



DEPARTMENT OF  
**ECOLOGY**  
State of Washington

**Concise Explanatory Statement**  
**Chapter 173-183 - WAC**  
**Oil Spill Natural Resource Damage**  
**Assessment**

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*Summary of rule making and response to comments*

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# **Concise Explanatory Statement**

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## **Chapter 173-183 - WAC Oil Spill Natural Resource Damage Assessment**

Spill Prevention, Preparedness and Response Program  
Washington State Department of Ecology  
Olympia, Washington 98504-7600

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# Introduction

The purpose of a Concise Explanatory Statement is to:

- Meet the Administrative Procedure Act (APA) requirements for agencies to prepare a Concise Explanatory Statement (see state law at RCW 34.05.325).
- Provide reasons for adopting the rule.
- Describe any differences between the proposed rule and the adopted.
- Provide Ecology's response to public comments.

This Concise Explanatory Statement provides information on The Washington State Department of Ecology's (Ecology) rule adoption for:

Title: Oil Spill Natural Resource Damage Assessment  
WAC Chapter(s): 173-183  
Adopted date: December 14, 2012  
Effective date: January 14, 2013

To see more information related to this rule making or other Ecology rule makings please visit our web site: <http://www.ecy.wa.gov/laws-rules/index.html>.

## Reasons for Adopting the Rule

### New Legislative Direction

The Department of Ecology is required by state law RCW 90.48.366 to “*adopt rules establishing a compensation schedule for the discharge of oil in violation of this chapter and chapter 90.56 RCW.*” RCW 90.48.368 also requires Ecology to “*adopt rules establishing a formal process for preassessment screening of damages resulting from spills to the waters of the state causing the death of, or injury to, fish, animals, vegetation, or other resources of the state.*” In essence, state laws direct Ecology to recover monetary compensation or equivalent restoration from parties liable for oil spills injuring state natural resources.

This body of law was originally passed in 1989 and recently amended in Chapter 122, 2011 Laws (E2SHB 1186). The 2011 legislation contained changes to current law and required Ecology to update its existing rules in Chapter 173-183 WAC. The rule update does three things.

First, it changes the multipliers in all of the calculations for damages to allow the compensation values to reach \$3 to \$300 dollars per gallon spilled, for any oil spill of 1000 gallons or more. This increase helps to insure that citizens are adequately compensated for injuries to natural resources that happen from oil spills. This requirement is specifically stated in the law.

Secondly, this update moves guidance into rule for the method on how to reduce compensation amounts if a spiller acts quickly to remove oil from the water. The guidance has been in effect since

1996. The new law specifically addresses persistent oil and sets a time of 48 hours to get credit for recovered oil. The current guidance gives 24 hours for all oil types. The adopted language addresses these differences, creates five new definitions, and moves all 24 and 48 hour recovery credit procedures into rule. The previous rule language on recovery credit is deleted.

Finally, this update changes the name of the rule to “Oil Spill Natural Resource Damage Assessment.”

### **Summary of Adopted Amendments**

The following changes are adopted:

- Update the monetary amount of compensation that can be calculated for spills of 1,000 gallons or greater in volume from \$1 to \$100 to a new range of \$3 to \$300 per gallon spilled.
- Amend the mathematical formula multipliers contained in WAC 173-183 sections 830, 840, 850, & 860.
- Define persistent oil, non-persistent oil, non-petroleum oil, recovered oil, and shoreline.
- Codify the method to provide credit back to a spiller for their early on-water recovery actions replacing the existing language in WAC 173-183-870.

# Differences between the Proposed Rule and Adopted Rule

RCW 34.05.325(6)(a)(ii) requires Ecology to describe the differences between the text of the proposed rule as published in the *Washington State Register* and the text of the rule as adopted, other than editing changes, stating the reasons for the differences.

We have not made any changes to the proposed rule WAC 173-183 filed on August 14, 2012. It is the same as the adopted rule filed on December 14, 2012.

# Response to Comments

Ecology accepted comments on the draft rule from August 14, 2012 until October 4, 2012. This section provides verbatim comments that were received during the public comment period and Ecology's responses. (RCW 34.05.325(6)(a)(iii))

Ecology received comments from two groups on the draft Natural Resource Damage Assessment rule. Both sets of comments were received as letters through electronic submission. No comments were received at the two public hearings held on September 25, 2012 and September 26, 2012. Ecology responded directly to each letter. This document provides the comment letter as it was received and Ecology's response.

Comment Received From

Ecology Response on

Chad Bowe chop  
Manager, Office of Marine Affairs  
Makah Tribe

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Colin Williams  
Chairman, Pollution Sub-committee  
International Group of P & I Clubs

Page 11

**Comments from Chad Bowechop, Manager,  
Office of Marine Affairs  
On Behalf of the Makah Tribe**



**MAKAH TRIBE**

P.O. BOX 115 • NEAH BAY, WA 98357 • 360-645-2201



IN REPLY REFER TO:

Washington Dept. of Ecology  
Attn: Rebecca Post  
PO Box 47600 Olympia, WA 98504-7600  
spillsrulemaking@ecy.wa.gov

4 October 2012

Re: Update of the Preassessment Screening and Oil Spill Compensation Schedule Regulations, Chapter 173-183 WAC

Dear Ms. Post:

The Makah Tribal Council would like to express our support for the Update of the Preassessment Screening and Oil Spill Compensation Schedule Regulations, including:

- increasing the amount of compensation that can be calculated for spills from the current range of \$1 to \$100 to a new range of \$3 to \$300 per gallon spilled;
- Define persistent oil, non-persistent oil, non-petroleum oil, recovered oil, and shoreline for the purposes of this rule.
- Codify the method to provide credit back to a spiller for their early on-water recovery actions by moving the Resource Damage Assessment Committee Resolution 96-1.1 from guidance into rule (24 hour recovery credit for non-persistent oils) and replacing the existing language in WAC 173-183-870.
- Develop the method to provide credit back to a spiller for their early on-water recovery actions by now allowing for a 48-hour recovery credit for persistent oils.

However, we request that you affirmatively assert in this rule that it does not diminish the authority of sovereign tribal resource trustees to implement our own ordinances for damages to tribal resources. Furthermore, there needs to be language inserted requiring consultation with tribes to identify restoration efforts for resources that were damaged as well as considering priority habitats identified by the Puget Sound Partnership. Finally, we would like to identify a way that restricts the legislature from drawing down on this account for other than restoration efforts as occurred last legislative session.

Thank you for your consideration. We request formal consultation to assure that these observations are understood as they were intended and to better understand how unconventional oils, like those derived from tar sands are accounted for.

Sincerely,

Chad Bowechop, Manager  
Makah Office of Marine Affairs

## Response to comments from Chad Bowechop

Thank you for the comment in support of the proposed rule update and for your comments regarding:

- Tribal sovereignty,
- Consultation on damage restoration,
- Consideration of Puget Sound Partnership identified habitats for restoration projects,
- Potential for legislative actions that could divert money from restoration,
- Formal consultation regarding your comments, and
- The methods currently used for assessing damages due to unconventional oil spills, such as diluted bitumen.

**Tribal Sovereignty** - This state rule making does not affect tribal sovereign authority. The rule does provide all tribal governments a mechanism to join the state Natural Resource Damage Assessment and Restoration (NRDA) process, when the tribe decides not to pursue damages independently and when a federal damage assessment process is not established. If Ecology were to add a statement regarding tribal sovereignty, it would be clearer to add it to WAC 173-183-010 Purpose. This section was not opened as a part of this rule update and opening it would be a substantive change that could result in significant delays to rule adoption and implementation. Given that this rule does not affect any tribe's sovereign authority, this statement was not added.

**Consultation on Damage Restoration** - In the state NRDA process, restoration efforts are approved by two committees – the preassessment screening committee identified in RCW 90.48.368(2) and the coastal protection fund steering committee identified in RCW 98.48.400(3). In both instances tribal governments are identified as members of those respective committees when their resources are affected by an oil spill. In addition to the legal obligation to do so, Ecology is committed to working with tribal governments that have resources impacted by an oil spill. A recent example of this partnership is Pettit Oil's spill in 2011 to Chalaat Creek. The damages assessed in this case went directly to fund the Hoh tribe's prioritized restoration projects. Since affected tribes may participate in the process, no additional language is added.

**Puget Sound Partnership Priorities for Restoration Projects** - The state NRDA process is a statewide program. The two committees mentioned above place the highest priority on restoration/enhancement projects that are "on-site" and "in-kind" on a statewide basis. Restoration projects are selected based on their geographic proximity to the spill and that directly benefit the resources that were impacted by the spill. These committees use a multitude of resources to select projects, including priorities set forth by the Puget Sound Partnership. Restoration actions are proposed and supported by such numerous agencies, non-governmental organizations, tribal governments, and other entities. Ecology believes that identifying them in rule would be cumbersome and could be perceived to be exclusive. Because restoration priorities of the Puget Sound Partnership are already taken into consideration where appropriate, no additional language is added.

**Legislative Actions that Could Divert Money from Restoration Projects** - It is beyond the scope of authority granted to Ecology to prohibit the state legislature from reallocating money from the Coastal Protection Fund to other activities. Therefore, no additional language is added.

Request for Government-to-Government Consultation - Ecology has taken action on your request for formal consultation. As of the time of publishing this Concise Explanatory Statement, the Makah Tribe and Ecology are seeking a mutually agreeable time, but the meeting has not taken place. Ecology does not foresee any misinterpretations of these comments, therefore no changes have been made to the rule language.

Damage Assessments for Spills of Unconventional Oils - The current rule already takes the basic characteristics of unconventional oils derived from tar sands into consideration when calculating damages. The new version has not changed this. Section 340 of the rule has a procedure in place to determine the acute toxicity, mechanical injury, and persistence of any oil not specifically listed in that section. The acute toxicity score is determined based on the aromatic ring structures of the oil, the mechanical injury score is based on the specific gravity of the oil, and the persistence score is based on empirical data for the spilled oil. The values generated by this process are variables that are used in completing the more comprehensive compensation formulas that are found in sections 830, 840, 850, and 860. Because these oils can already be processed through the compensation schedule, no additional language is added.

It is obvious from your comments that you have carefully read the rule and were thoughtful in your response. Thank you for taking the time to provide the comments and be assured personnel in the Program look forward to the requested Government-to-Government Consultation.

**Comments from Colin Williams, Chairman,  
Pollution Sub-committee,  
International Group of P & I Clubs**



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

4th October 2012

**RE: PROPOSED OIL SPILL CONTINGENCY PLAN AND NRDA RULES**

Dear Ms Larson, Dear Ms Post

I am writing to you as Chairman of the International Group of P&I Clubs' (the Group) Pollution Subcommittee.

The International Group comprises thirteen mutual not-for-profit marine insurance associations ("Clubs") which, between them, cover the legal liabilities to third parties relating to the use and operation of ships. This includes pollution, loss of life and personal injury, damage to fixed and floating objects, cargo loss, etc. The Clubs are true mutuals, i.e. the shipowner members are both insured and insurers and, as such, third party liabilities are shared between the members.

The thirteen member Clubs of the International Group insure over 90% of the world's ocean-going tonnage and approximately 95% of the world's tanker fleet. As such the Group Clubs are actively involved in ensuring that their shipowner members comply with Federal and State vessel response plan requirements.

The International Group very much appreciates the opportunity to comment on the proposed Oil Spill Contingency Plan Rule (173-182 WAC) and on the Natural Resource Damage Assessment (NRDA) Rule (173-183 WAC). For ease of reading we have listed our comments in two distinct sections below.

**I. Comments on the Oil Spill Contingency Plan Rule**

The International Group had previously addressed serious concerns with regards to House Bill 1186, in particular on the new Vessel of Opportunity program, the volunteer coordination system and the increased penalties. I attach these comments again as an Appendix to this letter for your attention.

## II. Comments on the NRDA Rule

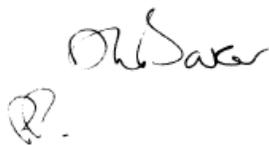
The current schedule has a compensation range between \$1 and \$100 per gallon spilled for any spill volume. The change proposed in this rule will make the range between \$3 and \$300 per gallon for spills of 1,000 gallons or more in volume.

Although the International Group appreciates that the money collected is used to restore and enhance oil-spill related injuries in the area of the spill, this increase is unjustified as, based on the factors used in the compensation schedule, the maximum possible/ceiling per gallon damage assessment has never been reached. The proposed increases are clearly not based on the historical experience of incidents and claims arising therefrom in Washington State, which should form the central basis of any proposed changes. This is clear given that the Frequently Asked Questions accompanying Rule Making (WAC 173-183) states that “since the adjustment was made in April of 2009, the average assessment determined by the Compensation Schedule has been \$27.36 per gallon of oil spilled. This figure comes from 71 cases”. If this is the case, then the existing compensation range between \$1 and \$100 is more than adequate and there is no justification to increase the range to between \$3 and \$300 per gallon.

Washington State Department of Ecology readily admits in the Preliminary Cost-Benefit and Least Burdensome Alternative Analyses (July 2012, Publication no. 12-08-008) that they could not determine the change in probability of contacting shoreline given the change in definition of “shoreline” and that it is therefore only possible to analyse that change qualitatively. Similarly, it is admitted that the definition of “*recovered oil*” has only been analysed qualitatively. Yet, Washington State Department of Ecology states that “*liable parties receive less recovery credit and pay more damages with the proposed rule definition of “shoreline” and that “there is conceivably a cost to liable parties in the form of small recovery credit, or greater damages” arising from the change in the definition of “recovered oil”*”.

Given the possible impacts of these changes on the liable parties as stated by Washington State Department of Ecology, and with little hard evidence/justification provided that the changes are necessary, the Group believes that the proposal to increase the current compensation ranges from between \$1 and \$100 per gallon to between \$3 and \$300 per gallon should be put on hold until the necessary justification is provided that such changes are needed.

Yours sincerely



Colin Williams  
Chairman, Pollution Sub-committee  
International Group of P&I Clubs



International Group of P&I Clubs

**WASHINGTON STATE PROPOSED SECOND SUBSTITUTE HOUSE BILL 1186 – 2SHB 1186–  
H AMD 63 (“House Bill 1186”)  
POSITION OF THE INTERNATIONAL GROUP OF P&I CLUBS (IG)**

**Introduction**

The 13 P&I Clubs (the Clubs) that comprise the IG are mutual not-for-profit insurance organizations that between them cover the legal liabilities to third parties (which include pollution, loss of life and personal injury, damage to fixed and floating objects, cargo loss) of approx. 90% of the world’s ocean-going tonnage. The Clubs are mutual organisations, that is the shipowner members are both insured and insurers and, as such, third party liabilities are shared (pooled) between the Members. Clubs are individually liable for claims up to US \$8 million. Above this amount, claims up to a figure of approx. US \$1 billion for oil pollution damage are pooled between the 13 Clubs.

**House Bill 1186**

The IG has a close interest in the proposals contained in House Bill 1186 since the IG Clubs insure approx. 95% of the world’s tanker fleet and the IG Clubs’ are actively involved in ensuring that their Members comply with State and Federal vessel response plan requirements.

The IG does however have significant concerns with House Bill 1186 which contains unrealistic and counter-productive proposals that would require tank owners or operators to establish or fund a new Vessel of Opportunity (VOO) program to supplement current spill response requirements. The IG supports the concerns already expressed by the Western States Petroleum Association (WPSA) that the proposals could be counter-productive, not least since Washington State already has a VOO program which provides training and contracts with vessels that can effectively support an oil spill response. It would be unfortunate if the current existing and effective arrangements are replaced with a system that fails to achieve the objective of improving safety, particularly in the absence of any evidence that it would meet this objective and given the excellent safety record of shipping in Washington State waters.

The IG also has concerns with the “volunteer co-ordination system” proposal which, as has also been pointed out by the WPSA, has been drafted without reference to any specific information about existing volunteer response programs that are in place, including the current work undertaken by the Department of Ecology with stakeholders which includes examining the safety and liability for volunteers.

The increased penalties contained in Section 11 are also unnecessary. No reasoned justification has been provided to suggest that an increase to the existing penalties that are contained in both State and Federal legislation is warranted. The IG therefore opposes the proposals to increase the penalties in Section 11 on such an arbitrary basis.

In conclusion, the IG supports the WPSA position that House Bill 1186 either duplicates or

conflicts with current State and Federal laws and, as a result, the IG questions the necessity for the proposals contained in the Bill, in particular the proposals on the VOO program, the volunteer co-ordination system and the increased penalties.

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## **Response to comments from Colin Williams**

You are correct that the proposed increase is not based on the historical values of damages assessed. The increase in the compensation range from \$1 to \$100 per gallon to \$3 to \$300 per gallon spilled, for spills over 1,000 gallons is based on unambiguous Legislative direction. The 2011 Washington State Legislature passed House Bill 1186 changing the statute RCW 90.48.366. The changes to the rule are consistent with the amended statute. No changes to the rule were made as a result of International Group of P & I Clubs' comment.

The comment letter also expressed concerns regarding the use of the terms “shoreline” and “recovered oil.” Both terms were added to the definitions section to help clarify Section 870 Reduction of damages based on actions taken by the potential liable party. The current oil recovery credit process recognizes that early containment and recovery of oil from the environment directly reduces the expected natural resource injuries caused by a spill. The credit is given for oil recovered from the surface of the water, before it comes ashore; not if the oil has already impacted shorelines.

In some cases, spill response tactics are approved for the purpose of flushing oil stranded on shorelines back out into the water where it can be more easily recovered after it floats free from sediment. In this case, the spilled oil has already impacted sensitive resources in the sediment so oil recovery credit will not be provided in this case. The definition in the regulation has been written so that this oil flushed out of the sediments cannot be applied to recovery credits. There have not been any historic cases in Washington where a liable party has requested credit for oil that has been recovered by this clean-up method. However, this definition will provide clarity on how this oil will be treated into the future. The definition of “recovered oil” has not been changed as a result of this comment.

“Shoreline” is a term with many meanings for many purposes. To avoid any conflict with other federal, state, or local regulations it has been defined for the purposes of this rule only. The definition of “shoreline” in the final rule has not been changed as a result of this comment.

# Appendix A: Transcripts from public hearings.

## Transcripts from the Preassessment Screening and Oil Spill Compensation Schedule rule public hearings

**Marysville – September 25, 2012 Hearing**

**Rule Writer – Rebecca Post**

**Public Hearing Officer – Bari Schreiner**

I'm Bari Schreiner, hearing officer for this hearing. This afternoon we are to conduct a hearing on the rule proposal for chapter 173-183 Washington Administrative Code Pre-assessment Screening and Oil Spill Compensation Schedule Regulations. Let the record show that the time is 3:29 P.M. on September 25th. Ecology is holding this hearing at the Holiday Inn Express Skykomish Room, 8606 36th Avenue NE, Marysville, Washington 98270 and is also holding the hearing using Webinar and phone conferencing. A legal notice of this hearing was published in the Washington State Register September 5th, 2012, Washington State Register number 12-17-074. In addition, notices of the hearing were e-mailed to over 1600 interested parties. Ecology also issued a news release on August 15th and September 19th. Notice was also published in the following papers on September 23rd - The Everett Herald, The Columbian, The Tri-City Herald. On the check in at this time I show that there is nobody who wants to provide testimony, so I am going to check one more time in the room in case anybody has changed their mind... No? If there is anybody on the phone, please press \*1 or if there is anybody on the Webinar, please raise your hand. Let the record show that about nine people attended the public hearing and nobody indicated that they wanted to provide testimony at this time. If you would like to send Ecology written comments, please remember that they must be received by October 4th, 2012. You can send them to, um sorry, and this information, I am going to give you an address right now. This information is also available on the Rules Proposal Notice in the room and this notice is also posted on Ecology's website. So, you can send your comments to Rebecca Post, P.O. Box 47600, Olympia, Washington 98504, or you can e-mail them to spillsrulemaking, all one word, at [ecy.wa.gov](mailto:ecy.wa.gov), or you could fax them to 360-407-7288. All testimony received at the public hearings, there will be another one in Pasco tomorrow and all written comments received no later than October 4, 2012 will be part of the official record for this proposal. Ecology will send notice about the concise explanatory statement or CES publication, to everyone that provided written comments or oral testimony on the rule proposal and submitted contact information. Everyone that attended today's meeting and provided an e-mail address, other interested parties on the agencies mailing list for this rule. The CES will, among other things, contain the agencies response to questions and issues of concern that were raised during the public comment period. If you want to receive a copy but did not provide us contact information, please let one of the staff know, or you could contact Rebecca Post to get added to that list.

The next step is to review the comments and make a determination whether to adopt the rule. Ecology's director, Ted Sturdevant, will consider the rule documentation, staff recommendations and will make a decision about adopting the proposal. Adoption is currently scheduled for no earlier than December 14th, 2012. If the proposed rule should be adopted that day and filed with the code reviser, it will go into effect 31 days later.

If we can be of any further help to you today, please let us know. Thank you very much for coming. Let the record show that it is 3:33 P.M. and this hearing is adjourned.

**Pasco – September 26, 2012 Hearing**  
**Rule Writer – Rebecca Post**  
**Public Hearing Officer – Ginger Wireman**

I'm recording officially now. I'm Ginger Wireman, hearing officer for this hearing. Tonight we are considering a hearing on the Rules Proposal for chapter 173-183 Washington Administrative Code Pre-assessment Screening and Oil Spill Compensation Schedule regulations. Let the record show it is 7, or 6:15 on September 26th. No one has come to this meeting so we have started the official hearing recording at this time. A legal notice of this hearing was published in the Washington State Register September 5th, Washington State Register 12-17-074. In addition, notices of the hearing were e-mailed to about 16, greater than 1600 interested parties. Ecology issued a news release on August 15th and September 19th and notice was also published in the following papers on September 23rd - The Everett Herald, The Columbian in Vancouver, and the Tri-City Herald in Kennewick.

No is at the inten, is attending this hearing. Let the record show Ecology held the hearing on this Rule Proposal and no one attended the public hearing. (you need to say the address too.) The hearing was held at Columbia Basin College in Pasco, Washington, Building B, Room B-116, the address is 2600 North 20th Avenue, Pasco, Washington 99301. And, let the record show that with no one in attendance this hearing is adjourned at 6:14 P.M., September 26th.