



# Toxics Cleanup Program

## Policy 500A: Identification of Potentially Liable Persons

*Established:* July 1, 1991

*Revised:* May 1, 2016

*Contact:* Policy & Technical Support Unit, Headquarters

*Purpose:* This Policy provides Ecology staff guidance on identifying potentially liable persons under the Model Toxics Control Act. Procedure 500A provides staff step-by-step instructions on how to identify potentially liable persons.

*References:* [RCW 70.105D.020](#) (22) and (26)  
[RCW 70.105D.040](#)  
[RCW 70.105D.050](#)  
[WAC 173-340-500](#)  
[TCP Procedure 500A: Identification of Potentially Liable Persons](#)  
[TCP Policy 800B: Information Access](#)  
[Ecology Policy and Procedures Manual](#) Chapter 20: Public Information, Records, & Publications [internal SharePoint site]

*Attachments:* None

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

*Approved by:*

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Toxics Cleanup Program

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

## **Purpose and Applicability**

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The Model Toxics Control Act (MTCA) specifies who is liable for the release or threatened release of hazardous substances at a contaminated site ([RCW 70.105D.040\(1\)](#)). Each liable person is strictly liable, jointly and severally, for all remedial action costs and all natural resource damages resulting from the release or threatened release ([RCW 70.105D.040\(2\)](#)).

- Strict liability means that a person is liable for the costs and damages resulting from a release or threatened release of hazardous substances at a site without regard to fault.
- Joint and several liability means that each liable person is liable for all the costs and damages resulting from the release or threatened release of hazardous substances at a site, regardless of relative fault for the release.

To facilitate the cleanup of contaminated sites, MTCA authorizes the Department of Ecology (Ecology) to identify potentially liable persons (PLPs) if there is credible evidence of their liability ([RCW 70.105D.020\(26\)](#)). Ecology needs to identify a person as a PLP before undertaking certain actions under MTCA, including:

- Entering into a consent decree or issuing an agreed order or enforcement order requiring the person to investigate or clean up the site ([RCW 70.105D.040\(4\)](#) and [70.105D.050\(1\)](#)).
- Recovering from the person any remedial action costs incurred by Ecology at the site or natural resource damages resulting from the release or threatened release at the site ([RCW 70.105D.040\(2\)](#) and [70.105D.050\(3\)](#)).

This Policy provides Ecology staff guidance on identifying PLPs. [Procedure 500A](#) provides step-by-step instructions on how to identify PLPs and identifies who is responsible for each step.

### **1. Ecology will make liability determinations using criteria in MTCA.**

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MTCA specifies who is liable with respect to a site in [RCW 70.105D.040\(1\)](#). In brief, the following persons may be liable unless they meet the conditions for a statutory exemption, exclusion, or defense:

- The current owner or operator of the facility.
- Persons who owned or operated the facility at the time of release.
- Persons who generated hazardous waste disposed of or treated at the facility.
- Persons who arranged for the disposal or treatment of a hazardous substance at the facility.
- Persons who transported a hazardous substance for disposal or treatment at the facility, if the facility could not legally receive the substance.
- Persons who sell and provide written instructions for the use of a hazardous substance, if a person following those instructions causes the release.

Ecology will determine whether a person is liable using these statutory criteria. Ecology will use its best professional judgment when identifying PLPs and determining whether credible evidence of liability exists. Ecology will consider liability exemptions, exclusions, and defenses in accordance with Section 2.

Before making a preliminary liability determination, the Cleanup Project Manager should consult with their Section Manager and, as appropriate, with the Attorney General's Office.

## **2. When making liability determinations, Ecology will consider exemptions, exclusions, and defenses if person provides credible evidence.**

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MTCA provides several exemptions, exclusions, and defenses to liability. They are specified in [RCW 70.105D.040\(3\)](#) and under the definition of "owner or operator" in [RCW 70.105D.020\(22\)](#).

When making a preliminary liability determination, Ecology generally will not consider whether a person qualifies for an exemption, exclusion, or defense.<sup>1</sup> In response to the preliminary liability determination, a person may claim an exemption, exclusion, or defense (see Section 11). When making the claim, the person needs to provide Ecology credible evidence that they qualify.

When making a final liability determination, Ecology will consider whether a person qualifies for an exemption, exclusion, or defense if the person made a claim during the comment period and provided Ecology with credible evidence that they qualify. Before deciding whether a person qualifies, the Cleanup Project Manager should consult with their Section Manager and, as appropriate, with the Attorney General's Office. Ecology's decision will be included in the final liability determination letter (see Section 11).

## **3. Ecology will interpret plume clause liability exemption to include subsequent purchasers.**

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MTCA exempts from liability "any person who has any ownership interest in, operates, or exercises control over real property where a hazardous substance has come to be located solely as a result of migration of the hazardous substance to the real property through the groundwater from a source off the property," provided the person meets certain other statutory conditions ([RCW 70.105D.020\(22\)\(b\)\(iv\)](#)). This liability exemption is often referred to as the "plume clause."

When considering whether the plume clause liability exemption applies to a person under Section 2, Ecology will interpret the exemption as follows:

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<sup>1</sup> If Ecology should decide that a person qualifies for an exemption, exclusion, or defense when making a preliminary liability determination, the Cleanup Project Manager will document the decision in writing and place it in the site file.

- a. The exemption applies to the owner or operator of the real property at the time a hazardous substance migrates through the groundwater onto the property and to any subsequent owner or operator of the property, provided the conditions specified in the statute are met.
- b. The exemption applies separately to each owner or operator of the real property and does not run with the land. To claim the exemption, a person must separately demonstrate they meet the conditions specified in the statute. This is because the exemption depends on the actions of the person who is claiming the exemption.
- c. If Ecology determines that the exemption applies to a person, the real property is still considered to be part of the contaminated site and the contaminated groundwater on the property must still be addressed under MTCA.

#### **4. Ecology will not certify that a person is not liable under MTCA.**

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Ecology does not have the statutory authority to certify that a person is exempt or excluded from or has a defense to MTCA liability. Therefore, Ecology will not make such certifications. However, as provided under Section 2, Ecology will consider such claims when deciding whether to name a person as a PLP.

For example, assume that a release has migrated off the source property and affected adjacent properties. In response to a potential contribution claim or in anticipation of sale, the owner of an affected property requests that Ecology certify that they are exempt from MTCA liability under [RCW 70.105D.020\(22\)\(b\)\(iv\)](#), which is often referred to as the “plume clause.” Ecology would not certify that the person is exempt. However, as provided under Section 2, Ecology would consider such a claim when deciding whether to name the person as a PLP.

#### **5. Ecology will search for and identify PLPs at specific times.**

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Ecology will search for and identify PLPs for a site at the following times, which partly depend on the administrative process used to clean up the site.

- a. For sites where **Ecology is conducting remedial actions**, Ecology will:
  - Search for and identify PLPs before undertaking remedial actions other than initial investigations; site hazard assessments and rankings; or emergency actions. See Sections 6 and 7 for guidance on the appropriate scope of the PLP search.
  - Identify additional PLPs after undertaking such remedial actions if Ecology receives credible evidence that a person is liable.
- b. For sites where **Ecology is supervising remedial actions** by PLPs under an order or decree, Ecology will:

- Search for and identify PLPs before entering into negotiations for an agreed order or consent decree, or issuing an enforcement order. See Sections 6 and 7 for guidance on the appropriate scope of PLP search.
  - Identify additional PLPs after an order or decree has been issued if Ecology receives credible evidence that a person is liable.
- c. For sites where **remedial actions are conducted independently**, including sites enrolled in the Voluntary Cleanup Program, Ecology will not search for PLPs. However, Ecology will identify a person as a PLP if the person provides Ecology credible evidence of their liability and requests Ecology make a liability determination.

Ecology may search for and identify PLPs at other times in the cleanup process. Ecology is not required to identify PLPs before conducting initial investigations; site hazard assessments and rankings; or emergency actions.

Before making a preliminary liability determination, the Cleanup Project Manager should discuss the specific facts and timing with their Section Manager and, as appropriate, with the Attorney General's Office.

## **6. Ecology will conduct search to identify current owners and operators.**

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When searching for PLPs as provided under Section 5, Ecology will conduct the following investigations at a minimum:

- Review Ecology and local health department records for the site.
- Review county property tax records or conduct a title search to identify current owners of real property within the site.
- Interview current owners of real property within the site.

If any of the investigations were completed at an earlier stage in the process (e.g., initial investigation or site hazard assessment), Ecology does not need to repeat the investigation unless it believes new information could be obtained.

The search must be sufficient to identify at least the current owners and operators of the real property within the site where the release or threatened release occurred.

## **7. Ecology may conduct more extensive search to identify other PLPs.**

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Under certain circumstances, Ecology may need to conduct a more extensive search than specified in Section 6 to identify other PLPs. For example, the current owners or operators may not be financially solvent; may not have viable insurance policies that would pay for remedial action; or may qualify for an exemption, exclusion, or defense to liability. Additional PLPs are likely to include:

- Past owners and operators of real property within the site at the time a release occurred.
- Significant generators and transporters of hazardous substances that have been released or have the potential to be released at the site.
- Owners and operators of nearby properties from which hazardous substances have migrated onto the subject property and contributed to the contamination.
- Any other person meeting the definition of a PLP, as determined by the best professional judgment of Ecology.

Ecology should use best professional judgment when determining the depth of a PLP search. For a list of potential investigative methods and sources of information, see [Procedure 500A](#).

## **8. Ecology must have credible evidence to identify person as PLP.**

To identify a person as a PLP, Ecology must determine there is credible evidence the person is liable under MTCA ([RCW 70.105D.020\(26\)](#)). Evidence is considered credible when an impartial, reasonable person would determine that the evidence is believable. The determination is based on the individual characteristics of each site. In general, to be credible, the evidence must support each of the following determinations:

- a. A release or threatened release of a hazardous substance has occurred. Examples of credible evidence include:
  - Analytical tests.
  - Complaints or observations.
  - Video footage or photographs.
  - Written spill or accident reports.
  - Expertise or professional judgment of investigators.
  - Receipts of acceptance or disposal of hazardous substances at the site.

If analytical test data is not available to confirm a release has occurred, Ecology will consult with the Attorney General's Office before identifying a PLP.

- b. The release or threatened release poses a threat to human health or the environment. Examples of credible evidence include:
  - The release itself or impacted media are at a concentration that exceeds cleanup levels, including standards established under applicable state and federal laws.
  - Available data indicates the hazardous substances are at low concentrations, but are suspected to exceed cleanup standards due to sampling limitations or other information available about the site.

- The hazardous substances are at unknown concentrations or do not have cleanup standards readily available, but are suspected to be sufficiently toxic or in a sufficient quantity to affect, have the potential to affect, or have had adverse effects on human health or the environment.
  - The site has characteristics or circumstances such that there is a potential for a release that poses a threat to human health and the environment.
- c. The person is liable for the release or threatened release under the criteria specified in [RCW 70.105D.040](#).

Ecology will identify a person as a PLP if it determines there is credible evidence the person is liable under MTCA.

## **9. Ecology will make preliminary liability determination and provide identified persons notice and opportunity to comment.**

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Ecology will make a preliminary determination of liability and provide the identified persons timely notice and a meaningful opportunity to comment, unless an emergency requires otherwise. Ecology may also notify any previously identified PLPs. When providing such notice, Ecology will use the Preliminary PLP Status letter template, which is attached to [Procedure 500A](#). Ecology must provide at least thirty (30) days to comment on its preliminary determination. Ecology may extend the comment period, provided that the extension does not threaten the quality or timeliness of the cleanup. Comments must be submitted in writing to Ecology ([WAC 173-340-500](#)(1) and (3)).

## **10. Identified persons may waive right to comment and accept status as PLP.**

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Identified persons may waive their right to notice and opportunity to comment on Ecology's preliminary determination of liability and decide to accept their status as a PLP. They may choose to waive their procedural rights as a good-faith gesture to Ecology or to begin negotiations more quickly. The waiver must be submitted in writing to Ecology ([WAC 173-340-500](#)(5)). Ecology has developed a template for this purpose, which is attached to [Procedure 500A](#). The template should be enclosed with the Preliminary PLP Status letter.

## **11. Ecology will make final liability determination and provide notice to identified persons and previously identified PLPs.**

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Ecology will make a final liability determination after reviewing any written comments received during the specified comment period. If the identified person questions whether credible evidence of their liability exists or claims an exemption, exclusion, or defense to liability, Ecology will consult with the Attorney General's Office before making a final determination. When notifying the identified person of its final determination, Ecology will use the Final PLP Status letter template, which is attached to [Procedure 500A](#).

If Ecology determines the person is a PLP, Ecology must also notify any previously identified PLPs of its determination ([WAC 173-340-500](#)(4) and (6)). When providing such notice, Ecology will use the Notice of Additional PLPs letter template, which is attached to [Procedure 500A](#).

## **12. Ecology will facilitate efforts by PLPs to identify additional PLPs.**

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PLPs may search for and identify other persons that may be PLPs, and submit this information to Ecology with a request to name the other persons as PLPs. As resources permit, Ecology will review the submitted information. If Ecology determines there is credible evidence of liability, Ecology will identify the other persons as PLPs in accordance with Sections 9 and 11.

## **13. Ecology will maintain record of PLP searches.**

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Ecology will maintain a record of a PLP search in the site file, consistent with Chapter 20 of [Ecology Policy and Procedures Manual](#) and [Toxics Cleanup Program Policy 800B](#). The following types of information, as appropriate, should be included as part of the PLP search record:

- Copies of all documents.
- Transcripts or summaries of all conversations and interviews.
- Copies of all inter-office and intra-office memos and e-mails; Early Notice letters and comments; PLP Status letters and comments; agency findings; and staff's personal notes.
- Telephone log and field notes.
- Financial information.
- Corporate information.
- Property tax records or title search results.

Ecology will release information to the public upon request, consistent with Chapter 20 of [Ecology Policy and Procedures Manual](#) and [Toxics Cleanup Program Policy 800B](#). Note that some PLP search documents may be considered attorney-client work product and therefore not subject to public disclosure. Ecology will consult with the Attorney General's Office to determine the status and proper disposition of the documents.

## References

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- Hazardous Waste Cleanup—Model Toxics Control Act. WASH. REV. CODE § Chapter 70.105D RCW. (2013). Retrieved from: <http://apps.leg.wa.gov/RCW/default.aspx?cite=70.105D>
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- Washington State Department of Ecology. (2008). *Toxics Cleanup Program Policy 800B: Information access*. (No publication no.) Lacey, WA: Ecology, Toxics Cleanup Program. Retrieved from: <http://www.ecy.wa.gov/programs/tcp/policies/tcppoly.html>
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