



Toxics Cleanup Program

Policy 710A: Permit Exemptions for Remedial Actions under MTCA

Established: February 17, 1995

Revised: November 9, 2015

Contact: Policy and Technical Support Unit Staff

References: [RCW 70.105D.090](#)
[WAC 173-340-710](#)

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

Policy Approved:

James J. Pendowski, Manager
Toxics Cleanup Program

Date: November 9, 2015

Purpose: This policy implements RCW 70.105D.090 and WAC 173-340-710, which exempts certain remedial actions from the procedural requirements of specific state environmental permits and local government permits that are conducted under the Model Toxics Control Act. To be eligible for these exemptions, the remedial action must be conducted by Ecology or be authorized under:

- An enforcement order;
- An agreed order; or
- A consent decree.

The intent of the exemption is to expedite cleanup of contaminated sites.

Applicability: The exemption applies to persons conducting a remedial action at a facility under an order or decree, and the Department of Ecology (Ecology) when it conducts a remedial action. Such actions are exempt from the procedural requirements of the following laws:

- 70.94 [Air-Limited exemption, see Appendix C]
- 70.95 [Solid Waste]
- 70.105 [State Only-Designated Dangerous Waste]
- 77.55 [Hydraulic Permit]
- 90.48 [State Waste Discharge Permit Only]
- 90.58 [Shorelands]
- Laws requiring or authorizing local government permits or approvals for the remedial action (see #8, below).

This exemption does not apply to:

- National Pollutant Discharge Elimination System (NPDES) permits issued under 90.48;
 - Resource Conservation and Recovery Act (RCRA) Corrective Action permits for federally-designated hazardous waste treatment, storage, or disposal (TSD) facilities;
 - Certain Clean Air Act permits described in an attachment to this policy; and
 - Independent remedial actions, including actions reviewed by Ecology under the Voluntary Cleanup Program (VCP).
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1. Ecology shall ensure compliance with substantive permit requirements.

Ecology shall ensure compliance with the substantive provisions of chapters 70.94, 70.95, 70.105, 77.55, 90.48, and 90.58 RCW, and the substantive provisions of laws requiring or authorizing local government permits or approvals. The substantive requirements, to the extent known at issuance of the order or decree, will be incorporated into the order or decree and, as Ecology views appropriate, into other appropriate remedial action documents.

2. Ecology will determine what substantive permit requirements apply.

Ecology will make a final determination on what substantive requirements will apply to the site. This includes situations where permit requirements conflict with remedial action requirements and schedule. Ecology will consult with the affected agencies before deciding.

3. Persons conducting remedial actions have a continuing obligation to identify substantive requirements.

Any substantive requirements shall be identified, to the extent known, during preparation of the order or decree or other document. However, the persons conducting the remedial action have a continuing obligation to identify whether other permits or substantive requirements are required. Ecology's site manager should periodically review whether there are any further requirements that apply to the remedial action, and should ensure compliance with any newly identified requirements.

If either the person conducting the remedial action or Ecology becomes aware of additional permits or substantive requirements that apply to the remedial action, they shall promptly notify the other party of this knowledge. Ecology, or at Ecology's request, the person conducting the remedial action, shall consult with the state or local agency about these additional requirements. Ecology will make the final determination on the applicability of any additional substantive requirements at the site.

4. State agencies and local governments shall be consulted on any exempted permit.

The Ecology Site Manager shall consult with state agencies, local governments, and Ecology programs that would normally issue the permits early in the remedial action process and at key points during the process. The purpose of this consultation is to help Ecology decide which permits are applicable to the remedial action and identify substantive permit requirements. Consultation with the permitting agency will occur throughout the remedial action process to ensure the remedial action is meeting the substantive permit requirements.

Site Managers will obtain documentation from the consulted agencies on the substantive requirements. Ecology may either request this documentation or ask the potentially liable person, or Ecology contractor consulting with the permitting agencies, to obtain the documentation.

5. Ecology shall provide an opportunity for public comment.

Ecology shall provide an opportunity for comment by the public, tribes, and state and local governments that would otherwise implement the laws referenced in this policy.

Ecology will also provide an opportunity for comment on the exempted permit requirements during the standard public comment opportunities provided under MTCA. To the extent Ecology knows the requirements, the public notice will specifically identify the permits exempted under RCW 70.105D.090 and seek comment on the substantive permit requirements. This notice will be sent to those individuals or organizations who would normally have received such notice and to the agencies that normally issue the permit or approval. It shall also be sent to the state and local governments that would otherwise implement the exempted permits.

6. When a permit is exempt, Ecology shall not assume responsibility for recovery of costs for other state agencies or local governments.

When a permit is exempt, Ecology will not normally cost-recover other governmental agencies' costs to identify applicable requirements, or to conduct technical assistance or inspections. However, the law allows other state and local agencies to charge potentially liable persons a fee to defray the costs of services rendered.

When an Ecology-administered permit is exempt, rather than charging a permit fee, Ecology's costs will be recovered using cost recovery procedures established under WAC 173-340-550. To enable this, staff in other programs will need to be given the site SIC and complete a site log for time spent working on the site.

7. When a permit is not exempt, either the potentially liable person (PLP) or the Ecology contractor shall apply and pay for the permit.

When a permit is required and the statutory exemption does not apply, the following persons shall apply and pay for the permit:

- a. When a potentially liable person is conducting a remedial action, that person shall be responsible for applying for any necessary permits and paying any permit fees.
- b. When Ecology is conducting the remedial action, the consultant or contractor hired by Ecology to do the work shall normally be responsible for applying for the permit and paying any permit fees. In these cases, the permit shall be issued to the Ecology

consultant or contractor. Costs incurred in applying for a permit (including permit fees), shall be included in the consultant's or contractor's charges and included in remedial action costs subject to cost-recovery under MTCA.

8. Ecology may apply for certain local permits to expedite cleanups.

The exemption under RCW 70.105D.090 broadly includes all local permits for remedial actions. This is intended to prevent the delay of remedial actions resulting from potential appeal of these permits. However, in some cases, invoking this broad exemption can actually delay a cleanup as Ecology works with the local government to identify substantive requirements and establishes methods for implementing these requirements. Accordingly, Ecology intends to retain the option of applying for, or asking PLPs to apply for, certain local permits that have minimal potential for appeal and that address life-safety, non-environmental issues that are typically outside of Ecology's expertise. Examples of such permits are those needed to comply with the building code; electrical permits (whether administered by the local government or Washington State Department of Labor & Industries); permits issued under the fire code; and street use and access permits.

In these cases, the person conducting the remedial action may be asked to apply for the relevant local permit. If a PLP refuses to apply for a permit on the grounds that local permits are exempt, Ecology will consult with the local government to identify the substantive requirements and arrange for compliance inspections to be done by the administering agency. The local agency will be asked to bill the PLP directly for these costs, not through Ecology's cost recovery process. The same approach should be used if the PLP applies for and receives a local permit (i.e., costs paid by the PLP directly to the local government).

Note that the exemption to local permits under RCW 70.105D.090 only applies to remedial actions. Work necessary to prepare the site for subsequent redevelopment is not subject to this exemption. Examples of such work and associated permits include:

- SEPA review for the development and implementation of any resulting development conditions;
- Lot line adjustments, subdivisions, and preliminary and final plat approvals;
- Conditional use permits and similar land use permits;
- Site preparation work beyond that needed for the remedial action such as tree removal; grading and filling; utility and road installation; and stormwater construction permits; and
- Building, landscaping, and related permits not integral to the remedial action.¹

1. For example, a building permit needed to construct a groundwater treatment system would be exempt, but a permit to construct a building as part of future development would not be exempt, even if it also serves to cap the site as part of a remedial action.

9. For remedial actions that are conducted under an Order or Decree or by Ecology, and which also require an NPDES permit, the following procedures shall apply:

- a. To expedite cleanup, Toxics Cleanup Program (TCP) staff will normally process and issue the NPDES permit.
- b. Before issuing the permit for public comment, TCP will ask the Water Quality Program to conduct a peer review of the permit.
- c. Water Quality Program staff will be responsible for entering monitoring data into the Water Quality Program's Permit and Reporting Information System database (PARIS).
- d. Rather than charging a permit fee, Ecology will recover its costs using the cost recovery procedures established under WAC 173-340-550. To enable recovery of all costs, Water Quality Program staff will need to be given a site SIC and complete a site log for time spent working on the site.

10. Ecology shall ensure that permit exemptions for remedial actions under MTCA will not jeopardize federal delegation.

This policy shall be periodically reviewed to ensure that exemptions from procedural requirements authorized under RCW 70.105D.090 do not jeopardize federal program delegation.

Attachments:

- A. *Memo from Ecology Director Linda Hoffman, June 21, 2004:* Ecology Director's determination withdrawing exemption to TSDf corrective action permits issued under Chapter 70.105 RCW.
- B. *Memo from Ecology Director Jay J. Manning, July 14, 2008:* Ecology Director's determination withdrawing exemption to NPDES permits issued under Chapter 90.48 RCW.
- C. *Memo from Ecology Director Maia D. Bellon, July 31, 2013:* Ecology Director's determination withdrawing certain exemptions for air quality permits under the federal Clean Air Act.

Attachment A

Memo from Ecology Director Linda Hoffman, June 21, 2004:


Ecology Director's determination withdrawing exemption to
TSDf corrective action permits issued
under Chapter 70.105 RCW

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DEPARTMENT OF ECOLOGY

Date: June 21, 2004

To: Darin Rice, HWTR Program Manager
Jim Pendowski, TCP Program Manager

From: Linda Hoffman, Director 

Subject: MTCA Exemption to RCRA Permitting

Ecoology has determined that we can no longer use the MTCA exemption to RCRA permitting for TSDF corrective action sites subject to RCRA permitting. Under the Model Toxics Control Act (MTCA), RCW 70.105D.090(1), a person conducting a remedial action at a facility under a consent decree, order, or agreed order is exempted from the procedural requirements of a number of state and local laws, including the Hazardous Waste Management Act (HWMA), chapter 70.105 RCW. Under RCW 70.105D.090(2), this exemption “shall not apply if the [Department of Ecology] determines that the exemption would result in loss of approval from a federal agency necessary for the state to administer any federal law, including the federal resource conservation and recovery act...”

Washington has a state hazardous waste program created pursuant to the HWMA. This program has been authorized by the United States Environmental Protection Agency pursuant to Subchapter III of the federal Solid Waste Disposal Act (commonly referred to as the Resource Conservation and Recovery Act, or RCRA). Once authorized, a state hazardous waste program is carried out in lieu of the federal program under RCRA in that state. 42 USC § 6926(b). To become authorized, a state program must, among other things, be equivalent to the federal hazardous waste program under RCRA and consistent with the federal and state programs in other states. *Id.*; *see generally*, 40 CFR Part 271.

A central feature of hazardous waste regulation under RCRA—and in turn, under an authorized state program—is the issuance of permits to regulate facilities that treat, store, or dispose of hazardous waste (known as “TSD facilities”). Such permits establish the operating, closure, and postclosure obligations of TSD facilities. To become authorized, a state program must have the legal authority to implement provisions at least as stringent as designated federal hazardous waste permit provisions. 40 CFR § 271.14.

Under RCRA, TSD facility permits must require “corrective action” for all releases of hazardous waste or hazardous waste constituents from solid waste management units at the facility. 42 USC § 6924(u), (v). This requirement is reflected in Washington’s Dangerous Waste Regulations, which implement the HWMA. *See* WAC 173-303-645(1)(a), (2)(a)(ii); WAC 173-303-646(1)(b), (2)(c). Washington’s hazardous waste program is authorized to implement corrective action through state-issued TSD facility permits. The terms of Washington’s authorization allows the program to rely on the cleanup authority of MTCA in order to implement corrective action requirements and compel corrective action. 59 FR 55332 (November 4, 1994). In order to satisfy corrective action obligations under this approach, an

implementing MTCA legal instrument must be incorporated into the TSD facility permit. Washington's authorization provides:

EPA emphasizes that corrective action requirements are not being deferred to a state superfund-like authority; rather, the state authority will be used to compel RCRA corrective action requirements. In order to fulfill the RCRA Section 3004(u) and (v) requirement that all RCRA permits must include corrective action permit conditions, state corrective action orders will be incorporated into RCRA permits issued pursuant to the authorized State program permitting regulations. [...] Under the Washington program, a State order *would be considered to be part of the authorized RCRA program only when the order is incorporated into an existing RCRA permit, or when the order is issued simultaneously with and incorporated by reference into a new RCRA permit.*

Id. (emphasis added).

To the extent that MTCA's permit exemption waives the procedural requirements of the HWMA, a conflict exists. If recognized, the MTCA permit exemption would, at least with respect to performing corrective action, relieve a TSD facility from the requirement to be permitted under the HWMA. This exemption would be in direct conflict with the terms of Washington's authorization. This conflict has been recognized by EPA Region 10, which has requested that Ecology remove references to chapter 70.105 RCW in the permit exemption portions of MTCA Orders that are incorporated by reference into TSD facility permits. (See attached correspondence from Jan Palumbo, EPA Region 10, to Kay Seiler, Ecology, dated May 18, 2004).

Based on this conflict and Ecology's communication with EPA Region 10, I am determining pursuant to RCW 70.105D.090(2) that application of the permit exemption of RCW 70.105D.090(1) to TSD facilities required by RCRA and the HWMA to obtain permits and perform corrective action would result in the loss of federal authorization to implement corrective action through state-issued TSD facility permits. This determination relates solely to TSD facilities subject to permitting requirements for performing corrective action under RCRA and the HWMA. It is not intended to apply to any other circumstance.

cc: Rick Albright, Region X EPA
Jack Boller, Region X EPA
Jan Palumbo, Region X EPA
TCP PMT
HWTR PMT

Attachment B

Memo from Ecology Director Jay J. Manning, July 14, 2008:


Ecology Director's determination withdrawing exemption to
NPDES permits issued under Chapter 90.48 RCW

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DEPARTMENT OF ECOLOGY

DATE: July 14, 2008

TO: Jim Pendowski, Manager
Toxics Cleanup Program

FROM: Jay J. Manning, Director 

SUBJECT: **Determination of Application of MTCA Permit Exemption, RCW 70.105D.090, to National Pollutant Discharge Elimination System Permits**

The Department of Ecology (Ecology or we) has determined that we can no longer use the Model Toxics Control Act (MTCA) exemption to National Pollutant Discharge Elimination System (NPDES) permitting for discharges to navigable waters at or from sites being cleaned up pursuant to MTCA. Under RCW 70.105D.090(2), MTCA exempts parties conducting cleanups under order or decree from having to obtain certain permits. However, the permit exemption “shall not apply if [Ecology] determines that the exemption would result in loss of approval from a federal agency necessary for the state to administer any federal law, including . . . the federal clean water act[.]”

The federal Environmental Protection Agency (EPA) has delegated to Washington the authority to implement the federal clean water act (CWA) in this state. The delegation includes the NPDES permit program. To obtain and maintain this delegation, Washington’s NPDES program must carry out the objectives of the CWA, including the primary objective of prohibiting the unpermitted discharge of pollutants into navigable waters. 33 U.S.C. § 1342(a)(5).

Only Congress can create exemptions to the CWA’s mandate that discharges to navigable waters can only occur pursuant to a permit. *Northern Plains Resource Council v. Fidelity Exploration and Development Co.*, 325 F.3d 1155, 1164 (9th Cir. 2003), *cert. denied*, 540 U.S. 967 (2003). Yet, nothing in the CWA indicates Congress exempted discharges associated with a MTCA cleanup from NPDES permitting requirements. Instead, the CWA provides that states may not adopt or enforce provisions less stringent than the CWA (such as a provision not requiring a permit). 33 U.S.C. § 1370. A recent Ninth Circuit case makes this clear, finding a state simply “has no authority to create a permit exemption from the CWA for discharges that would otherwise be subject to the NPDES permitting process.” *Northern Plains*, 325 F.3d at 1164 (citing 33 U.S.C. § 1370). Accordingly, Washington has no authority to exempt discharges associated with a MTCA cleanup from NPDES permitting.¹

¹ The federal cleanup law, the Comprehensive, Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. specifically exempts those conducting cleanups under order or decree from obtaining permits, such as NPDES permits. However, this exemption cannot be applied to MTCA cleanups, for one primary reason: Congress did not say it could. Under cases interpreting the CWA, only Congress can create exemptions to its requirements. See *Northern Plains*, at 1164. If Congress does not specifically create an exemption to the CWA, there is no exemption to the CWA. *Id.*

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A state NPDES program can lose EPA approval if the program fails to meet the requirements of the CWA. *See e.g.* 40 C.F.R. § 123.63 (regulations governing withdrawal of state program approval). One specific way a state program can lose its EPA approval is if the state “fails to comply with the requirements of this part, including . . . failure to issue permits [.]” 40 C.F.R. § 123.63(a)(2)(i). Accordingly, if Washington failed to issue permits for a discharge into navigable waters during a MTCA cleanup, which discharge would otherwise require an NPDES permit, it would provide a basis for EPA to withdraw approval for Washington’s implementation of the NPDES program.

Based on this analysis, I am determining, pursuant to RCW 70.105D.090(2), that application of the permit exemption of RCW 70.105D.090(1) to discharges to navigable waters at or from MTCA cleanup sites that would otherwise require NPDES permits would result in the state’s loss of federal authorization to implement the NPDES program in Washington. This determination applies solely to discharges into navigable waters from MTCA cleanup sites, and is not intended to apply to any other circumstance.

cc: Toxics Cleanup Program Management Team
Mary Sue Wilson, Senior Assistant Attorney General
Ron Lavigne, Senior Counsel
Kristie Carevich, Assistant Attorney General

Attachment C

Memo from Ecology Director Maia D. Bellon, July 31, 2013:

Ecology Director's determination withdrawing certain
exemptions for air quality permits under the
federal Clean Air Act

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STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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July 31, 2013

TO: Jim Pendowski, Manager
Toxics Cleanup Program

FROM: Maia D. Bellon, Director

SUBJECT: Determination of Application of MTCA Permit Exemption, RCW 70.105D.090,
to Air Quality Program Permits

Under RCW 70.105D.090(2), Model Toxics Control Act (MTCA) exempts parties conducting cleanups under order or decree from having to obtain certain permits. However, the permit exemption "shall not apply if [Ecology] determines that the exemption would result in loss of approval from a federal agency necessary for the state to administer any federal law, including ... the federal clean air act[.]"

The Department of Ecology (Ecology or we) has determined that we can no longer use the MTCA exemption to exempt from permitting air emissions from remedial actions at MTCA clean-up sites that are sufficient to trigger the need for Title V air operating permits (AOPs), prevention of significant deterioration permits (PSD permits), or nonattainment new source review permits (nonattainment NSR permits). These permits are mandated by the Federal Clean Air Act (CAA). *See* 42 U.S.C. § 7475 (requiring PSD permits); 42 U.S.C. § 7661a (requiring Title V air operating permits); 42 U.S.C. § 7502(c)(5) (requiring Nonattainment NSR permits). Pursuant to the CAA, the United States Environmental Protection Agency (EPA) has authorized Ecology to issue these permits.

Only Congress can create exemptions to the CAA's requirement that these permits be issued when air emissions are sufficient to trigger the need for them. Based on this analysis, we are determining, pursuant to RCW 70.105D.090(2), that the application of the permit exemption RCW 70.105D.090(1) to air emissions from remedial actions at MTCA cleanup sites that would otherwise require PSD permits, Title V AOPs, or Nonattainment NSR permits would result in the state's loss of federal authorization to implement these CAA permitting requirements in

Washington. This determination applies solely to emissions into the air from remedial actions at MTCA cleanup sites, and is not intended to apply to any other circumstance.

In addition, the federal Clean Air Act requires Washington to develop and implement a plan (SIP) for the attainment and maintenance of the national ambient air quality standards (NAAQS). Washington's SIP includes the requirement that each new or modified minor source of air pollutants in Washington file a notice of construction with Ecology, and obtain a permit regulating its air emissions. Washington's SIP has been approved by EPA and, as a result, has become enforceable federal law. Ecology's failure to implement the permit requirements in the SIP could result in sanctions against the state and the issuance of a federal plan (FIP).

Based on this analysis, we are determining, pursuant to RCW 70.105D.090(2), that until the MTCA exemption for minor source permits are approved into Washington's SIP, application of the permit exemption RCW 70.105D.090(1) to remedial actions at MTCA cleanup sites that emit NAAQS pollutants or their precursors would result in the state's loss of federal authorization to implement these CAA permitting requirements in Washington. This determination applies solely to NAAQS pollutants which would be emitted into the air from remedial actions at MTCA cleanup sites, and is not intended to apply to any other circumstance.

cc: Toxics Cleanup Program Management Team
 Air Quality Program Management Team
 Kay Shirey, Assistant Attorney General
 Ivy Anderson, Assistant Attorney General