

“Impacted Soil” and How Ecology’s Proposed Revisions to the Washington State Solid Waste Handling Standards (Chapter 173-350 WAC) Will Change the Environmental Liability Paradigm

Presented by:
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Principal, and

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The Plan - Then, Current Events...

- In November 2016, reviewing proposed “impacted soil” sections 235/995 seemed timely and a good fit for SWANA meeting.
 - 2010-2017, WAC 173-350 process, conversations with Ecology
 - New section applied to fill soil, would introduce new environmental liability paradigm.
 - Soil Screening Levels, anti-degradation, new definitions, new background levels, and connection to MTCA Levels (WAC 173-340)
 - New conditions for and restrictions on property-development fills
 - Anticipation of development project process changes
 - Likely benefit and cost for solid waste landfills
- Then, March 16, 2017...



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Ecology Announcement March 16, 2017 Regarding “Impacted Soil” Section 995

- Plan to remove (impacted) soil and sediment section.
- Revise the definition of “clean soil” & “contaminated soil”. New definitions similar to existing, and based on MTCA levels.
- New draft will allow placement of soils at any location, provided the placement does not exceed MTCA cleanup standards that would apply at that location.



What replaces proposed “Impacted Soil and Sediment” framework in revised WAC 173-350 Regulations?

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Topics

- Current Events/Ecology March 2017 Announcement
- Background – Previously proposed WAC 173-350 “impacted soil and sediment” section, interest to regulated community
- Relationship to MTCA (WAC 173-340)
- Sketch of announced approach, and implications for business
- Updated WAC 173-350 Promulgation Schedule



Background – Regulatory WAC 173-350

- WAC 173-350 SWHS regulates non-MSW activities, including limited purpose & inert waste LFs, groundwater monitoring, transfer stations, composting, recycling, waste piles ...
- Drafts 1 & 2 introduced new Sections 235/995, to regulate “Impacted Soil and Sediment” . Exposure-based criteria (SSLs) in a solid waste regulation - similar to cleanup regulation levels.



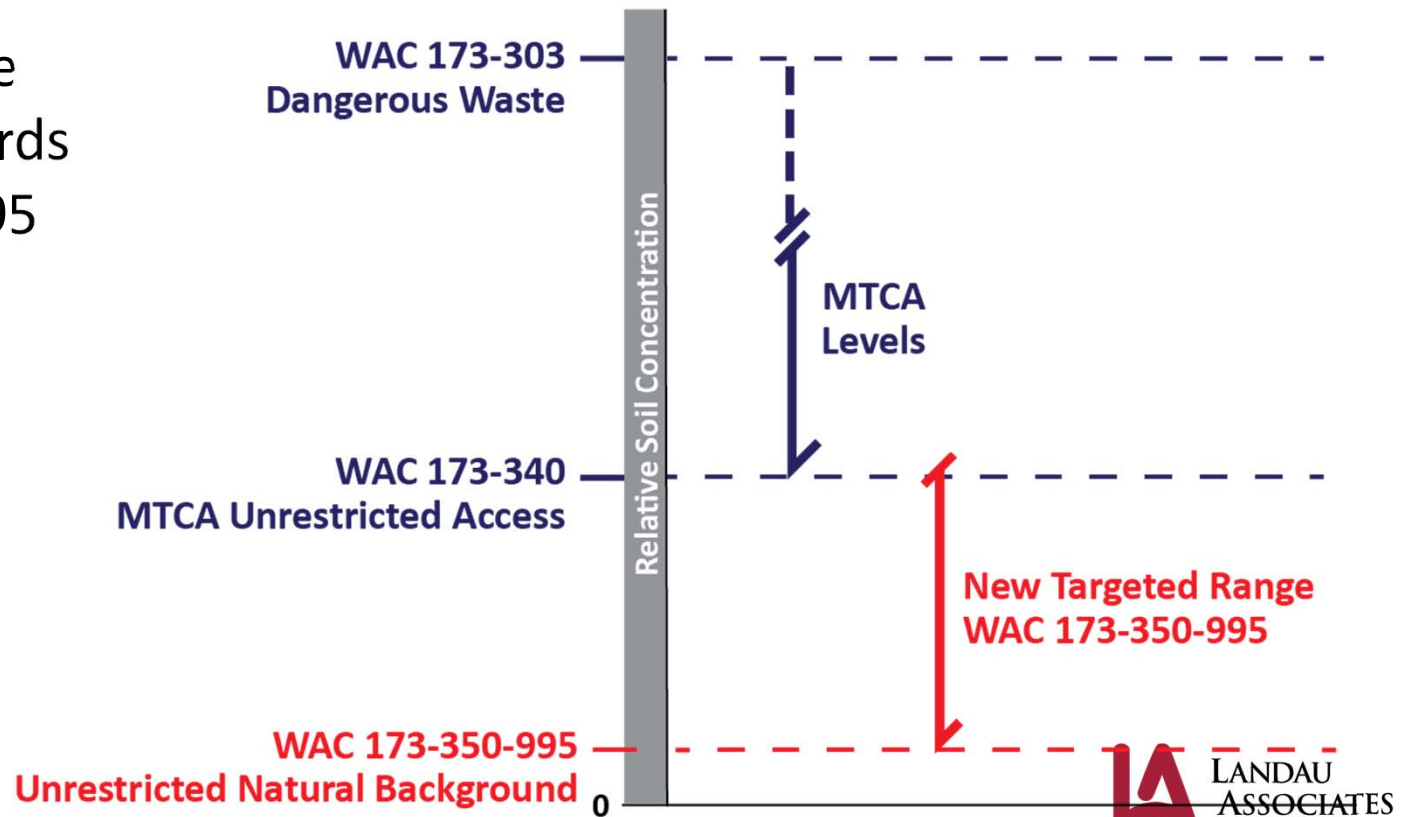
Background –Proposed “Impacted Soil and Sediment” Section

- **Purpose. Explicit:** definitions, Street Waste, Engineered Soil, restrictions on use of properties receiving fill soil, standardize approach by JHDs. **Implicit:** Anti-degradation
- In Draft Versions 1 & 2, Ecology introduced new definitions.
- Proposed **217** compounds with exposure-based Soil Screening Levels (SSLs)
- Proposed approach - regulate soil/sediment used as fill **as solid waste** if concentrations > “unrestricted” SSLs
- SSLs sought to apply to lower concentrations than existing MTCA levels



Impacted Soil and Sediment

- Draft Solid Waste Handling Standards WAC 173-350-995



Background – Section 995, 5 SSL Categories - Complex

Regulation	Categories for Each Constituent				
Constituent	Clean/ Unrestricted (revised back ground)	Residential/Ag ricultural (High exposure)	Limited Access	Ecologically Sensitive	Groundwater Sensitive
PCB (mg/kg)	0.02	0.5	2	40 – Plants 0.65 - Wildlife	0.02



Background - Section 995 Requirements

- **Established a due diligence process** for evaluating soil to be used as fill similar to Phase I/II ESA process
- **Introduced penalties** and solid waste permit requirements for non-compliance, **with no “shield”** if appropriate due diligence conducted
- Required that import soil quality for “Impacted Soil” be as good or better than receiving site soil quality (**i.e., non-degradation**)
- Required **notice to local health district** in advance of placing > 2,000 CY Impacted Soil fill
- Required **notice on deed** if > 2,000 CY Impacted Soil fill placed



Background - Section 995 (cont.)

- **Prohibited placement** of Impacted Soil on properties that received “Impacted Soil” fill prior to the implementation of the new regulations
- **Prohibited placement** of Impacted Soil on MTCA or CERCLA sites
- **Limited Impacted Soil disposal options** to MSW and Limited Purpose Landfills
- Considered soil/sediment fill **Impacted Soil until proven clean**
- Ecology expected new regulation to be **self-implementing**
- Required **maintenance of records** documenting due diligence **for 5 years**



Examples of properties developed using fill

Recent and Older



Potential Section 995 Winners and Losers

Winners	Losers
Existing MSW and LPLFs - increased filling and revenue	Landfill capacity. Accelerated filling decreases use of permitted head space in MSWLFs
Chemical Testing Laboratories – Increased soil testing of source and receiving sites.	Real Estate Transactions chilled.
Aggregate industry - Increased mining as soil re-use declined	Property Development decreases in Washington State
Consultants - navigate SWHS process	Washington state competitiveness
	Confidence in MTCA. Confusion regarding how “unrestricted-access” defined



Ecology March 2017 Announcement Regarding “Impacted Soil” Section 995

- Plan to remove soils section. (Removes SSLs and removes complex conditions, property restrictions)
- Revise the definition of “clean soil” & “contaminated soil”. New definitions of clean/contaminated based on MTCA levels. (Anti-degradation theme removed. Use existing MTCA.)
- New draft will allow placement of soils at any location, provided the placement does not exceed MTCA cleanup standards that would apply at that location. (Details Important. Stay tuned.)



What replaces proposed “Impacted Soil” framework?

- **Before March 2017.** Proposed SSLs and conditions. SSLs were similar to and many “unrestricted levels” lower than MTCA.
- **Since March 16, 2017.** Ecology will require soil quality used as fill to “comply with MTCA levels applicable to location”. **Waiting to see specific proposed language...**



MTCA Soil Cleanup Levels for Unrestricted Use (Examples)

Potentially Applicable Levels					
Constituent	MTCA Method A - Unrestricted Land Uses	MTCA Method B - Direct Contact	MTCA Method B - Protective of Drinking Water (Vadose)	MTCA Method B - Protective of Surface Water (Vadose)	Terrestrial Ecological - Unrestricted Land Use
PCBs (mg/Kg)	1	0.5	–	–	2



What replaces proposed “Impacted Soil” framework? (Continued)

- Apply MTCA cleanup standards (to fill soil) that would apply to fill location
- Rigorous full MTCA cleanup level development/review may be complex depending on conditions. MTCA allows engineering measures so controls *may* be allowed to mitigate levels?
- Case by case communication with Ecology and/or JHD
- Until final language available, won't know process details
- Stay tuned.....



Updated Schedule for Chapter 173-350 WAC Revisions

April – August, 2017 – Revise rule language

September 2017 – Economic analysis

Late 2017 – Formal proposed rule filed (CR-102). Formal comment period begins

January 2018 – Public hearings and formal comment period closes

Spring 2018 – Rule adopted



Questions?

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Changes to Chapter 173-350 WAC Solid Waste Handling Standards



MTCA Soil Cleanup Levels for Unrestricted Use

- MTCA Method A - Unrestricted Land Uses
- MTCA Method B - Direct Contact
- MTCA Method B - Protective of Drinking Water (Vadose)
- MTCA Method B - Protective of Surface Water (Vadose)
- Terrestrial Ecological - Unrestricted Land Use
- Background - Statewide Soil Concentrations



Regulated Community, Considerations Through Drafts 1 & 2

- **Real estate transactions:** New category of environmental liability, due diligence process, use restrictions, new element for valuation/sale, notice on deed.
- **Infrastructure Development:** Know site conditions (site soil, import fill?), process, new restrictions for soil import/export, 90 day stockpiling limit, new costs, contracting changes likely, schedule delays.
- **Permitting and compliance:** Move some costs earlier to permitting stage, schedule delays, report use of >2000 CY to JHD, meet exemption requirements, liabilities, penalties for non-compliance.
- **Cleanup sites:** Appeared to prevent beneficial use at cleanup sites
- **Solid Waste Site** – Inert waste changes, anticipated increase of soil to MSWLF



Timeline – WAC 173-350 Revision Process

Date	Item
Pre-2010	Ecology initiated consideration of revisions for WAC 173-350
November 17, 2010	Governor Gregoire places non-essential rulemaking on hold.
2013	Organic Waste Composting and Anaerobic Digesters, Section 220 and 250
July 2, 2014	Announcement that revisions underway. Working Groups. New sections including Sections 235/995 for Impacted soil (Street waste, Engineered Soil...)
Draft Versions	Working draft Dec 2015, Review Draft #1 July 1, 2016, #2 December 21, 2016
Formal Comments	September 2016, February 2017. Key areas Portland Cement and Impacted Soil
Ecology Decision to “Step Back” on 235	Constituent Groups communicate with Legislature, Governors Office, & Ecology
Next Step - Fall 2017	Revised WAC 173-350 CR 102 Draft



What would have approval of WAC 173-350-995 meant to Solid Waste Industry?

Item	Short Term	Long Term
Income	Revenue! from soil disposal for Existing MSW and LPLF permitted to receive soil.	Declining revenue as development wanes. Head space fills ahead of plan. Permit expansions and new facilities
Landfill head space	Increased filling	Predicted filling duration decreased
Permitting	Communications with JHD about new waste stream	New cells constructed sooner than plan or new landfills permitted
Permitting of limited purpose landfills for soil	May have been a business consideration	



Piles for storage, treatment, recycling (Section 320)

- Expanded to include Impacted Soil (i.e., soil stockpiles)
- No volume exemption (i.e., no stockpile is too small)
- Requires permit for Impacted Soil stockpiles remaining more than 3 months
- Extensive permit design, operation and reporting requirements – similar to those required for an inert waste landfill
- Surfacing requirements for roadways and beneath materials capable of leaching
- Stormwater management requirements



Suggestions to clarify and modify Section 235

- Resolve conflicts with MTCA regulation and ARAR issue
- Narrow applicability to soil classes with specific concerns: e.g., street waste, engineered soil, gravel mine refill. (i.e., eliminate regulation of general fill)
- Use full MTCA cleanup level process **or** adopt reduced number of SSL parameters and categories
- Eliminate exclusion of sites with pre-existing Impacted Soil fill
- Allow consideration of engineering measures (as allowed in MTCA) for planned development in defining limited access sites and applicability of other criteria
- Clarify/narrow applicability and reduce permitting requirements for management of piles



Summary & Considerations for Port

- **Permitting and compliance:** Move some costs to permitting stage, schedule delays, report use of >2000 CY to JHD, meet exemption requirements, liabilities, penalties for non-compliance, and notice on deed.
- **Infrastructure Development:** Know site conditions (site soil, import fill?), process and new restrictions for soil import/export, 90 day stockpiling limit for impacted soil, costs, contracting, schedule delays.
- **Real estate transactions:** Consider new category of environmental liability, additional due diligence item for Phase I/II, new valuation element, notice on deed.
- **MTCA & Cleanup sites:** ARAR? Prevents re-use of impacted soils at cleanup sites



Change of focus for talk...

From: “Impacted Soil” and How Ecology’s Proposed Revisions to the Washington State Solid Waste Handling Standards (Chapter 173-350 WAC) Will Change the Environmental Liability Paradigm.”

To: WAC 173-350 Revisions & What replaces proposed “Impacted Soil” Regulations?



Background - Ecology's goals for Section 995

- Control specific “**impacted soil and sediment**” types, including street waste, engineered soil and petroleum contaminated soil
- Respond to complaints of “**bad behavior**” by some contractors, and commercial pit operators during reclamation refill
- Address **inconsistent county policies** related to fill soil quality
- ****Integrate a **non-degradation policy** into the solid waste regulations (unstated goal; second attempt)****



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Summary of Section 995

- Creates **5 categories** of soil screening levels (SSLs) for over **200 chemical parameters**
 - Unrestricted
 - Residential/Agricultural
 - Limited Access
 - Groundwater Sensitive
 - Ecologically Sensitive
- Regulates soil/sediment used as fill if concentrations > SSLs based largely on natural background (“**Impacted Soil**”)



Section 995 permit exemptions

- Impacted Soil placed **at or near location of generation** within the project site
- Impacted Soil with **contaminants from routine human activity** placed at locations anticipated to have comparable concentrations (**Port exemption deleted**)
- Impacted Soil placed at **locations containing similar or greater concentrations** (**requires soil testing of source and receiving site**)
- Impacted Soil placed at **locations that will not create adverse impact** to human health or the environment (**requires testing of source and comparison to SSLs**)



Section 995 Implications

- Significant liability if Ecology/LHD determines (after the fact) permit exemptions not met
- Significant liability/cost/schedule uncertainties for property development
 - New buyer/seller environmental liability paradigm
 - Cost/schedule implications for Section 995 due diligence
 - Schedule delay/uncertainty for regulatory consultation
- Level of Ecology and LHD involvement appears greatly underestimated and “infrastructure” not in place for timely & consistent regulatory consultation
- Reduced reuse of Impacted Soil due to liability and/or schedule concerns

