

WAC 173-340-420 Periodic review.

(1) **Purpose.** A periodic review consists of a review by the department of post-cleanup site conditions and monitoring data to assure that human health and the environment are being protected and to determine the effectiveness of the environmental covenant.

(2) **Applicability.** The department shall conduct periodic reviews of a site whenever one of the following conditions exists; at the site:

(a) Where an environmental covenant, institutional control, and/or financial assurance is required as part of an interim action or cleanup action:

(i) At a department conducted remedial action;

(ii) By an order, agreed order or consent decree; or,

(iii) As a condition of a written opinion issued under WAC 173-340-515.

The department may conduct periodic reviews at other facilities as resources permit.

(b) Where the cleanup level is based on a practical quantitation limit as provided for under WAC 173-340-707; and

(c) Where, in the department's judgment, modifications to the default equations or assumptions using site-specific information would significantly increase the concentration of hazardous substances remaining at the site after cleanup or the uncertainty in the ecological evaluation or the reliability of the cleanup action is such that additional review is necessary to assure long-term protection of human health and the environment.

(3) **Timing of Periodic Review.** If a periodic review is required under subsection (2) of this section, a review shall be conducted by the department at the following times:

(a) At least once every five years after an environmental covenant has been recorded.

(b) If an institutional control other than an environmental covenant is required at the site by an order, agreed order or consent decree, or as a condition of a written opinion issued under WAC 173-340-515, at least once every five years after implementation of the institutional control.

(c) If the environmental covenant is not recorded or other institutional control is not implemented, at least once every five years after the environmental covenant or institutional control was required at the site by an order, agreed order or consent decree, or as a condition of a written opinion issued under WAC 173-340-515.

(d) The department may rely on periodic reviews conducted by the United States Environmental Protection Agency to fulfill this requirement.

(4) **Periodic review contents.** The department may require potentially liable persons, and others to submit information needed by the department to conduct a periodic review. A periodic review shall include at least the following:

(a) A review of relevant reports documenting conditions at the site and relevant decision documents (e.g. consent decree, order, cleanup action plan or no further action determination);

(b) A review of the title of the real property subject to the environmental covenant to determine whether the environmental covenant was properly recorded and, if applicable, amended or terminated;

(c) A physical inspection of the site to determine compliance with the environmental covenant, other institutional controls, and any other cleanup requirements, including whether any development or redevelopment of the real

property has violated any of these requirements; and

(d) An evaluation of the effectiveness of any environmental covenant and other institutional controls in limiting or prohibiting activities that may interfere with the integrity of the remedial action or that may result in exposure to or migration of hazardous substances. This shall include a review of available monitoring data.

(e) A review of any financial assurance mechanisms required by the department under this chapter.

(f) A review of the effectiveness of the remedy in protecting human health and the environment.

(5) Review criteria. When evaluating whether human health and the environment are being protected and the effectiveness of any environmental covenant or other institutional control, the factors the department shall consider include:

(a) The effectiveness of ongoing or completed cleanup actions, including the effectiveness of engineered controls, environmental covenants, and institutional controls in limiting exposure to hazardous substances remaining at the site;

(b) New scientific information for individual hazardous substances or mixtures present at the site;

(c) New applicable state and federal laws for hazardous substances present at the site;

(d) Current and projected site and resource uses;

(e) The availability and practicability of more permanent remedies; and

(f) The availability of improved analytical techniques to evaluate compliance with cleanup levels.

(6) Notice and public comment. The department shall publish a notice of all periodic reviews in the *Site Register* and provide an opportunity for public comment. The department shall also notify all potentially liable persons known to the

department of the results of the periodic review. A final report of the periodic review shall not be issued until the public comment period has been completed.

(7) Determination of whether additional remedial action is required.

When the department determines that any of the following conditions exists, the department shall take any and all appropriate actions. Where the department requires remedial actions substantially different from a previously approved remedy, the department shall provide an opportunity for public review and comment on the new remedial actions.

(i) The environmental covenant or other institutional control has not been recorded or otherwise established;

(ii) The environmental covenant or other institutional control has been amended or terminated without proper authority;

(iii) The terms of the environmental covenant or other institutional control have been violated;

(iv) The environmental covenant or other institutional control is no longer effective in limiting or prohibiting activities that may interfere with the integrity of the remedial action or that may result in exposure to or migration of hazardous substances;

(v) The financial assurance mechanism is inadequate; or,

(vi) The cleanup action is no longer protective of human health and the environment.

(8) Determination of whether future periodic reviews required.

In conducting a periodic review under this section, the department shall determine whether additional reviews are necessary, taking into consideration the factors in subsection ~~(4)~~ (5) of this section. Sites with institutional controls shall remain subject to periodic reviews as long as the institutional controls are required under this chapter.

(9) Cost Recovery. A periodic review is a remedial action under this chapter. As such, the department may require payment of the costs for periodic reviews under WAC 173-340-550.

(a) Periodic review costs are a component of costs of department conducted remedial actions and the department providing administrative oversight under an order, agreed order or consent decree.

(b) Where the department conditions a written opinion on an environmental covenant or other institutional control which necessitates periodic reviews, periodic review costs are a component of the costs of providing advice and assistance.

(c) The department may require upfront payment of the costs of future periodic reviews as a condition to a settlement, satisfaction of an order, or a written opinion issued under the WAC 173-340-515.

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WAC 173-340-440 Institutional controls. (1) **Purpose.** Institutional controls are measures undertaken to limit or prohibit activities or uses of real property or resources that may interfere with the integrity of an interim action or cleanup action or that may result in exposure to hazardous substances at a site. Institutional controls may also include affirmative actions such as actions to ensure the integrity of an interim action or cleanup action. Institutional controls may include:

- (a) Physical measures such as fences;
- (b) Limitations on activities or uses of the property or resources;
- (c) Requirements that additional cleanup be conducted if certain conditions change at the site such as removal of existing structures or pavement;
- (d) Maintenance requirements for engineered controls such as the inspection and repair of monitoring wells, treatment systems, caps or ground water barrier systems;
- (e) Periodic reporting requirements;
- (f) Educational programs such as signs, postings, public notices, health advisories, mailings, and similar measures that educate the public and/ or employees about site contamination and ways to limit exposure; and
- (g) Financial assurances (see subsection (11) of this section).

(2) **Relationship to engineered controls.** The term institutional controls refers to nonengineered measures while the term engineered controls means containment and/or treatment systems that are designed and constructed to prevent or limit the movement of, or the exposure to, hazardous substances. See the definition of engineered controls in WAC 173-340-200 for examples of engineered controls.

(3) **Applicability.** This section applies to remedial actions being conducted at sites

under any of the administrative options in WAC 173-340-510 and 173-340-515.

(4) **Circumstances required.** Institutional controls shall be required to assure both the continued protection of human health and the environment and the integrity of an interim action or cleanup action in the following circumstances:

(a) The cleanup level is established using Method A or B and hazardous substances remain at the site at concentrations that exceed the applicable cleanup level;

(b) The cleanup level is established using Method C;

(c) An industrial soil cleanup level is established under WAC 173-340-745;

(d) A ground water cleanup level that exceeds the potable ground water cleanup level is established using a site-specific risk assessment under WAC 173-340-720(6)(c) and institutional controls are required under WAC 173-340-720(6)(c)(iii);

(e) A conditional point of compliance is established as the basis for measuring compliance at the site;

(f) Any time an institutional control is required under WAC 173-340-7490;

(g) When such controls are required by WAC 173-340-740(6)(f) to prohibit or limit activities or uses that could interfere with the long-term integrity of a soil containment system; or

(h) Where the department determines such controls are required to assure the continued protection of human health and the environment or the integrity of the interim or cleanup action.

(5) **Minimum requirements.** Cleanup actions that use institutional controls shall meet each of the minimum requirements specified in WAC 173-340-360, just as any other cleanup action. Institutional controls should demonstrably reduce risks to ensure a protective remedy.

(6) Limit on use of institutional controls. In addition to meeting each of the minimum requirements specified in WAC 173-340-360, cleanup actions shall not rely primarily on institutional controls and monitoring where it is technically possible to implement a more permanent cleanup action for all or a portion of the site.

(7) Periodic review. The department shall review compliance with institutional control requirements as part of periodic reviews under WAC 173-340-420.

(8) Format of activity and use limitations.

(a) Except as otherwise provided for in this section, for properties owned by a person who has been named as a potentially liable person or who has not been named a potentially liable person by the department but meets the criteria in RCW 70.105D.040 for being named a potentially liable person, activity and use limitations shall take the form of an environmental covenant granted by the property owner to the department or other department approved holder under Chapter 64.70 RCW. The covenant shall be placed on each parcel making up the property following the procedures in Chapter 64.70 RCW and any other applicable laws. The department may also require the holders of other real property interests such as an easement, right of way or mineral rights to subordinate those rights to the department's environmental covenant.

(b) For properties owned by a local, state, or federal government entity, an environmental covenant may not be required if that entity demonstrates to the department's satisfaction that:

(i) It does not routinely file with the county recording officer records relating to the type of interest in real property that it has in the site; and

(ii) It will implement an effective alternative system to meet the requirements of subsection (9) of this section.

The department shall require the government entity to implement the alternative system under an order or decree.

(iii) If a government entity meets these criteria, and if it subsequently transfers its ownership in any portion of the property, then the government entity must grant an environmental covenant upon transfer if any of the conditions in subsection (4) of this section still exist.

Would it be helpful to include more specific criteria for alternative systems for public ROWs?

(c) For properties within the site where the owner does not meet the criteria in RCW 70.105D.040 for being a potentially liable person, the department may approve of activity or use limitations implemented through legal and/or administrative mechanisms other than an environmental covenant. This provision is intended to apply only to situations where the release has affected properties within the site not owned by a person meeting the criteria in 70.105D.040 for being named a potentially liable person.

(i) Unless otherwise determined by the department, A potentially liable person must make a good faith effort to obtain an environmental covenant before the department will approve of other legal or administrative mechanisms under this provision.

(ii) For the purposes of this provision, a good faith effort means public notice was provided to affected property owners, and an attempt was made to engage them in discussions, including offering reasonable monetary compensation for the reduced value of the property as a result of the activity or use limitations.

(iii) Examples of such legal or administrative mechanisms under this provision include special building code requirements, zoning overlays, placing notices in local zoning or building

department records or state lands records, public notices and educational mailings.

(9) Environmental covenants. Where required, the environmental covenant shall comply with a department provided format to include the following:

(a) State that the document is an environmental covenant executed pursuant to Chapter 64.70 RCW;

(b) Contain a legally sufficient description of the real property subject to the covenant;

(c) Designate the department, or other person approved by the department, as the holder of the covenant;

(d) Be signed by the department, every holder, and, unless waived by the department, every owner of a fee simple interest in the real property subject to the covenant. To ensure compliance with this provision, the potentially responsible person shall provide the department with the results of a title search conducted within six months prior to recording the covenant for all parcels of real property subject to the covenant;

(e) Identify the location of the administrative record for the property subject to the environmental covenant;

(f) Describe with specificity the activity or use limitations on the real property subject to the covenant. Where applicable, this shall prohibit uses and activities:

(i) Inconsistent with the uses or activities the cleanup standards are based on;

(ii) That may interfere with a cleanup action, operation and maintenance, monitoring, or other measures necessary to assure the integrity of the cleanup action and continued protection of human health and the environment;

(iii) That may result in the release of a hazardous substance that was contained as a part of the cleanup action;

(g) Require notice to the department of the owner's intent to convey any interest in

the property. No conveyance of title, easement, lease, or other interest in the property shall be consummated without adequate and complete provision for the continued operation, maintenance and monitoring of the cleanup action, and for continued compliance with this chapter;

(h) Require the owner to restrict leases to uses and activities consistent with the environmental covenant and notify all lessees of such restrictions. This requirement applies only to environmental covenants imposed after February 1, 1996. Lease agreements for tenants do not require this notice when the tenant does not have authorization for uses or activities that have the potential to lead to exposure to the contamination;

(i) Require the owner to include in any instrument conveying any interest in the property, a notice of the environmental covenant;

(j) Require notice to the department of all permit and building applications pertaining to the property and approval by the department of any proposed activity or use of the property in a manner that is inconsistent with the environmental covenant;

(k) Grant the department and its designated representatives the right to enter the property at reasonable times for the purpose of evaluating compliance with this chapter, including the right to take samples, inspect any remedial actions taken at the site, and to inspect records;

(l) The department may also require the environmental covenant to include:

(i) A narrative description of the types and locations of hazardous substances remaining on the property and a brief description of the remedy;

(ii) Requirements for periodic inspections and reporting demonstrating compliance with the covenant;

(iii) Limitations on amendment or termination of the covenant in addition to those contained in RCW 64.70.090 and 64.70.100;

(iv) A requirement to reimburse the department for costs related to implementation of the environmental covenant; and

(v) Other information, restrictions or requirements, required by the department.

(10) Local government notification. Prior to imposing activity or use limitations at a site, the department shall consult with the city or county land use planning authority for the site. In determining the appropriateness of proposed limitations, the department shall consider potential redevelopment and revitalization opportunities, information regarding present and proposed land and resource uses, the comprehensive land use plan and zoning provisions applicable to the site and other factors identified in the consultation process.

(11) Financial assurances. The department shall, as appropriate, require financial assurance at sites where the cleanup action selected includes engineered and/or institutional controls. It is presumed that financial assurance will be required unless the PLP can demonstrate that sufficient financial resources are available and in place to provide for the long-term effectiveness of engineered and institutional controls adopted.

(a) Mechanisms. Financial assurance mechanisms may include one or more of the following: A trust fund, a surety bond, a letter of credit, financial test, guarantee, standby trust fund, government bond rating test, government financial test, government guarantee, government fund, or financial assurance mechanisms required under another law (for example, requirements for solid waste landfills) that meets the requirements of this section. **When required by the department, the financial assurance**

mechanism shall meet the requirements of WAC 173-303-620 (Financial Requirements for Hazardous Waste Facilities). Unless otherwise required by the department, the original financial assurance instrument shall be submitted to the department.

(b) Amount of financial assurance.

Option 1: Coverage for all costs associated with the operation and maintenance of the cleanup action, including institutional controls, compliance monitoring, periodic reviews and corrective measures in the event of a failure of the remedial action.

Option 2: Coverage for just the costs of implementation of institutional controls, compliance monitoring and future periodic reviews. Coverage for other costs optional (i.e. operation and maintenance of the cleanup action and corrective measures.)

(12) Amendment or termination of restrictions. If the conditions at the site requiring an institutional control under subsection (4) of this section have changed or no longer exist, then the owner may submit a request to the department that the institutional control be amended or eliminated. The institutional control shall be amended or terminated if the department, after public notice and opportunity for comment, concurs. **Amendment or termination of environmental covenants executed under Chapter 64.70 must also follow the procedures in Chapter 64.70 RCW.**

(13) Cost Recovery. The department may require payment for its cost of reviews and actions under this section under WAC 173-340-550 including:

(i) Review and processing of proposed environmental covenants and other institutional controls;

(ii) Review and processing of notices and applications for approvals required by environmental covenants or other institutional controls; and

(iii) Applications for amendment or termination of environmental covenants or other institutional controls.

(14) Effect of nonconforming environmental covenants. Environmental covenants and deed restrictions recorded prior to the effective date of this chapter that are not in the exact format or content specified in this section are not intended to be made invalid or unenforceable by any changes to this section.

[Statutory Authority: Chapter 70.105D RCW. 01-05-024 (Order 97-09A), § 173-340-440, filed 2/12/01, effective 8/15/01; 96-04-010 (Order 94-37), § 173-340-440, filed 1/26/96, effective 2/26/96; 91-04-019, § 173-340-440, filed 1/28/91, effective 2/28/91.]