the moneys received from the amount eligible for grant funding to the applicant.

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**Deleted:** If the applicant successfully pursues a private right of action for contribution or a claim for insurance proceeds, then the department shall be reimbursed for a proportional share of the moneys received, after the local government's legal fees in pursuing such actions have been deducted.

AMENDATORY SECTION (Amending Order 97-09A, filed 2/12/01, effective 3/15/01)

**WAC 173-322-110 ((~~Grant administration.~~)) Methamphetamine lab site assessment and cleanup grants.** ((~~(1) Local governments will be periodically informed of the availability of remedial action grant funding.~~

~~(2) A grant application package will be sent to all parties expressing interest in remedial action grants and to all local governments that have been required by decree or order to perform remedial actions. Grant application packages will include grant guidelines and application forms.~~

~~(3) Application must be made within sixty days after the date that a decree or order becomes effective or for independent remedial actions, within sixty days of receipt of a no further action (NFA) determination.~~

~~(4) The department will prepare a guidance manual on a biennial basis to assist grant applicants and to facilitate compliance with this regulation.~~

~~(5) Appropriation and allocation of funds. Grants will be awarded within the limits of available funds. The obligation of the department to make grant payments is contingent upon the availability of funds through legislative appropriation and allotment, and such other conditions not reasonably foreseeable by the department rendering performance impossible. When the grant crosses over bienniums, the obligation of the department is contingent upon the legislative appropriation of funds for the next biennium.~~

~~(6) Remedial action grants shall be used to supplement local government funding and funding from other sources to carry out required remedial action.~~

~~(7) The department may fund all or portions of eligible grant applications.~~

~~(8) To the extent that the Constitution and laws of the state of Washington permit, the grantee shall indemnify and hold the department harmless, from and against, any liability for any or all injuries to persons or property arising from the negligent act or omission of the grantee arising out of a grant contract.~~

~~(9) All grants under this chapter shall be consistent with "*Administrative Requirements for Ecology Grants and Loans*" WDOE publication No. 91-18, revised October 2000.~~)) (1) **Purpose.** The purpose of the methamphetamine lab site assessment and cleanup grant program is to provide funding to local health districts

and departments that assess and cleanup sites of methamphetamine production. The program is not intended to assist local health districts and departments in the initial containment of methamphetamine lab sites.

(2) **Applicant eligibility.** To be eligible for a methamphetamine lab site assessment and cleanup grant, the applicant must meet the following requirements:

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

(b) The methamphetamine lab site must be located within the jurisdiction of the applicant; and

(c) The scope of work for the assessment or cleanup of a methamphetamine lab site must conform to chapter 246-205 WAC and applicable board of health and department of health guidelines. The scope of work for the methamphetamine lab site assessment must also conform to WAC 173-340-320 and applicable department of ecology guidelines.

(3) **Application process.**

(a) **Submittal.** The application for a methamphetamine lab site assessment and cleanup grant may be submitted to the department at any time.

(b) **Content.** The grant application must be completed on forms provided by the department and include the following:

(i) Sufficient evidence to demonstrate compliance with the applicant eligibility requirements in subsection (2) of this section;

(ii) A description of the work completed under the prior grant agreement, if applicable;

(iii) A description of the anticipated work to be completed under the grant;

(iv) A budget for the anticipated work;

(v) A description of the environmental benefits of the project;

(vi) A description of all current or potential sources of funding including, but not limited to, other grants or loans *and proceeds from contribution or insurance claims*; and

(vii) A commitment by the applicant to provide the required matching funds and a description of the sources of those funds.

(4) **Application evaluation and prioritization.**

(a) The grant application will be evaluated by the department for completeness and adequacy. After the application has been completed, the department and the applicant will negotiate the scope of work and budget for the grant. The department will consider cost eligibility and other sources of funding when negotiating the scope of work and budget for the grant.

(b) When pending grant applications or anticipated demand for methamphetamine lab site assessment and cleanup grants exceed the amount of funds available, the department may

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prioritize applications or limit grant awards based on the following:

(i) Potential public health or environmental threat from the methamphetamine lab sites;

(ii) Ownership of the methamphetamine lab sites. Publicly owned sites will receive priority over privately owned sites; and

(iii) Relative readiness of the applicant to proceed promptly to accomplish the scope of work.

(5) **Cost eligibility.** Costs must be eligible under this section and be approved by the department in order to be eligible for reimbursement.

(a) **Eligible costs.** Eligible costs for methamphetamine lab site assessment and cleanup grants include, but are not limited to, the reasonable costs for the following:

(i) Posting the property, as defined in WAC 246-205-010 and required under WAC 246-205-520;

(ii) Inspecting the property and determining whether the property is contaminated, as required under WAC 246-205-530;

(iii) Posting contaminated property, as defined in WAC 246-205-010 and required under WAC 246-205-560;

(iv) Notifying occupants, property owners, and other persons with an interest in the contaminated property, as required under WAC 246-205-560;

(v) Cleaning up contaminated publicly owned property, as required under WAC 246-205-570, including performing a *pre-cleanup* site assessment, developing and implementing the cleanup work plan, performing a post-cleanup site assessment, and developing a cleanup report. Eligible costs include the costs incurred by an authorized contractor and the cost of overseeing the work performed by the contractor;

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(vi) Overseeing the cleanup of contaminated privately owned property, as required under WAC 246-205-570 and 246-205-580, including reviewing cleanup work plans and reports and inspecting the property during and subsequent to the cleanup;

(vii) Disposal of contaminated property, as defined in WAC 246-205-010, if the property is publicly owned;

(viii) Releasing the property for use, as required under WAC 246-205-580;

(ix) County fees related to deed notification; and

(x) Equipment and training, if approved by the department in advance.

(b) **Ineligible costs.** Ineligible costs for methamphetamine lab site assessment and cleanup grants include, but are not limited to, the following:

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

(ii) Initial containment of methamphetamine lab sites, as defined in WAC 173-322-020;

(iii) Restricting access to privately owned property, except as required under chapter 246-205 WAC;

(iv) Cleaning up privately owned contaminated property;

(v) Disposal of contaminated property, as defined in WAC 246-205-010, if the property is privately owned;

(vi) Disposal of property that is not contaminated, as defined in WAC 246-205-010;

(vii) Natural resource damage assessment costs and natural resource damages;

(viii) Legal costs including, but not limited to, the cost of pursuing *contribution* or insurance claims, the cost of administrative hearings, the cost of pursuing penalties or civil or criminal actions against persons, the cost of penalties incurred by the applicant, the cost of defending actions taken against the applicant, and attorney fees;

(ix) Education and outreach activities; and

(x) In-kind services.

(6) **Retroactive cost eligibility.** Retroactive costs are not eligible for reimbursement unless:

(a) The department unreasonably delays the processing of the grant application; or

(b) The department provided only partial funding under a prior grant agreement because funds were not available.

(7) **Funding and reimbursement.**

(a) **Adjustment of eligible costs.** *If the applicant receives proceeds from a contribution claim before the effective date of the grant agreement, then the department shall deduct those proceeds from the amount eligible for grant funding, after subtracting from those proceeds the legal costs incurred by the applicant pursuing the contribution claim.*

(b) **Funding of eligible costs.** The applicant shall be eligible to receive funding for up to one hundred percent of eligible methamphetamine lab site assessment costs. Except as provided under (c) of this subsection, the applicant shall also be eligible to receive funding for up to fifty percent of eligible methamphetamine lab site cleanup costs.

(c) **Additional funding.** If the applicant is a county, or is located within a county, that is economically disadvantaged, as defined in WAC 173-322-020, then the applicant shall be eligible to receive funding for up to seventy-five percent of eligible methamphetamine lab site cleanup costs.

(d) **Match requirement.** The applicant shall fund those eligible costs not funded by the department under the grant. The applicant may not use in-kind services or *proceeds from contribution claims* to meet the match requirement.

(e) **Reimbursement of grant funds.** *If the applicant receives proceeds from a contribution claim after the effective date of the grant agreement, then the applicant shall reimburse the department for a proportional share of those proceeds, after*

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**Deleted:** If the applicant successfully pursues a private right of action for contribution or a claim for insurance proceeds, then the department shall be reimbursed for a proportional share of the moneys received, after the local government's legal fees in pursuing such actions have been deducted.

*subtracting from those proceeds the legal costs incurred by the applicant pursuing the contribution claim.*

AMENDATORY SECTION (Amending Order 97-09A, filed 2/12/01, effective 3/15/01)

**WAC 173-322-120 ((~~Loans.~~)) Derelict vessel remedial action grants.** ((~~The department may award a loan or combination loan and grant to a grant applicant. Loan terms and the repayment provisions of a loan shall be established on a case-by-case basis under an agreement between the local government and the department.~~)) (1) **Purpose.** The purpose of the derelict vessel remedial action grant program is to provide funding to local governments that clean up and dispose of hazardous substances from abandoned or derelict vessels that pose a threat to human health or the environment.

(2) **Applicant eligibility.** To be eligible for a derelict vessel remedial action grant, the applicant must meet the following requirements:

(a) The applicant must be a local government, as defined in WAC 173-322-020;

(b) The vessel must be an abandoned or derelict vessel, as defined in WAC 173-322-020; and

(c) The applicant must be the owner of the abandoned or derelict vessel.

(3) **Application process.**

(a) **Submittal.** The application for a derelict vessel remedial action grant may be submitted to the department at any time.

(b) **Content.** The grant application must be completed on forms provided by the department and include the following:

(i) Sufficient evidence to demonstrate compliance with the applicant eligibility requirements in subsection (2) of this section;

(ii) A description of the vessel, the types and quantities of hazardous substances located within the vessel, the threat posed by the vessel to human health and the environment, the remedial actions to be performed to address that threat, and the authority under which the remedial action will be performed;

(iii) A copy of the scope of work that specifies the remedial actions to be performed to address the threat;

(iv) A description of the environmental benefits of the project;

(v) A budget for the scope of work;

(vi) A description of all current or potential sources of

funding including, but not limited to, other grants or loans *and proceeds from contribution or insurance claims*; and

(vii) A commitment by the applicant to provide the required matching funds and a description of the sources of those funds.

(4) **Application evaluation and prioritization.**

(a) The grant application will be evaluated by the department for completeness and adequacy. After the application has been completed, the department and the applicant will negotiate the scope of work and budget for the grant. The department will consider cost eligibility and other sources of funding when negotiating the scope of work and budget for the grant.

(b) When pending grant applications or anticipated demand for derelict vessel remedial action grants exceed the amount of funds available, the department may prioritize applications or limit grant awards based on the following:

(i) Relative risk to human health and the environment;

(ii) Evidence that the grant will expedite cleanup; and

(iii) Relative readiness of the applicant to proceed promptly to accomplish the scope of work.

(5) **Cost eligibility.** Costs must be eligible under this section and be approved by the department in order to be eligible for reimbursement.

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

(i) Remedial investigation of the vessel, including sampling and analysis; and

(ii) Removal and disposal of hazardous substances and materials designated as dangerous wastes under chapter 173-303 WAC.

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

(i) Retroactive costs, except as provided in subsection (6) of this section;

(ii) Administrative cost of taking ownership of the vessel;

(iii) Removal and disposal of materials that are *not* hazardous substances or designated as dangerous wastes under chapter 173-303 WAC;

(iv) Disposal of the vessel at a landfill, including transport of the vessel;

(v) Disposal of the vessel at sea;

(vi) Natural resource damage assessment costs and natural resource damages;

(vii) Legal costs including, but not limited to, the cost of pursuing *contribution*, or insurance claims, the cost of administrative hearings, the cost of pursuing penalties or civil or criminal actions against persons, the cost of penalties

Deleted: , contributions from private right of action, and proceeds from insurance claims

Deleted: private right of action

incurred by the applicant, the cost of defending actions taken against the applicant, and attorney fees; and

(viii) In-kind services.

(6) **Retroactive cost eligibility.** Retroactive costs are not eligible for reimbursement unless:

(a) The department unreasonably delays the processing of the grant application; or

(b) The department provided only partial funding under a prior grant agreement because funds were not available.

(7) **Funding and reimbursement.**

(a) **Adjustment of eligible costs.** *If the applicant receives proceeds from a contribution claim before the effective date of the grant agreement, then the department shall deduct those proceeds from the amount eligible for grant funding, after subtracting from those proceeds the legal costs incurred by the applicant pursuing the contribution claim.*

(b) **Funding of eligible costs.** Except as provided under (c) of this subsection, the applicant shall be eligible to receive funding for up to fifty percent of eligible costs, not to exceed twenty-five thousand dollars.

(c) **Additional funding.** If the applicant is a county, or is located within a county, that is economically disadvantaged, as defined in WAC 173-322-020, then the applicant shall be eligible to receive funding for up to seventy-five percent of eligible costs, not to exceed twenty-five thousand dollars.

(d) **Match requirement.** The applicant shall fund those eligible costs not funded by the department under the grant. The applicant may not use in-kind services or *proceeds from contribution claims* to meet the match requirement.

(e) **Reimbursement of grant funds.** *If the applicant receives proceeds from a contribution claim after the effective date of the grant agreement, then the applicant shall reimburse the department for a proportional share of those proceeds, after subtracting from those proceeds the legal costs incurred by the applicant pursuing the contribution claim.*

**Deleted:** If the applicant has successfully pursued a private right of action for contribution or a claim for insurance proceeds, then the department shall deduct the moneys received from the amount eligible for grant funding to the applicant.

**Deleted:** project

**Deleted:** project

**Deleted:** the department's share of the moneys identified under (e) of this subsection

**Deleted:** If the applicant successfully pursues a private right of action for contribution or a claim for insurance proceeds, then the department shall be reimbursed for a proportional share of the moneys received, after the local government's legal fees in pursuing such actions have been deducted.

NEW SECTION

**WAC 173-322-130 Loans.** (1) **Purpose.** This section establishes requirements for a program of remedial action loans to local governments under RCW 70.105D.070 (3)(a) and (7). The loan program shall be limited to providing loans to supplement local government funding and funding from other sources to meet the match requirements for oversight remedial action grants. The intent of the loan program is to encourage and expedite the cleanup of hazardous waste sites and to lessen the impact of the cleanup cost on ratepayers and taxpayers.

(2) **Applicant eligibility.** To be eligible for a loan, the applicant must meet the following requirements:

(a) The applicant must be a local government, as defined in WAC 173-322-020;

(b) The applicant must meet the eligibility requirements for an oversight remedial action grant set forth in WAC 173-322-070(2);

(c) The applicant must agree to undergo an independent third-party financial review to determine its financial need for the loan, ability to repay the loan, and inability to obtain funds from any other source. The financial review shall be conducted at the direction and cost of the department; and

(d) The hazardous waste site must present an immediate danger to human health and the environment.

(3) **Application process.**

(a) **Submittal.** The loan application must be submitted to the department at the same time as the associated oversight remedial action grant application.

(b) **Content.** The loan application must be completed on forms provided by the department and include the following:

(i) Sufficient evidence to demonstrate the applicant's financial need for the loan, ability to repay the loan, and inability to obtain matching funds from any other source;

(ii) Sufficient evidence that the hazardous waste site presents an immediate danger to human health and the environment; and

(iii) A copy of the applicant's most recent Comprehensive Annual Financial Report.

(4) **Application evaluation and prioritization.**

(a) The department will evaluate the loan application together with the associated oversight remedial action grant application. The grant and loan applications will be evaluated by the department for completeness and adequacy. After the

grant and loan applications have been completed, the department and the applicant will negotiate a scope of work and budget for the grant and loan. The department will consider cost eligibility and other sources of funding when negotiating the scope of work and budget for the grant and loan.

(b) The department will fund the loan from the same fund allocation used to fund the associated oversight remedial action grant. When the demand for funds allocated for oversight remedial action grants and loans exceeds the amount of funds available, the department will prioritize the associated grant and loan applications together using the criteria set forth in WAC 173-322-070(5).

(5) **Cost eligibility.** The eligible costs for the loan program shall be the same as the eligible costs for the oversight remedial action grant program set forth in WAC 173-322-070(6).

(6) **Retroactive cost eligibility.** The eligibility of retroactive costs for the loan program shall be the same as the eligibility of retroactive costs for the oversight remedial action grant program set forth in WAC 173-322-070(7).

(7) **Funding and repayment.**

(a) **General.** If the department provides the applicant an oversight remedial action grant and the grant is funded to the maximum extent allowed under WAC 173-322-070(8), then the department may also provide the applicant a loan to enable the applicant to meet the match requirement for the grant. The loan shall be used to supplement local government funding and funding from other sources to meet the match requirement.

(b) **Department funding of match requirement.** The department may provide a loan to the applicant for up to one hundred percent of the match requirement for the oversight remedial action grant.

(c) **Local government funding of match requirement.** The applicant shall fund those eligible costs not funded by the department under the grant or loan. The applicant may not use in-kind services or *proceeds from contribution claims* to meet the match requirement.

**Deleted:** the department's share of the moneys identified under WAC 173-322-070 (8)(d)

(d) **Repayment of loan.** The terms and conditions for repayment of the loan shall be based on the applicant's ability to repay the loan, as determined by an independent third-party financial review. The independent third-party financial review shall be conducted at the direction and cost of the department.

# Appendix C

# Comparison of the New Rule with the Old Rule

# Comparison of the New Rule with the Old Rule

The amendment of chapter 173-322 WAC, Remedial Action Grants and Loans, includes a reorganization of the rule. The rule was reorganized to improve its clarity and usability. For an overview of the reorganization, please refer to Chapter 2 of the Concise Explanatory Statement. To clarify the reorganization, the following table has been prepared to identify the source in the old rule of each section or subsection in the new rule.

| NEW RULE | OLD RULE |
|---|---|
| **WAC 173-322-010 Purpose and authority** | |
| • WAC 173-322-010 | • WAC 173-322-010 |
| **WAC 173-322-020 Definitions** | |
| • WAC 173-322-020 | • WAC 173-322-020 |
| **WAC 173-322-030 Relation to other legislation and administrative rules** | |
| • WAC 173-322-030 | • WAC 173-322-030 |
| **WAC 173-322-040 Administration** | |
| • 040(1) – Notice of availability | • WAC 173-322-110(1) |
| • 040(2) – Application package | • WAC 173-322-110(2) |
| • 040(3) – Application guidance | • WAC 173-322-110(4) |
| • 040(4) – Application period | • WAC 173-322-110(3) |
| • 040(5) – Application form | • NEW |
| • 040(6) – Appropriation of funds | • WAC 173-322-110(5) |
| • 040(7) – Allocation of funds | • WAC 173-340-080 |
| • 040(8) – Funding | • WAC 173-322-110(6) |
| • 040(9) – Department discretion | • WAC 173-322-110(7) |
| • 040(10) – Indemnification | • WAC 173-322-110(8) |
| • 040(11) – Administrative requirements | • WAC 173-322-110(9) |
| **WAC 173-322-050 Fiscal controls** | |
| • 050(1) – General | • WAC 173-322-100(1) |
| • 050(2) – Partial funding | • WAC 173-322-100(2) |
| • 050(3) – Limit on funding for a hazardous waste site | • WAC 173-322-100(3)<br>• WAC 173-322-090(1) |
| • 050(4) – Retroactive funding | • WAC 173-322-100(4) |
| • 050(5) – Consideration of contribution claims | • WAC 173-322-100(5) |
| • 050(6) – Consideration of insurance claims | • WAC 173-322-100(5) |
| • 050(7) – Repayment of area-wide ground water remedial action grant funds | • WAC 173-322-100(6) |
| • 050(8) – Financial reporting | • NEW |
| • 050(9) – Financial responsibility | • WAC 173-322-090(7) |

| NEW RULE | OLD RULE |
|---|---|
| **WAC 173-322-060 Site hazard assessment grants** | |
| • 060(1) – Purpose | • WAC 173-322-040(4) |
| • 060(2) – Applicant eligibility | • WAC 173-322-040(4) |
| • 060(3) – Application process | • WAC 173-322-060(1), (2)(a), (2)(d) |
| • 060(4) – Application evaluation and prioritization | • WAC 173-322-070(3) |
| • 060(5) – Cost eligibility | • WAC 173-322-050(3), (4) |
| • 060(6) – Retroactive cost eligibility | • WAC 173-322-100(4) |
| • 060(7) – Funding | • WAC 173-322-090(2) |
| **WAC 173-322-070 Oversight remedial action grants** | |
| • 070(1) – Purpose | • NEW |
| • 070(2) – Applicant eligibility | • WAC 173-322-040(2) |
| • 070(3) – Retroactive applicant eligibility | • NEW |
| • 060(4) – Application process | • WAC 173-322-060(1), (2)(a), (2)(b)<br>• WAC 173-322-110(3) |
| • 070(5) – Application evaluation and prioritization | • WAC 173-322-070(1) |
| • 070(6) – Cost eligibility | • WAC 173-322-050(1), (4) |
| • 070(7) – Retroactive cost eligibility | • WAC 173-322-100(4) |
| • 070(8) – Funding | • WAC 173-322-090(1), (4-5)<br>• WAC 173-322-100(5) |
| **WAC 173-322-080 Independent remedial action grants** | |
| • 080(1) – Purpose | • NEW |
| • 080(2) – Applicant eligibility | • WAC 173-322-040(2) |
| • 080(3) – Application process | • WAC 173-322-060(1), (2)(a), (2)(e)<br>• WAC 173-322-110(3) |
| • 080(4) – Application evaluation and prioritization | • WAC 173-322-070(1) |
| • 080(5) – Cost eligibility | • WAC 173-322-050(1), (4) |
| • 080(6) – Retroactive cost eligibility | • WAC 173-322-100(4) |
| • 080(7) – Funding | • WAC 173-322-090(1), (4)<br>• WAC 173-322-100(5) |
| **WAC 173-322-090 Area-wide ground water remedial action grants** | |
| • 080(1) – Purpose | • NEW |
| • 080(2) – Applicant eligibility | • WAC 173-322-040(2) |
| • 080(3) – Application process | • WAC 173-322-060(1), (2)(a), (2)(b)<br>• WAC 173-322-110(3) |
| • 080(4) – Application evaluation and prioritization | • WAC 173-322-070(1) |
| • 080(5) – Cost eligibility | • WAC 173-322-050(1), (4) |
| • 080(6) – Retroactive cost eligibility | • WAC 173-322-100(4) |
| • 080(7) – Funding | • WAC 173-322-090(1), (3), (5)<br>• WAC 173-322-100(5), (6) |

| NEW RULE | OLD RULE |
|---|---|
| **WAC 173-322-100 Safe drinking water action grants** | |
| • 080(1) – Purpose | • NEW |
| • 080(2) – Applicant eligibility | • WAC 173-322-040(3) |
| • 080(3) – Application process | • WAC 173-322-060(1), (2)(a), (2)(c)<br>• WAC 173-322-110(3) |
| • 080(4) – Application evaluation and prioritization | • WAC 173-322-070(2) |
| • 080(5) – Cost eligibility | • WAC 173-322-050(2), (4) |
| • 080(6) – Retroactive cost eligibility | • WAC 173-322-100(4) |
| • 080(7) – Funding | • WAC 173-322-090(1), (4-6)<br>• WAC 173-322-100(5) |
| **WAC 173-322-110 Methamphetamine lab site assessment and cleanup grants** | |
| • NEW (based on pilot program in the Remedial Action Program Guidelines) | |
| **WAC 173-322-120 Derelict vessel remedial action grants** | |
| • NEW (based on pilot program in the Remedial Action Program Guidelines) | |
| **WAC 173-322-130 Loans** | |
| • NEW (limited loan program based on pilot program in the Remedial Action Program Guidelines and replaces the current case-by-case program in WAC 173-322-120) | |