



DEPARTMENT OF
ECOLOGY
State of Washington

Concise Explanatory Statement
Chapter 173-224 WAC
Wastewater Discharge Permit Fees

Summary of rulemaking and response to comments

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Publication and Contact Information

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For more information contact:

Ecology Water Quality Program
P.O. Box 47600
Olympia, WA 98504-7600

Phone: 360-407-6600

Washington State Department of Ecology - www.ecy.wa.gov

- Headquarters, Olympia 360-407-6000
- Northwest Regional Office, Bellevue 425-649-7000
- Southwest Regional Office, Olympia 360-407-6300
- Central Regional Office, Union Gap 509-575-2490
- Eastern Regional Office, Spokane 509-329-3400

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Concise Explanatory Statement

Chapter 173-224 WAC Wastewater Discharge Permit Fees

Water Quality 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 (RCW 34.05.325).
- Provide reasons for adopting the rule.
- Describe any differences between the proposed rule and the adopted rule.
- 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: Wastewater Discharge Permit Fees
WAC Chapter(s): 173-224
Adopted date: November 18, 2015
Effective date: December 19, 2015

To see more information about this rulemaking or other Ecology rulemakings please visit our web site: <http://www.ecy.wa.gov/laws-rules/index.html>

Reason for Adopting the Rule

Adopting this rule will allow continued funding of Ecology’s wastewater and stormwater permit programs that protect surface and ground waters of the state.

Brief History Leading to this Rule Adoption:

Ecology has been issuing federal National Pollutant Discharge Elimination System (NPDES) permits and State Waste Discharge Permits since the 1970’s. The permit program was initially funded out of state general fund monies. However, in 1988, Initiative 97 was passed by Washington State voters mandating that Ecology create a fee program for issuing and administering wastewater discharge permits.

The wastewater permit fee portion of Initiative 97 was later codified as RCW 90.48.465 – Water Discharge Fees. This law requires Ecology to establish fees to cover its expenses for issuing and administering wastewater and stormwater permits. In response to this mandate, Ecology adopted a rule, Chapter 173-224 WAC – Wastewater Discharge Permit Fees, which establishes annual fees for over 165 categories and subcategories of permit types.

Over the years, the law has been amended by the Washington State Legislature, but changes have not been made to the rule. As a result of those amendments, inequities were created between fee

categories in the rule, and Ecology has not been allowed to recover its true costs for issuing and managing some fee types.

Inequities created within the law include:

- Capping fees for municipal publicly-owned treatment works.
- Establishing and capping fees for dairies.
- Setting base fees for certain aquatic pest control permits.
- Requiring Ecology to mitigate impacts of fees for small business.

Further inequities were established when Initiative 601 was passed in 1993 by Washington State voters. That initiative created a calculation that allows the Washington Expenditure Limit Committee to determine the percentage rate that state fee programs could increase their fees. This limit is called the fiscal growth factor.

Between the inequities established in the law and Ecology's only being allowed to increase fees to the fiscal growth factor limit, some fee category types became over-payers, meaning the fees they pay are greater than the costs of managing their permits, and some category types are under-payers, meaning the fees they pay are less than the costs of managing their permits. Monies received from the over-payers subsidize the costs of managing permits for the under-paying fee types. As a result of this, over-payer fee types have requested Ecology to eliminate the subsidy and have all permit fee types pay their own costs.

Historically, when increasing fees, the Office of Financial Management (OFM) directed all state agencies to seek legislative authority for the fee increases, which Ecology has done over the last several biennia. However, an opinion from the Attorney General's Office informed Ecology that legislative approval was not needed for the imposition or increase of fees. Ecology was told by OFM that under current state law (RCW 90.48.465) it could seek to increase fees by the fiscal growth factor via the rulemaking process.

Current Proposed Amendments

In this rulemaking proposal, Ecology is using its legislative authority for increasing fees and has begun addressing the inequities among fee payers by doing the following:

- Increase fees for the following fee types (overpaying fee payers) by:
 - 3.25% for fiscal year 2016
 - 3.21% for fiscal year 2017
- Increase fees for the following fee types (underpaying fee payers) by:
 - 5.31% for fiscal year 2016
 - 5.27% for fiscal year 2017
- Increase fees for publicly-owned treatment works with greater than 250,000 residential equivalents (RE's) by:
 - 12 cents per RE in 2016

- 14 cents per RE in 2017
- Create new fee categories for Wineries issued general permit coverage, In-Water Vessel Deconstruction, and Bridge Washing.

The fiscal growth factor increases, totaling 4.22 percent for state fiscal year 2016 and 4.19 percent for state fiscal year 2017, are assumed in the Office of Financial Management’s (OFM) fund balance projections for the 2015-2017 biennium.

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.

There are some differences between the proposed rule filed on July 22, 2015, and the adopted rule filed on November 18, 2015. Ecology made these changes for all or some of the following reasons:

- In response to comments Ecology received.
- To ensure clarity and consistency.
- To meet the intent of the authorizing statute.

The following content describes the changes and Ecology’s reasons for making them.

Ecology is correcting two errors made on the fee schedule filed with the Code Reviser’s Office. OTS-7225.2 is being changed in the following manner:

Original Language

	Industrial Facility Categories	FY2016 Annual Permit Fee	FY2017 Annual Permit Fee
Page 2 –	c. Concrete Production 3. 200,000 cu. yds/yr. and greater	\$ 2,2651.00	2,791.00

Correction

	Industrial Facility Categories	FY2016 Annual Permit Fee	FY2017 Annual Permit Fee
Page 2 –	c. Concrete Production 3. 200,000 cu. yds/yr. and greater	\$ 2,651.00	2,791.00

Original Language

	Industrial Facility Categories	FY2016 Annual Permit Fee	FY2017 Annual Permit Fee
Page 6	3. NPDES Permit Issued post post 7/1/94	\$ 8,740.00	\$ 9,021.00

Correction

Industrial Facility Categories	FY2016 Annual Permit Fee	FY2017 Annual Permit Fee
	\$ 9,050.00	9,341.00

Ecology received comments regarding the proposed fee increase for Aluminum and Magnesium Reduction Mills. Based on those comments, the proposed fee increase has been reduced to reflect the following:

Original Language

	Industrial Facility Categories	FY2016 Annual Permit Fee	FY2017 Annual Permit Fee
Page 1	Aluminum & Magnesium Reduction Mills		
	a. NPDES Permit	\$ 103,786.00	\$ 109,254.00
	b. State Permit	51,895.00	54,629.00

Proposed Change

	Industrial Facility Categories	FY2016 Annual Permit Fee	FY2017 Annual Permit Fee
Page 1	Aluminum & Magnesium Reduction Mills		
	c. NPDES Permit	\$ 101,757.00	\$ 105,023.00
	d. State Permit	50,881.00	52,514.00

Response to Comments

Ecology accepted comments between July 22, 2015, and September 9, 2015. Each comment is identified by the commenter using the Commenter Index below. Responses are directly below each comment. Appendix A of this document contains all of the comments received during the public comment period in their original form.

Commenter Index

The table below lists the names of individuals and the organizations they represent who submitted a comment on the rule proposal and where you can find Ecology's response to the comment(s). No oral comments were received during the public hearing. Identification codes beginning with "W" indicate comments submitted in writing. Comments have been paraphrased from the original documents submitted. However, the original written document can be found in Appendix A in its original form.

Commenter/Affiliation	Identification Code
Kay Kassinger Peninsula Housing Authority	W-1
Kathryn Mitchell, Barry Hullett, Mark Huber Alcoa Global Primary Products	W-2
Ken Johnson Weyerhaeuser Company	W-3
Christian M. McCabe Northwest Pulp & Paper Association	W-3

Comments Concerning Construction Stormwater Permit Fee Increases

Comment W-1

In reviewing the costs associated with stormwater discharge permit fees paid by the Peninsula Housing Authority from 2008-2014 (last payment made), the cost for one of our permits on a 5 acre parcel has increased 39%.

While I understand the reasoning that a permit system should be self-sustaining, I am not certain what additional services we have received over the past 6 years that could account for this large fee increase which seems to be annually adjusted upward.

The site noted in the above permit has complete on-site detention/infiltration with no discharge off site. None. My question is what is driving these increases and can you more clearly explain the equitable distribution of costs?

Ecology Response:

Permit fees are not a fee for service. Even though fees for construction stormwater permit holders have increased by the state fiscal growth factor for the last several years, the increases have not allowed Ecology to recover its costs for operating the construction stormwater permit program.

Ecology received revenue from construction stormwater permit holders totaling \$1.7 million dollars for fiscal year 2014 but the costs to manage the construction stormwater permit program totaled \$2.6 million dollars. This resulted in other permit holders (over-payers) subsidizing construction stormwater permittees by \$964,000 +. This is unacceptable to the over-payers. This rule proposal begins to address the over-payer/under-payer issues. It is the goal that in the future, monies received from construction stormwater permit holders will fund the operation and management of the construction stormwater permit program.

Comments Concerning Aluminum Reduction Mills

Comment W-2

Aluminum reduction plants have long been considered NPDES fee over-payers. This remains true. In October 2011 Ecology, as part of its efforts to reduce and consolidate permit categories, placed aluminum reduction mills in a new metals category with nine other unrelated sources. The entire metals category was initially listed as an over-payer, so the change did not affect the status of the aluminum reduction mills. The agency then created a job code for the metals category, and the information collected showed the category was actually under-paying the permit fee costs. The outcome of using an overly broad category, without consideration of the difference in the sources, resulted in aluminum reduction plants being placed into an under-payer designation despite the fact that the plants continue to pay the third highest fees among all NPDES categories. Alcoa requests that Ecology correct the proposed fee rule and apply the over-payer fee increase rate to aluminum reduction plants.

When aluminum reduction plants were placed in the new larger category with non-related sources, and that larger category was reclassified to under-payer, it resulted in an under-payer designation for aluminum reduction plants. Classifying aluminum reduction plants, that are each paying \$98,554.00 per year (\$492,770.00 for a five year permit cycle). As under-payers is not reasonable. This incorrect classification would have negative impacts well beyond the biennium in question.

Alcoa, therefore, requests that the FY16 3.25% and FY17 3.21% fee increases, proposed for over-payers, be applied to the NPDES permits for aluminum reduction plants. It is also requested that aluminum reduction plants be assigned a specific job code. Using the same job code for the broad metals group does not adequately identify under and over payers within the category. The specific job codes should provide data to correctly identify over or under payer status in future biennium's.

Ecology response:

All permit holders in the various metals fee categories will no longer be assigned the same job code. Ecology is developing a plan to assign a specific job code for each metal fee type in the future that will enable it to capture data to determine who is an over-payer versus under-payer. Ecology has also decided to change aluminum reduction plants from the under-payer fee designation to the over-payer fee designation for this rulemaking. This means aluminum reduction mills will be assessed fees by 3.25% for fiscal year 2016 and 3.21% for fiscal year 2017.

General Comments Concerning Fee Increases for Over-Payers

Comment W-3

“The Executive Summary accompanying the state register notice includes an accurate discussion on the evolution of the permit fee structure to ultimately create what are now pathetically referred to as “over-payer” source categories. Less convincing is the assertion that this proposed regulation

amendment does something to “address(ing) the subsidy issue” or to respond to the structural inequities in the permit fee schedule. After two biennial budget cycles where Ecology chose to freeze some over-payer source category fees, this regulation amendment now proposed fee increases of 3.25% and 3.21% in coming biennium. This is going in the wrong direction.

The statutory factors directing Ecology’s design of the permit fee schedule in WAC 173-224 admittedly impose difficult constraints. But at least for the industrial Facility Categories the fundamental fairness of aligning fees with Ecology’s work effort to accomplish the listed tasks in RCW 90.48.461(1), seemed to gain consensus approval. The agency acknowledged and promoted this model in advisory committee work in 2008 and then again in 2011. Among other learning’s, the agency analysis exposed the outrage of a “Chemical Pulp Mill w/Chlorine Bleaching” paying an annual \$150,400/year (and soon apparently, \$155,288/year, and then \$160,273/year) for work Ecology itself costs out at less than \$30,000/year.

Ecology’s adoption of the immediate proposed regulation is a given. As before, we could encourage the agency to then get serious about fixing the permit fee schedule consistent with reasoned adherence to statutory criteria. This is more than adjusting the municipal cap and slicing/dicing and apportioning fiscal growth factor increases. Viable ideas have been shared and Ecology has some latitude absent any statutory changes to reform the fee schedule. We look forward to being a productive partner in the agency effort to fix this fee program.”

“We (NWPPA) believe the Department of Ecology’s Waste Discharge Permit Fee Task Force Problem Statement (See: <http://ecy.wa.gov/programs/wq/wdpftaskforce/index.html>) accurately reflects the primary problem with the way NPDES fees are calculated in this state. According to the Department of Ecology:

“... Over time, the fee rate structure has become outdated and does not reflect the actual cost of administering the various categories of permits. Some categories pay more than others do for similar permit services. Ecology established a task force to help identify ideas and solutions to this inequity.”

As a result the current system has created “over-payer” categories, based on the theoretical “fee-for-service” model and Ecology staff time actually spent on administering various NPDES permits. NWPPA members fall into this “over-payer” category. The Department of Ecology has recognized that pulp and paper mills have fallen into this category for many years, most recently in its proposed Wastewater Discharge Permit Fee rate schedule (See: <http://www.ec.wa.gov/programs/wq/wdpftaskforce/15-17CategoryImpacts.pdf>)

And of those in the “over-paying” category, most NWPPA members are among the highest of the over-payers, who currently pay from \$133,692 - \$150,400 a year. Under the proposed rule for 2016, those rates would increase 3.25% from \$142,468 - \$160,400 a year. As you know Ecology has acknowledged the actual cost to administer one of these permits for a pulp and paper mill is less than \$30,000 a year.

NWPPA appreciates that the Department of Ecology continues to acknowledge this disparity in the program and the fact that categories like pulp and paper producers continue to subsidize under-payers like municipalities. This is reflected in Ecology’s proposal to mitigate the fee increase on all categories by charging over-payers 3.25% and under-payers 5.31%.

However, charging over-payers like pulp and paper producers a smaller fee increase than under-payers is by no means a panacea, fix or reasonable solution to this gross over-subsidization problem. As recognized by the Department in the advisory committee's work in 2008 and 2011, the agency must go farther in addressing this fundamental lack of fairness and bring parity back into the program. This rulemaking proposal falls well short of that need.”

Ecology Response:

State law (RCW 90-.48.465 – Water Pollution Control) requires Ecology to recover its costs for issuing and administering wastewater and stormwater discharge permits. State law also places fee limits on what can be charged for dairy permits, aquatic pest control permits, municipal sewage treatment plant permits, as well as requiring Ecology to mitigate the impact of fees on small business. However, what the law does not do is provide additional revenue that will off-set the revenue that is lost by the special exemptions it requires. Ecology looked at various options of funding the program for fiscal years 2016 and 2017. For the last six years, Ecology has only increased fees for the under-payers. Ecology was able to do this because of a funding balance carry-forward from previous years. However, that fund balance carry-forward no longer exists and Ecology will have a more than \$2 million dollars budget deficit if fees are not increased. Ecology looked at three options for increasing funding.

- Option #1: Continue to increase under-paying categories only but by enough to fully recover costs. This would result in under-payers receiving fee increases totaling almost 10% for both fiscal year 2016 and 2017. Ecology believes these increases are too high a burden to put on under-paying fee payers.
- Option #2: Increase fees for all categories by the state fiscal growth factor. This would result in all permit holders receiving increases totaling 4.22% for fiscal year 2016 and 4.19% for fiscal year 2017. Ecology decided against this because of it wanted to have as small an increase to the over-payers as possible.
- Option #3: Increase over-paying fee categories below the fiscal growth factor and increase fees for the under-paying fee categories above the fiscal growth factor. Although this would increase fees for all permit holders, setting higher fees for the under-payers starts to address the equity issue raised by the over-payers.

None of these options is perfect, but the one option that allows the program to be funded and is the least burdensome on both over-payers and under-payers is Option #3. Over the course of the next several rulemakings, Ecology intends to continue moving toward payment equity between the different fee subcategories.

Appendix A: Copies of all written comments

Appendix B: Transcript from public hearing.

AUGUST 31, 2015 – PERMIT FEE PUBLIC HEARING TRANSCRIPT

“I’m Bari Schreiner hearing officer for this hearing. This afternoon we are to conduct a hearing on the rule proposal for Chapter 173-224 Washington Administrative Code titled Wastewater Discharge Permit Fees.”

“Let the record show it is 1:53 p.m. on August 31, 2015. Ecology is using video conferencing for this hearing with the following locations:

- Lacey at Ecology Headquarters Building at 300 Desmond Drive
- Bellevue at Ecology Northwest Regional Office at 3190 – 160th Ave SE
- Spokane at Ecology Eastern Regional Office at 4601 N Monroe St, Room
- Union Gap – Ecology Central Regional Office at 1250 W Alder Street.”

“A legal notice of this hearing was published in the Washington State Register:

- August 5, 2015
- Washington State Register Number 15-15-174.”

“In addition, notices of the hearing were:

- Mailed to approximately 5,600 permit holders,
- Email notices were sent to approximately 1,500 interested people,
- And a news release was issued on July 23, 2015.”

“At this time, do you want to come up and provide testimony for the record? No? Alright.”

“Let the record show at this time we have two people in attendance and no one has indicated that they want to testify.”

“If you would like to send Ecology written comments, please remember they must be submitted by September 9, 2015.”

“You can send them to:

Bev Poston
Department of Ecology
Water Quality Program
PO Box 47600
Olympia, WA 98504-7600

You can email them to Bev at bev.poston@ecy.wa.gov or they can be faxed to 360 407-7151.”

“One more time, there’s no one at the other offices? Looks like that’s a no.”

“All comments received and written comments submitted by September 9, 2015 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 and who submitted contact information.
- Everyone who signed in today for the hearing and provided at least an email address.
- Other interested parties that are already on the agencies mailing lists for this rule.”

“The CES will among other things, contain the agency’s response to comments and issues of concern and questions that are raised during the public comment period. If you would like to receive a copy but haven’t given us your contact information, please either see one of the hearing officers or Bev at the end of this public hearing.”

“The next step is to review the comments and make a determination about whether or not to adopt the rule. Ecology Director Maia Bellon will consider the rule documentation and staff recommendations and will make a decision about adopting the proposal.”

“Adoption is currently scheduled for no earlier than November 18, 2015. 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 further help to you today, please let us know.”

“On behalf of the Department of Ecology, I would like to thank you for coming.”

“Let the record show that this hearing is adjourned at 1:57 p.m.”

Appendix C: Citation List

Chapter 173 – 224 WAC Wastewater Discharge Permit Fees AO # 15 – 02

This citation list contains references for data, factual information, studies, or reports on which the agency relied in the adoption of this rule making (RCW 34.05.370(f).

At the end of each citation is a number in brackets identifying which of the citation categories below the sources of information belongs. (RCW 34.05.272).

Citation Categories	
1	Peer review is overseen by an independent third party.
2	Review is by staff internal to Department of Ecology.
3	Review is by persons that are external to and selected by the Department of Ecology.
4	Documented open public review process that is not limited to invited organizations or individuals.
5	Federal and state statutes.
6	Court and hearings board decisions.
7	Federal and state administrative rules and regulations.
8	Policy and regulatory documents adopted by local governments.
9	Data from primary research, monitoring activities, or other sources, but that has not been incorporated as part of documents reviewed under other processes.
10	Records of best professional judgment of Department of Ecology employees or other individuals.
11	Sources of information that do not fit into one of the other categories listed.

1. The Office of Management fund balance sheet for Fund 176 – Water Quality Permit Fees. (#11)
2. RCW 90.48.465 – Water Pollution Control (#7)