

MTCA Gets a Makeover: Ecology Finalizes First Major Updates to Washington Cleanup Rule in 20 Years

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After a multi-year [rulemaking process](#), the Washington Department of Ecology (Ecology) issued the first substantive updates to the contaminated site cleanup regulations, Chapter 173-340 WAC, under the [Model Toxics Control Act](#) (MTCA) in over 20 years. The changes clarify the site discovery, investigation, remedy selection, and cleanup process, with a significant emphasis on integrating environmental justice considerations into the regulatory framework. The changes also include revisions to Ecology's system for ranking site hazards and programmatic planning priorities. The updates will become effective on January 1, 2024.

Announced at the end of 2018, Ecology's rulemaking effort spanned four and a half years, continuing even during the Covid-19 pandemic. It included over a dozen meetings with a [Stakeholder and Tribal Advisory Group](#) before the proposed rule changes were issued on February 15, 2023, for public comment.

Overview of the Rule Changes

Ecology completed updates to nearly every part of the rule, other than the cleanup standards. Ecology plans future rulemakings to update the cleanup standards. The amendments range from minor technical corrections to new decision-making criteria and procedural requirements that will likely result in material changes to how cleanups are conducted. Several of the more significant changes are described below.

Remedial Investigation and Feasibility Study/Assessment of Cleanup Alternatives

Many key substantive changes to the rule affect Remedial Investigation and Feasibility Study requirements. Although a large proportion of the changes are simply a repackaging of existing requirements, the clarifications are likely to affect in practice how these steps in the cleanup process are conducted and reported.¹ In a related change, Ecology also accorded itself more discretion in approving sampling and analytical methods by maintaining a list of these methods outside of the rule.² In addition, Ecology has attempted to standardize the disproportionate cost analysis procedure

to determine whether a cleanup “uses permanent solutions to the maximum extent practicable,” as required by statute, while also preserving sufficient flexibility to weigh costs and benefits of different cleanup alternatives to account for site-specific circumstances.

Environmental justice considerations

The rule changes reflect an increased commitment by Ecology to address environmental justice concerns associated with cleanup sites. These include, for example:

- Explicit consideration of potential impacts to “vulnerable populations and overburdened communities” throughout the contaminated site lifecycle, from initial listing to site investigation, and selection and implementation of the cleanup action.
- Increased communications and public comment periods, especially for Ecology-supervised and -conducted cleanups.
- Formalization of tribal engagement requirements for Ecology supervised-and-conducted cleanups.
- New requirements “to avoid, minimize, or mitigate adverse effects from remedial actions on archaeological and historic archaeological sites, historic buildings and structures, traditional cultural places, sacred sites, and other cultural resources.”³

Updates to the site hazard ranking process and the SHARP Tool

MTCA requires Ecology to rank sites based on their hazards.⁴ The prior site ranking process was viewed as cumbersome and difficult to apply, which was reflected in the fact that most cleanup sites in the state were not ranked. The updated rule eliminated the prior methodological requirements in favor of providing guiding principles for a site ranking system that allows Ecology more flexibility to create, modify, and implement a ranking system without going through rulemaking. Over the last several years, in anticipation of this change, Ecology has been building a new site ranking system – the [SHARP Tool](#).⁵ As part of the rule updates, Ecology included expectations that each site will be ranked and reranked with the SHARP Tool, depending on available information and cleanup status.

Updates to administrative site lists

In light of the changes to the site hazard ranking system, Ecology plans to consolidate its several hazardous sites lists into a “Contaminated Sites List” and a “No Further Action Sites List.” The rule updates also require publication of specific information about each site, including cleanup status and use of institutional controls.

Site discovery, reporting, listing, and de-listing

The amendments also clarify the procedures and standards for site discovery and reporting and Ecology’s initial investigation and decision about whether to include a site on the “Contaminated Sites List.”⁶ The same parts of the updated rule also specify when it is appropriate to include a site on the “No Further Action Sites List.”⁷

Public communications

Throughout the rule, Ecology made changes to the schedule and methods for sharing information and soliciting public comments on site cleanups. Significantly, the public communications

requirements can vary depending on whether the site is enrolled in a formal cleanup program or is being cleaned up independently.⁸ Several of these changes are intended to address concerns about the lack of information available to vulnerable populations and overburdened communities. Across the board, Ecology is moving to enhance electronic communications and to tailor communication options to specific sites or areas of concern.

Additional Guidance Outside of the Rule Expected

Along with the rule itself, parties performing cleanups should take the time to familiarize themselves with the associated documentation. Ecology's response to comments in the [Concise Explanatory Statement](#), for example, addresses a number of issues about how Ecology interprets existing requirements and the changes and expects them to be implemented.⁹ Ecology also posted a track changes version on the rulemaking website for ease of comparison with the prior regulations. Ecology plans to develop additional guidance to address several implementation issues, and has committed to or suggested that it will consider new guidance on the following topics:

- Identifying and considering vulnerable populations and overburdened communities during the cleanup process, including how to understand the scope of tribal interests and related engagement.
- Protecting cultural resources.
- Considering climate resilience.
- Completing initial investigations.
- Conducting disproportionate cost analyses.

In the meantime, parties performing cleanups have a lot to digest. While the basic framework remains the same and the changes should be applied readily to many sites, the updates contain material regulatory changes that will influence the course of cleanups in the state.

¹ Ideally, the restructured sections of the rule will help expedite cleanups by clarifying for responsible parties and Ecology when applicable requirements have been met. However, to the extent that requirements are more explicit, the changes could also generate more process-related documentation. For example, the new rule requires that deviations from the "cleanup action expectations" in WAC 173-340-370 be "documented and explained in the feasibility study report."

² See New WAC 173-340-830.

³ See New WAC 173-340-815.

⁴ [RCW 70A.305.030\(2\)\(b\)](#).

⁵ "SHARP" stands for site hazard and ranking process.

⁶ In some cases, the initial investigation may be conducted by other entities, including the Washington Pollution Liability Insurance Agency (PLIA), which has jurisdiction over and may provide [technical assistance](#) in connection with certain cleanups. A site may be added to the "Contaminated Sites List" if more is required to "[c]onfirm whether there is a threat to human health or the environment posed by a release or threatened release." New WAC 173-340-330(2).

⁷ This depends on what type of cleanup action has occurred. Under most circumstances, Ecology

also expects that sites will be moved automatically, because they will be Ecology-supervised or -conducted cleanups or part of the Voluntary Cleanup Program. The rule has an option to “petition” to move sites onto the “No Further Action Sites List,” but Ecology anticipates that the use of the petition method will be limited to situations where the listing was “erroneous.”

⁸ Independent cleanups include cleanups undertaken in Ecology’s Voluntary Cleanup Program and the PLIA’s technical assistance program, as well as cleanups that may be done without any technical assistance from Ecology or PLIA.

⁹ Though, the “concise” descriptor may be misleading: The document is 690 pages.

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