



# Toxics Cleanup Program

## Policy 540A: Enforcement Orders

*Established:* April 8, 1992

*Revised:* April 2018 [updated Attachment A: Enforcement Order Boilerplate]

*Contact:* Policy and Technical Support Unit, Headquarters

*Purpose:* This Policy provides Ecology staff guidance on when and how to exercise their enforcement authority under the Model Toxics Control Act to require a potentially liable person to conduct or pay for remedial actions.

*References:* [RCW 70.105D.020](#) (22)  
[RCW 70.105D.040](#) (1)  
[RCW 70.105D.050](#) (1) and (3)  
[WAC 173-340-510](#)  
[WAC 173-340-540](#)  
[WAC 173-340-600](#) (12)  
[TCP Policy 520A: Consent Decrees](#)  
[TCP Policy 530A: Agreed Orders](#)  
[Sediment Cleanup User's Manual II](#)  
[U.S. EPA, OSWER Directive 9834.6](#)

*Attachments:* A – Enforcement Order Boilerplate

*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:*

James J. Pendowski, Program Manager  
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) authorizes the Department of Ecology (Ecology) to issue an enforcement order requiring a potentially liable person (PLP) to conduct remedial actions or to pay for remedial actions or natural resource damage assessments conducted by Ecology. ([RCW 70.105D.050\(1\)](#) and [WAC 173-340-540](#)).

This Policy provides Ecology staff guidance on when and how to exercise this enforcement authority. For additional guidance related to sediment cleanups, see the [Sediment Cleanup User's Manual II](#) (SCUM II).

For related guidance on identifying PLPs, see [Policy 500A](#). For related guidance on using consent decrees or agreed orders, see [Policy 520A](#) and [Policy 530A](#) respectively.

### **1. Ecology may issue emergency enforcement order any time during cleanup process.**

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Ecology may issue an emergency enforcement order at any time during the cleanup process. In an emergency, Ecology may issue an enforcement order before undertaking or completing certain administrative actions (see Sections 2 and 3 of this Policy). In general, Ecology should only issue an emergency enforcement order when the normal process for issuing an enforcement order would be longer than the date established in the enforcement order for initiating remedial action.

### **2. Except in emergency, Ecology will make PLP determination before issuing enforcement order.**

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Except in an emergency, Ecology will issue:

- Preliminary PLP status letter before issuing the enforcement order; and
- Final PLP status letter before the effective date of the enforcement order.

In an emergency, Ecology may issue:

- Preliminary PLP status letter when issuing the enforcement order; and
- Final PLP status letter after the effective date of the enforcement order ([WAC 173-340-540](#)).

### **3. Except in emergency, Ecology will attempt to negotiate consent decree or agreed order before issuing enforcement order.**

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Except in an emergency, Ecology will attempt to negotiate a consent decree or an agreed order with a PLP before issuing an enforcement order. The Cleanup Project Manager should document attempts to negotiate a consent decree or agreed order in the site file before issuing an enforcement order. For policies on negotiating consent decrees and agreed orders, see [Policy 520A](#) and [Policy 530A](#).

#### **4. Generally, Ecology will issue enforcement order before conducting remedial actions using state funds.**

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In general, when attempts at negotiating an agreed order or consent decree are unsuccessful, Ecology will issue an enforcement order requiring a PLP to conduct the remedial actions before conducting those actions itself using State funds. This enables Ecology to seek treble damages and levy fines if the PLP refuses to comply.<sup>1</sup>

However, in some situations, it may be appropriate for Ecology to conduct the remedial actions using State funds instead of issuing an enforcement order, such as where:

- The remedial actions are necessary to address emergency conditions at a site.
- The remedial actions will provide additional information necessary to assess and rank the hazard of a site, or evaluate potential sources of contamination.
- The remedial actions will provide additional information that will facilitate negotiations or enforcement action.
- The remedial actions will provide additional information necessary to identify additional PLPs.
- No PLPs can be identified or none of the identified PLPs are able to conduct the remedial actions.

Except in an emergency, Ecology will make a reasonable effort to notify PLPs before conducting remedial actions for which the recovery of public funds can be sought under [RCW 70.105D.050](#)(3) ([WAC 173-340-510](#)(4)).

#### **5. Ecology will use boilerplate when drafting enforcement order.**

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Ecology has developed a boilerplate enforcement order (**Attachment A**). The boilerplate is available to staff on Ecology's Enforcement Boilerplates SharePoint site at: <http://partnerweb/sites/EXEC/ComplianceEnforcement/Pages/TCP.aspx>. Ecology will use this boilerplate when drafting an enforcement order. The Cleanup Project Manager may not alter the boilerplate without consulting with their Section Manager and the assigned Assistant Attorney General.

Ecology will not negotiate the terms of an enforcement order with a PLP. However, before issuing the order, Ecology may provide a PLP with an opportunity to comment.

#### **6. Ecology will provide public with notice and opportunity to comment.**

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Before or concurrent with issuing an agreed order, Ecology will provide the public with notice and opportunity to comment. The notice must be mailed no later than three (3) days after issuance (if not emergency) or ten (10) days after issuance (if emergency). The notice may be combined with notice of other MTCA documents, such as a cleanup action

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<sup>1</sup> Under [RCW 70.105D.050](#), a person who fails to comply with an order or agreed order is liable for up to three times the amount of the costs incurred by the state and a civil penalty of up to \$25,000 per day of violation.

plan, or notice required under other laws, such as the State Environmental Policy Act (SEPA), [Chapter 43.21C RCW](#). At a minimum, the notice must:

- Identify and generally describe the facility.
- Identify the persons who are parties to the order.
- Generally describe the remedial actions proposed in the order, including any institutional controls or permit exemptions authorized under [RCW 70.105D.090](#).
- Invite the public to comment on the order ([WAC 173-340-600\(12\)](#)).

Ecology will provide the public at least thirty (30) days following the notice to comment on the order ([WAC 173-340-600\(12\)](#) and (4)(e)).

Ecology may amend the enforcement order based on public comments. Ecology will provide additional public notice and opportunity to comment if the order is substantially changed ([WAC 173-340-600\(12\)\(b\)](#)).

## **7. Attorney General may bring action to enforce.**

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Under MTCA, the Attorney General is authorized to bring an action in state or federal court against any liable person who refuses, without sufficient cause, to comply with an enforcement order. Such persons are liable for up to three times the costs incurred by the State as a result of their refusal to comply, and a civil penalty of up to \$25,000 per day for each day they refuse to comply ([RCW 70.105D.050\(1\)](#)). This authority is included as a term in the boilerplate enforcement order (**Attachment A**).

If a PLP fails to comply with an enforcement order without sufficient cause, the Cleanup Project Manager should consult with their Section Manager and assigned Assistant Attorney General to determine the appropriate enforcement approach.

## **8. Generally, Ecology will not take enforcement actions under MTCA against residential landowners and lessees.<sup>2</sup>**

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A residential landowner or lessee may be liable under MTCA as an “owner” ([RCW 70.105D.040\(1\)\(a\)](#) and [70.105D.020\(22\)](#)). However, in the exercise of its enforcement discretion, Ecology generally will not pursue enforcement actions under MTCA against residential landowners and lessees, provided the following conditions are met:

- a. Hazardous substances have not been generated, stored, managed, or otherwise handled on the property other than in quantities typical of residential uses;

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<sup>2</sup> These factors have been modeled after the U.S. Environmental Protection Agency’s OSWER Directive 9834.6, “Policy towards Owners of Residential Property at Superfund Sites,” July 3, 1991. This document is available at <https://www.epa.gov/enforcement/guidance-owners-residential-property-superfund-sites>. For the purposes of this Policy, “residential land use” means a parcel with four (4) or fewer existing single family dwelling units not used for commercial or industrial activities or use.

- b. Any disposal of hazardous substances on the property has not caused a release or threatened release requiring remedial action;
- c. The property owner/lessee has not caused, exacerbated, or contributed to a release or threatened release of hazardous substances requiring remedial action;
- d. The property owner/lessee complies with any MTCA obligations (e.g., reporting the release of a hazardous substance);
- e. The property owner/lessee provides Ecology or PLPs under an order or decree access to the property to conduct remedial actions and does not impede the conduct of such remedial actions;
- f. Any remedial actions conducted by the property owner/lessee are in compliance with the rules adopted under MTCA and any preexisting requirements identified by Ecology;
- g. Any development or improvement of the property is consistent with residential use, and does not cause a release or threatened release of a hazardous substance requiring remedial action; and
- h. The property owner/lessee agrees to and complies with any institutional controls that apply to the property.

## References

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- Model Toxics Control Act—Cleanup Regulation. WASH. ADMIN CODE § Chapter 173-340 WAC. (2013). Retrieved from: <http://apps.leg.wa.gov/wac/default.aspx?cite=173-340>
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**Attachment A**  
**Enforcement Order Boilerplate**

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STATE OF WASHINGTON  
DEPARTMENT OF ECOLOGY

In the Matter of Remedial Action by:

[Name of Subject PLP(s)]

[MODEL] ENFORCEMENT ORDER

No. DE \_\_\_\_\_

TO: [Name]  
[Address]

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EXHIBIT A  
EXHIBIT B

Site Location Diagram  
[List all exhibits]

## I. INTRODUCTION

The objective of the State of Washington, Department of Ecology (Ecology) under this Enforcement Order (Order) is to require remedial action at a facility where there has been a release or threatened release of hazardous substances. This Order requires [Subject PLP(s)] to [briefly describe actions required by Order]. Ecology believes the actions required by this Order are in the public interest.

## II. JURISDICTION

This Enforcement Order is issued pursuant to the Model Toxics Control Act (MTCA), RCW 70.105D.050(1).

## III. PLP BOUND

This Enforcement Order shall apply to and be binding upon [Subject PLP(s)]. To the extent allowed by law, changes in ownership or corporate status shall not alter [Subject PLP(s)]'s responsibility under this Order. [Subject PLP(s)] shall provide a copy of this Order to all agents, contractors, and subcontractors retained to perform work required by this Order, and shall ensure that all work undertaken by such agents, contractors, and subcontractors complies with this Order.

## IV. DEFINITIONS

Unless otherwise specified herein, the definitions set forth in RCW 70.105D[, WAC 173-204 (include where the Site might include sediments)] and WAC 173-340 shall control the meanings of the terms in this Order.

A. Site: The Site is referred to as [Site name]. The Site constitutes a facility under RCW 70.105D.020(8). The Site is defined by where a hazardous substance, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located. Based upon factors currently known to Ecology, the Site is generally located at [street address or general location] as shown in the Site Location Diagram (Exhibit A).

B. Potentially Liable Person (PLP): Refers to [name all PLP(s) identified by Ecology].

C. Subject PLP(s): Refers to PLP(s) subject to the Order. [Use this definition where there are multiple PLPs at the Site, and not every named PLP is subject to the EO. Where all named PLP(s) are subject to the EO, delete this definition and refer throughout the EO to “PLP(s)”.]

D. Enforcement Order or Order: Refers to this Order and each of the exhibits to the Order. All exhibits are an integral and enforceable part of this Order.

E. [Other definitions as applicable.]

## V. FINDINGS OF FACT

Ecology makes the following findings of fact, without any express or implied admissions of such facts by [Subject PLP(s)]: [State all necessary facts in lettered paragraphs. These facts should be sufficient to show that there has been a release or threatened release of a hazardous substance at a facility that presents a threat to human health or the environment, and that remedial action is thereby required. The Site should be clearly identified. State all known information that defines the extent of contamination and therefore the extent of the Site. The facts supporting the status of the PLP as an owner, operator, generator, etc., should be stated as well. This section should not be used as an opportunity to advocate for a particular legal or factual position for related contribution actions. Be sure to properly use the terms “property” and “Site” in order to avoid using them interchangeably.]

A. Based upon factors currently known to Ecology, the Site is generally located at [street address (include the City) or general location] as shown in the Site Location Diagram (Exhibit A). [Describe the location/extent of contamination released in each media. Should include the State Plane coordinates or latitude/longitude of the street address, and give the coordinate system (if known and accessible). Potentially include map of release location. This describes the location of the Site in narrative form.]

B.

C.

D.

E. [Etc.]

## VI. ECOLOGY DETERMINATIONS

Ecology makes the following determinations, without any express or implied admissions of such determinations (and underlying facts) by [Subject PLP(s)].

A. [State liability determination, e.g., [Subject PLP] is an “owner or operator” as defined in RCW 70.105D.020(22) of a “facility” as defined in RCW 70.105D.020(8). Include all bases for liability, such as “transporter”, etc. Repeat section A, B, and C for each Subject PLP.]

B. Based upon all factors known to Ecology, a “release” or “threatened release” of “hazardous substance(s)” as defined in RCW 70.105D.020(32) and (13), respectively, has occurred at the Site.

C. Based upon credible evidence, Ecology issued a PLP status letter to [Subject PLP] dated [date], pursuant to RCW 70.105D.040, .020(26), and WAC 173-340-500. [Select one of the following two options: [1] After providing for notice and opportunity for comment, reviewing any comments submitted, and concluding that credible evidence supported a finding of potential liability, Ecology issued a determination that [Subject PLP] is a PLP under RCW 70.105D.040 and notified [Subject PLP] of this determination by letter dated [date]; or [2] By letter dated [date], [Subject PLP] voluntarily waived its rights to notice and comment and accepted Ecology’s determination that [Subject PLP] is a PLP under RCW 70.105D.040.]

D. Pursuant to RCW 70.105D.030(1) and .050(1), Ecology may require PLPs to investigate or conduct other remedial actions with respect to any release or threatened release of hazardous substances, whenever it believes such action to be in the public interest. Based on the foregoing facts, Ecology believes the remedial actions required by this Order are in the public interest.

E. [Include this paragraph if an interim action is currently not required at the Site: Under WAC 173-340-430, an interim action is a remedial action that is technically necessary to reduce a threat to human health or the environment by eliminating or substantially reducing one

or more pathways for exposure to a hazardous substance, that corrects a problem that may become substantially worse or cost substantially more to address if the remedial action is delayed, or that is needed to provide for completion of a site hazard assessment, remedial investigation/feasibility study, or design of a cleanup action plan. Either party may propose an interim action under this Order. If the Parties are in agreement concerning the interim action, the Parties will follow the process in Section VII.D. If the Parties are not in agreement, Ecology reserves its authority to require interim action(s) under a separate order or other enforcement action under RCW 70.105D, or to undertake the interim action itself.]

[Include this paragraph if an interim action is currently required at the Site: Under WAC 173-340-430, an interim action is a remedial action that is technically necessary to reduce a threat to human health or the environment by eliminating or substantially reducing one or more pathways for exposure to a hazardous substance, that corrects a problem that may become substantially worse or cost substantially more to address if the remedial action is delayed, or that is needed to provide for completion of a site hazard assessment, remedial investigation/feasibility study, or design of a cleanup action plan. [Describe circumstances at the Site needing to be addressed by an interim action.] Based on these circumstances, Ecology has determined that an interim action is warranted under WAC 173-340-430. Either party may propose an additional interim action under this Order. If the Parties are in agreement concerning the additional interim action, the Parties will follow the process in Section VII.D. If the Parties are not in agreement, Ecology reserves its authority to require additional interim action(s) under a separate order or other enforcement action under RCW 70.105D, or to undertake the interim action(s) itself

F. [If an emergency order, so state.]

## VII. WORK TO BE PERFORMED

Based on the Findings of Fact and Ecology Determinations, it is hereby ordered that [Subject PLP(s)] take the following remedial actions at the Site. [Include the following if the EO requires implementation of a CAP: The area within the Site where remedial action is necessary

under RCW 70.105D is described in the Remedial Action Location Diagram (Exhibit B).] These remedial actions must be conducted in accordance with WAC 173-340 [and -204 (where the Site might include sediments)]:

A. [Set forth scope of work and schedule. Preferred method is to cross-reference to a scope of work exhibit rather than repeat the information, using language in this paragraph such as “[Subject PLP(s)] will [describe work: e.g., “complete a Remedial Investigation/Feasibility Study and submit an Ecology Review preliminary draft Cleanup Action Plan for the Site”] in accordance with the schedule and terms of the Scope of Work and Schedule, Exhibit \_\_\_\_, and all other requirements of this Order.” The following naming conventions shall be used for documents: Agency Review Draft (designation for the first time Ecology receives a document); Public Review Draft (designates a document ready for public comment); Final (designation for a document after public comment and Ecology approval); and the preliminary Draft Cleanup Action Plan (designation for the Subject PLP(s)’s version of the DCAP).]

B. If Subject PLP(s) learns of a significant change in conditions at the Site, including but not limited to a statistically significant increase in contaminant and/or chemical concentrations in [media e.g.: soil, groundwater, surface water, air, and/or sediments], Subject PLP(s), within seven (7) days of learning of the change in condition, shall notify Ecology in writing of said change and provide Ecology with any reports or records (including laboratory analyses, sampling results) relating to the change in conditions.

C. [Optional provision for progress reports: [Subject PLP(s)] shall submit to Ecology written [monthly, quarterly, etc.] Progress Reports that describe the actions taken during the previous [month, quarter, etc.] to implement the requirements of this Order. All Progress Reports shall be submitted by the tenth (10th) day of the month in which they are due after the effective date of this Order. Unless otherwise specified by Ecology, Progress Reports and any other documents submitted pursuant to this Order shall be sent by certified mail, return receipt requested, to Ecology’s project coordinator. The Progress Reports shall include the following:

1. A list of on-site activities that have taken place during the [month, quarter, etc.].
2. Detailed description of any deviations from required tasks not otherwise documented in project plans or amendment requests.
3. Description of all deviations from the Scope of Work and Schedule (Exhibit \_\_\_) during the current [month, quarter, etc.] and any planned deviations in the upcoming [month, quarter, etc.].
4. For any deviations in schedule, a plan for recovering lost time and maintaining compliance with the schedule.
5. All raw data (including laboratory analyses) received during the previous quarter (if not previously submitted to Ecology), together with a detailed description of the underlying samples collected.
6. A list of deliverables for the upcoming [month, quarter, etc.] if different from the schedule.]

D. [Add this section only if the Order requires implementation of a cleanup action that includes engineered and/or institutional controls that require financial assurances under WAC 173-340-440(11). Tailor section accordingly.] Pursuant to WAC 173-340-440(11), [Subject PLP(s)] shall maintain sufficient and adequate financial assurance mechanisms to cover all costs associated with the operation and maintenance of the remedial action at the Site, including institutional controls, compliance monitoring, and corrective measures.

1. Within sixty (60) days of the effective date of this Order, [Subject PLP(s)] shall submit to Ecology for review and approval an estimate of the costs under this Order for operation and maintenance of the remedial actions at the Site, including institutional controls, compliance monitoring and corrective measures. Within sixty (60) days after Ecology approves the aforementioned cost estimate, [Subject PLP(s)] shall provide proof of financial assurances sufficient to cover all such costs in a form acceptable to Ecology.

2. [Subject PLP(s)] shall adjust the financial assurance coverage and provide Ecology's project coordinator with documentation of the updated financial assurance for:
    - i. Inflation, annually, within thirty (30) days of the anniversary date of the entry of this Order; or if applicable, the modified anniversary date established in accordance with this section, or if applicable, ninety (90) days after the close of [Subject PLP(s)]'s fiscal year if the financial test or corporate guarantee is used.
    - ii. Changes in cost estimates, within thirty (30) days of issuance of Ecology's approval of a modification or revision to the cleanup action plan (CAP) that result in increases to the cost or expected duration of remedial actions. Any adjustments for inflation since the most recent preceding anniversary date shall be made concurrent with adjustments for changes in cost estimates. The issuance of Ecology's approval of a revised or modified CAP will revise the anniversary date established under this section to become the date of issuance of such revised or modified CAP.
- E. [Use only if the Order requires implementation of an interim action or cleanup action that requires institutional controls under WAC 173-340-440 and an Environmental (Restrictive) Covenant will be used to implement the institutional controls. If a property at the Site meets the criteria of WAC 173-340-440(8)(b) or (c), Ecology may approve the use of an administrative mechanism other than an Environmental (Restrictive) Covenant to implement institutional controls on the property. Seek advice from your AAG for this situation. This section would then be revised to describe the property using the alternative mechanism and that process.] As detailed in the [Interim Action Work Plan or Cleanup Action Plan], institutional controls are required at the Site. Environmental (Restrictive) Covenants will be used to implement the institutional controls.

1. In consultation with [Subject PLP(s)], Ecology will prepare the Environmental (Restrictive) Covenants consistent with WAC 173-340-440, RCW 64.70, and any policies or procedures specified by Ecology. The Environmental (Restrictive) Covenants shall restrict future activities and uses of the Site as agreed to by Ecology and [Subject PLP(s)].
  2. After approval by Ecology, [Subject PLP(s)] shall record the Environmental (Restrictive) Covenant for affected properties it owns with the office of the [ ] County Auditor as detailed in the Schedule (Exhibit [ ]). [Subject PLP(s)] shall provide Ecology with the original recorded Environmental (Restrictive) Covenants within thirty (30) days of the recording date.
  3. [Use where the remedy requires an environmental covenant on property not owned by the Subject PLP(s).] As detailed in the [Interim Action Work Plan or Cleanup Action Plan], as part of the remedial action for the Site, institutional controls are required on properties not owned by [Subject PLP(s)]. [Subject PLP(s)] will ensure that the owner of each affected property records an Ecology-approved Environmental (Restrictive) Covenant as detailed in the Schedule (Exhibit [ ]). Upon a showing that [Subject PLP(s)] has made a good faith effort to secure an Environmental (Restrictive) Covenant for an affected property and failed to do so, Ecology may provide assistance to [Subject PLP(s)]. Unless Ecology determines otherwise, affected properties include [addresses or parcel numbers]. [Subject PLP(s)] shall provide Ecology with the original recorded Environmental (Restrictive) Covenants within thirty (30) days of the recording date.
- F. All plans or other deliverables submitted by [Subject PLP(s)] for Ecology's review and approval under the Scope of Work and Schedule (Exhibit \_\_\_\_ ) shall, upon Ecology's approval, become integral and enforceable parts of this Order.

G. If the Parties agree on an interim action under Section VI.E, [Subject PLP(s)] shall prepare and submit to Ecology an Interim Action Work Plan, including a scope of work and schedule, by the date determined by Ecology. Ecology will provide public notice and opportunity to comment on the Interim Action Work Plan in accordance with WAC 173-340-600(16). The [Subject PLP(s)] shall not conduct the interim action until Ecology approves the Interim Action Work Plan. Upon approval by Ecology, the Interim Action Work Plan becomes an integral and enforceable part of this Order, and [Subject PLP(s)] is required to conduct the interim action in accordance with the approved Interim Action Work Plan.

H. If Ecology determines that [Subject PLP(s)] has failed to make sufficient progress or failed to implement the remedial action, in whole or in part, Ecology may, after notice to [Subject PLP(s)], perform any or all portions of the remedial action or at Ecology's discretion allow the [Subject PLP(s)] opportunity to correct. In an emergency, Ecology is not required to provide notice to [Subject PLP(s)], or an opportunity for dispute resolution. [Subject PLP(s)] shall reimburse Ecology for the costs of doing such work in accordance with Section VIII.B (Remedial Action Costs). Ecology reserves the right to enforce requirements of this Order under Section X (Enforcement).

I. Except where necessary to abate an emergency situation or where required by law, the [Subject PLP(s)] shall not perform any remedial actions at the Site outside those remedial actions required by this Order to address the contamination that is the subject of this Order, unless Ecology concurs, in writing, with such additional remedial actions pursuant to Section VIII.J. (Amendment of Order). In the event of an emergency, or where actions are taken as required by law, [Subject PLP(s)] must notify Ecology in writing of the event and remedial action(s) planned or taken as soon as practical but no later than within twenty-four (24) hours of the discovery of the event.

## VIII. TERMS AND CONDITIONS

### A. Public Notice

[Include this section only if the Order is going out for concurrent public notice (i.e., the Order will be going into effect before the public notice period ends): RCW 70.105D.030(2)(a) requires that, at a minimum, this Order be subject to concurrent public notice. Ecology shall be responsible for providing this public notice and reserves the right to modify or withdraw any provisions of this Order should public comment disclose facts or considerations which indicate to Ecology that this Order is inadequate or improper in any respect.] [Note that Ecology must also create a public participation plan pursuant to WAC 173-340-600(9)(d), but this is unnecessary to state in the Order.]

### B. Remedial Action Costs

[Subject PLP(s)] shall pay to Ecology costs incurred by Ecology pursuant to this Order and consistent with WAC 173-340-550(2). These costs shall include work performed by Ecology or its contractors for or on the Site under RCW 70.105D, including remedial actions and Order preparation, oversight, and administration. These costs shall include work performed both prior to and subsequent to the issuance of this Order. Ecology's costs shall include costs of direct activities and support costs of direct activities as defined in WAC 173-340-550(2). [Include the following when Ecology has not previously billed the PLP for this Site: Ecology has accumulated [\$ amount provided by TCP Cost Recovery Coordinator] in remedial action costs related to this Site as of [insert date provided by TCP Cost Recovery Coordinator.] NOTE: The date specified by the TCP Cost Recovery Coordinator will be the end of the last quarter, and the amount specified will be the amount as of the end of the last quarter. For costs incurred before this date, Ecology will send the Subject PLP(s) an invoice soon after the Order is signed. For costs incurred after this date, Ecology will send the Subject PLP(s) an invoice quarterly.] For all Ecology costs incurred, [Subject PLP(s)] shall pay the required amount within thirty (30) days of receiving from Ecology an itemized statement of costs that includes a summary of costs incurred, an identification of involved staff,

and the amount of time spent by involved staff members on the project. A general statement of work performed will be provided upon request. Itemized statements shall be prepared quarterly. Pursuant to WAC 173-340-550(4), failure to pay Ecology's costs within ninety (90) days of receipt of the itemized statement of costs will result in interest charges at the rate of twelve percent (12%) per annum, compounded monthly.

In addition to other available relief, pursuant to RCW 19.16.500, Ecology may utilize a collection agency and/or, pursuant to RCW 70.105D.055, file a lien against real property subject to the remedial actions to recover unreimbursed remedial action costs.

**C. Designated Project Coordinators**

The project coordinator for Ecology is:

[Name]  
[Address]  
[Telephone]  
[Email]

[Choose Option 1: The project coordinator for [Subject PLP(s)] is:

[Name]  
[Address]  
[Telephone]  
[Email]

or Option 2 (if Subject PLP(s) coordinator is unknown): Within ten (10) days of the effective date of this Order, [Subject PLP(s)] shall inform Ecology of the identity and contact information of its project coordinator.]

Each project coordinator shall be responsible for overseeing the implementation of this Order. Ecology's project coordinator will be Ecology's designated representative for the Site. To the maximum extent possible, communications between Ecology and [Subject PLP(s)], and all documents, including reports, approvals, and other correspondence concerning the activities performed pursuant to the terms and conditions of this Order shall be directed through the project

coordinators. The project coordinators may designate, in writing, working level staff contacts for all or portions of the implementation of the work to be performed required by this Order.

Any party may change its respective project coordinator. Written notification shall be given to the other party at least ten (10) calendar days prior to the change.

**D. Performance**

All geologic and hydrogeologic work performed pursuant to this Order shall be under the supervision and direction of a geologist or hydrogeologist licensed by the State of Washington or under the direct supervision of an engineer registered by the State of Washington, except as otherwise provided for by RCW 18.43 and 18.220.

All engineering work performed pursuant to this Order shall be under the direct supervision of a professional engineer registered by the State of Washington, except as otherwise provided for by RCW 18.43.130.

All construction work performed pursuant to this Order shall be under the direct supervision of a professional engineer or a qualified technician under the direct supervision of a professional engineer. The professional engineer must be registered by the State of Washington, except as otherwise provided for by RCW 18.43.130.

Any documents submitted containing geologic, hydrologic, or engineering work shall be under the seal of an appropriately licensed professional as required by RCW 18.43 and 18.220.

[Subject PLP(s)] shall notify Ecology in writing of the identity of any engineer(s) and geologist(s), contractor(s) and subcontractor(s), and others to be used in carrying out the terms of this Order, in advance of their involvement at the Site.

**E. Access**

[Consult with AAG if considering access to a Site.]

RCW 70.105D.030(1)(a) authorizes Ecology or any Ecology authorized representative to enter all property at the Site that [Subject PLP(s)] either owns, controls, or has access rights to, after reasonable notice unless an emergency prevents such notice. [Subject PLP(s)] shall make all

reasonable efforts to secure access rights for those properties within the Site not owned or controlled by [Subject PLP(s)] where remedial activities or investigations will be performed pursuant to this Order.

#### **F. Sampling, Data Submittal, and Availability**

With respect to the implementation of this Order, [Subject PLP(s)] shall make the results of all sampling, laboratory reports, and/or test results generated by it or on its behalf available to Ecology. Pursuant to WAC 173-340-840(5), all sampling data shall be submitted to Ecology in both printed and electronic formats in accordance with Section VII (Work to be Performed), Ecology's Toxics Cleanup Program Policy 840 (Data Submittal Requirements), and/or any subsequent procedures specified by Ecology for data submittal.

If requested by Ecology, [Subject PLP(s)] shall allow Ecology and/or its authorized representative to take split or duplicate samples of any samples collected by [Subject PLP(s)] pursuant to the implementation of this Order. [Subject PLP(s)] shall notify Ecology seven (7) days in advance of any sample collection or work activity at the Site. Ecology shall, upon request, allow [Subject PLP(s)] and/or its authorized representative to take split or duplicate samples of any samples collected by Ecology pursuant to the implementation of this Order, provided that doing so does not interfere with Ecology's sampling. Without limitation on Ecology's rights under Section VIII.E (Access), Ecology shall notify [Subject PLP(s)] prior to any sample collection activity unless an emergency prevents such notice.

In accordance with WAC 173-340-830(2)(a), all hazardous substance analyses shall be conducted by a laboratory accredited under WAC 173-50 for the specific analyses to be conducted, unless otherwise approved by Ecology.

#### **G. Retention of Records**

During the pendency of this Order, and for ten (10) years from the date of completion of the work performed pursuant to this Order, [Subject PLP(s)] shall preserve all records, reports, documents, and underlying data in its possession relevant to the implementation of this Order and

shall insert a similar record retention requirement into all contracts with project contractors and subcontractors. Upon request of Ecology, [Subject PLP(s)] shall make all such records available to Ecology and allow access for review within a reasonable time.

Nothing in this Order is intended to waive any right [Subject PLP(s)] may have under applicable law to limit disclosure of documents protected by the attorney work-product privilege and/or the attorney-client privilege. If [Subject PLP(s)] withholds any requested records based on an assertion of privilege, [Subject PLP(s)] shall provide Ecology with a privilege log specifying the records withheld and the applicable privilege. No Site-related data collected pursuant to this Order shall be considered privileged.

## **H. Resolution of Disputes**

1. In the event that [Subject PLP(s)] elects to invoke dispute resolution, [Subject PLP(s)] must utilize the procedure set forth below.

a. Upon the triggering event (receipt of Ecology's project coordinator's written decision or an itemized billing statement), [Subject PLP(s)] has fourteen (14) calendar days within which to notify Ecology's project coordinator in writing of its dispute (Informal Dispute Notice).

b. The Parties' project coordinators shall then confer in an effort to resolve the dispute informally. The parties shall informally confer for up to fourteen (14) calendar days from receipt of the Informal Dispute Notice. If the project coordinators cannot resolve the dispute within those 14 calendar days, then within seven (7) calendar days Ecology's project coordinator shall issue a written decision (Informal Dispute Decision) stating: the nature of the dispute; the [Subject PLP(s)'s] position with regards to the dispute; Ecology's position with regards to the dispute; and the extent of resolution reached by informal discussion.

c. [Subject PLP(s)] may then request regional management review of the dispute. This request (Formal Dispute Notice) must be submitted in writing to the [region]

Region Toxics Cleanup Section Manager within seven (7) calendar days of receipt of Ecology's Informal Dispute Decision. The Formal Dispute Notice shall include a written statement of dispute setting forth: the nature of the dispute; the disputing Party's position with respect to the dispute; and the information relied upon to support its position.

d. The Section Manager shall conduct a review of the dispute and shall issue a written decision regarding the dispute (Decision on Dispute) within thirty (30) calendar days of receipt of the Formal Dispute Notice. The Decision on Dispute shall be Ecology's final decision on the disputed matter.

2. The Parties shall only utilize the dispute resolution process in good faith and shall expedite, to the extent possible, the dispute resolution process whenever it is used.

3. Implementation of these dispute resolution procedures shall not provide a basis for delay of any activities required in this Order, unless Ecology agrees in writing to a schedule extension.

4. In case of a dispute, failure to either proceed with the work required by this Order or timely invoke dispute resolution may result in Ecology's determination that insufficient progress is being made in preparation of a deliverable, and may result in Ecology undertaking the work under Section VII.E (Work to be Performed) or initiating enforcement under Section X (Enforcement).

#### **I. Extension of Schedule**

1. [Subject PLP(s)] request for an extension of schedule shall be granted only when a request for an extension is submitted in a timely fashion, generally at least thirty (30) days prior to expiration of the deadline for which the extension is requested, and when good cause exists for granting the extension. All extensions shall be requested in writing. The request shall specify:

- a. The deadline that is sought to be extended.
- b. The length of the extension sought.
- c. The reason(s) for the extension.

d. Any related deadline or schedule that would be affected if the extension were granted.

2. The burden shall be on [Subject PLP(s)] to demonstrate to the satisfaction of Ecology that the request for such extension has been submitted in a timely fashion and that good cause exists for granting the extension. The existence of good cause shall be determined by Ecology in its sole discretion. Good cause may include, but may not be limited to:

a. Circumstances beyond the reasonable control and despite the due diligence of [Subject PLP(s)] including delays caused by unrelated third parties or Ecology, such as (but not limited to) delays by Ecology in reviewing, approving, or modifying documents submitted by [Subject PLP(s)].

b. Acts of God, including fire, flood, blizzard, extreme temperatures, storm, or other unavoidable casualty.

c. Endangerment as described in Section VIII.J (Endangerment).

However, neither increased costs of performance of the terms of this Order nor changed economic circumstances shall be considered circumstances beyond the reasonable control of [Subject PLP(s)].

3. Ecology shall act upon any [Subject PLP(s)'s] written request for extension in a timely fashion. Ecology shall give [Subject PLP(s)] written notification of any extensions granted pursuant to this Order. A requested extension shall not be effective until approved in writing by Ecology.

4. At [Subject PLP(s)'s] request, an extension shall only be granted for such period of time as Ecology determines is reasonable under the circumstances. Ecology may grant schedule extensions exceeding ninety (90) days only as a result of one of the following:

a. Delays in the issuance of a necessary permit which was applied for in a timely manner.

b. Other circumstances deemed exceptional or extraordinary by Ecology.

- c. Endangerment as described in Section VIII.J (Endangerment).

**J. Endangerment**

In the event Ecology determines that any activity being performed at the Site under this Order is creating or has the potential to create a danger to human health or the environment on or surrounding the Site, Ecology may direct [Subject PLP(s)] to cease such activities for such period of time as it deems necessary to abate the danger. [Subject PLP(s)] shall immediately comply with such direction.

In the event [Subject PLP(s)] determines that any activity being performed at the Site under this Order is creating or has the potential to create a danger to human health or the environment, [Subject PLP(s)] may cease such activities. [Subject PLP(s)] shall notify Ecology's project coordinator as soon as possible, but no later than twenty-four (24) hours after making such determination or ceasing such activities. Upon Ecology's direction, [Subject PLP(s)] shall provide Ecology with documentation of the basis for the determination or cessation of such activities. If Ecology disagrees with [Subject PLP(s)]'s cessation of activities, it may direct [Subject PLP(s)] to resume such activities.

If Ecology concurs with or orders a work stoppage pursuant to this section, [Subject PLP(s)]'s obligations with respect to the ceased activities shall be suspended until Ecology determines the danger is abated, and the time for performance of such activities, as well as the time for any other work dependent upon such activities, shall be extended in accordance with Section VIII.I (Extension of Schedule) for such period of time as Ecology determines is reasonable under the circumstances.

Nothing in this Order shall limit the authority of Ecology, its employees, agents, or contractors to take or require appropriate action in the event of an emergency.

**K. Reservation of Rights**

Ecology reserves its rights under RCW 70.105D, including the right to require additional or different remedial actions at the Site should it deem such actions necessary to protect human

health or the environment, and to issue orders requiring such remedial actions. Ecology also reserves all rights regarding the injury to, destruction of, or loss of natural resources resulting from the release or threatened release of hazardous substances at the Site.

**L. Transfer of Interest in Property**

Before any voluntary conveyance or relinquishment of title, easement, leasehold, or other interest in any portion of the Site shall be consummated by [Subject PLP(s)], [Subject PLP(s)] shall provide for continued implementation of all requirements of this Order and implementation of any remedial actions found to be necessary as a result of this Order.

Further, prior to [Subject PLP(s)]'s transfer of any interest in all or any portion of the Site, [Subject PLP(s)] shall provide a copy of this Order to any prospective purchaser, lessee, transferee, assignee, or other successor in said interest; and at least thirty (30) days prior to any transfer, [Subject PLP(s)] shall notify Ecology of said transfer. Upon transfer of any interest, [Subject PLP(s)] shall notify all transferees of the restrictions on the activities and uses of the property under this Order and incorporate any such use restrictions into the transfer documents.

**M. Compliance with Applicable Laws**

[Ecology makes the final determination on whether applicable permit or substantive requirements are "legally applicable" or "relevant and appropriate" under WAC 173-340-710(2). Seek AAG assistance for help as needed to make this determination.]

1. *Applicable Laws.* All actions carried out by [Subject PLP(s)] pursuant to this Order shall be done in accordance with all applicable federal, state, and local requirements, including requirements to obtain necessary permits or approvals, except as provided in RCW 70.105D.090. [Insert Option A: At this time, no federal, state, or local requirements have been identified as being applicable to the actions required by this Order; or Option B: The permits or specific federal, state, or local requirements that the agency has determined are applicable and that are known at the time of the execution of this Order have been identified in Exhibit \_\_\_\_.] [Subject PLP(s)] has a continuing obligation to identify additional applicable federal, state, and local requirements which

apply to actions carried out pursuant to this Order, and to comply with those requirements. As additional federal, state, and local requirements are identified by Ecology or the [Subject PLP(s)], Ecology will document in writing if they are applicable to actions carried out pursuant to this Order and the PLP must implement those requirements.

2. *Relevant and Appropriate Requirements.* All actions carried out by [Subject PLP(s)] pursuant to this Order shall be done in accordance with relevant and appropriate requirements identified by Ecology. [Insert Option A: At this time, no relevant and appropriate requirements have been identified as being applicable to the actions required by this Order; or Option B: The relevant and appropriate requirements that Ecology has determined apply have been identified in Exhibit \_\_\_\_.] If additional relevant and appropriate requirements are identified by Ecology or [Subject PLP(s)], Ecology will document in writing if they are applicable to actions carried out pursuant to this Order and [Subject PLP(s)] must implement those requirements.

3. Pursuant to RCW 70.105D.090(1), [Subject PLP(s)] may be exempt from the procedural requirements of RCW 70.94, 70.95, 70.105, 77.55, 90.48, and 90.58 and of any laws requiring or authorizing local government permits or approvals. However, [Subject PLP(s)] shall comply with the substantive requirements of such permits or approvals. For permits and approvals covered under RCW 70.105D.090(1) that have been issued by local government, Ecology has the non-exclusive ability under this Order to enforce those local government permits and/or approvals. [Insert Option A: At this time, no state or local permits or approvals have been identified as being applicable but procedurally exempt under this section; or Option B: The exempt permits or approvals and the applicable substantive requirements of those permits or approvals, as they are known at the time of the execution of this Order, have been identified in Exhibit \_\_\_\_.]

4. [Subject PLP(s)] has a continuing obligation to determine whether additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required for the remedial action under this Order. In the event either Ecology or [Subject PLP(s)] determines that additional permits or approvals addressed in RCW 70.105D.090(1) would otherwise be required

for the remedial action under this Order, it shall promptly notify the other party of its determination. Ecology shall determine whether Ecology or [Subject PLP(s)] shall be responsible to contact the appropriate state and/or local agencies. If Ecology so requires, [Subject PLP(s)] shall promptly consult with the appropriate state and/or local agencies and provide Ecology with written documentation from those agencies of the substantive requirements those agencies believe are applicable to the remedial action. Ecology shall make the final determination on the additional substantive requirements that must be met by [Subject PLP(s)] and on how [Subject PLP(s)] must meet those requirements. Ecology shall inform [Subject PLP(s)] in writing of these requirements. Once established by Ecology, the additional requirements shall be enforceable requirements of this Order. [Subject PLP(s)] shall not begin or continue the remedial action potentially subject to the additional requirements until Ecology makes its final determination.

5. Pursuant to RCW 70.105D.090(2), in the event Ecology determines that the exemption from complying with the procedural requirements of the laws referenced in RCW 70.105D.090(1) would result in the loss of approval from a federal agency that is necessary for the state to administer any federal law, the exemption shall not apply and [Subject PLP(s)] shall comply with both the procedural and substantive requirements of the laws referenced in RCW 70.105D.090(1), including any requirements to obtain permits.

#### **N. Periodic Review**

[Add this section only if the Enforcement Order requires implementation of a cleanup action that requires a periodic review under WAC 173-340-420(2).]

So long as remedial action continues at the Site, the Parties agree to review the progress of remedial action at the Site, and to review the data accumulated as a result of monitoring the Site as often as is necessary and appropriate under the circumstances. Unless otherwise agreed to by Ecology, at least every five (5) years after the initiation of cleanup action at the Site the Parties shall confer regarding the status of the Site and the need, if any, for further remedial action at the Site. [Include the following requirement, as appropriate: At least ninety (90) days prior to each

periodic review, [Subject PLP(s)] shall submit a report to Ecology that documents whether human health and the environment are being protected based on the factors set forth in WAC 173-340-420(4).] Ecology reserves the right to require further remedial action at the Site under appropriate circumstances. This provision shall remain in effect for the duration of this Order.

#### **IX. SATISFACTION OF ORDER**

The provisions of this Order shall be deemed satisfied upon [Subject PLP(s)]'s receipt of written notification from Ecology that [Subject PLP(s)] has completed the remedial activity required by this Order, and that [Subject PLP(s)] has complied with all other provisions of this Enforcement Order.

#### **X. ENFORCEMENT**

Pursuant to RCW 70.105D.050, this Order may be enforced as follows:

A. The Attorney General may bring an action to enforce this Order in a state or federal court.

B. The Attorney General may seek, by filing an action, if necessary, to recover amounts spent by Ecology for investigative and remedial actions and orders related to the Site.

C. A liable party, who refuses without sufficient cause, to comply with any term of this Order will be liable for:

1. Up to three (3) times the amount of any costs incurred by the State of Washington as a result of its refusal to comply.

2. Civil penalties of up to twenty-five thousand dollars (\$25,000) per day for each day it refuses to comply.

D. This Order is not appealable to the Washington Pollution Control Hearings Board.

This Order may be reviewed only as provided under RCW 70.105D.060.

Effective date of this Order: \_\_\_\_\_

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[NAME OF SIGNATORY]  
Section Manager  
Toxics Cleanup Program  
[Region] Regional Office  
[Telephone]