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Title of Law: Environmental Excellence Program Agreements

Effective Date of Law: 7-27-97

Citation: Chapter 381, Laws of 1997

## Overview

This new law authorizes and directs state agencies to solicit and support environmental excellence agreements that use innovative environmental measures or strategies to achieve environmental results more effectively or efficiently.

More effective environmental results are defined as results that are better overall than those that would be achieved under the legal requirements superseded or replaced by the agreement.

More efficient environmental results are defined as results that are achieved at reduced cost under the legal requirements superseded or replaced by the agreement, but the overall environmental results achieved by the participating facility can not be decreased.

For the regulated community this is a voluntary program, and will depend on facilities coming in with proposals for environmental excellence agreements.

## Legal Impacts

The terms of an environmental excellence agreement supersede and replace otherwise applicable requirements under several of Washington State's environmental laws.

The laws affected are as follows: Chapter 43.21a RCW Department Of Ecology, Chapter 70.94 RCW Washington Clean Air Act, Chapter 70.95 RCW Solid Waste Management--Reduction And Recycling, Chapter 70.105 RCW Hazardous Waste Management, Chapter 70.119a RCW Public Water Systems--Penalties And Compliance, Chapter 75.20 RCW Construction Projects In State Waters, Chapter 90.48 RCW Water Pollution Control, Chapter 90.52 RCW Pollution Disclosure Act Of 1971, Chapter 90.58 RCW Shoreline Management Act Of 1971, Chapter 90.64 RCW Dairy Waste Management, and Chapter 90.71 RCW Puget Sound Water Quality Protection.

Chapter 70.105d RCW Hazardous Waste Cleanup--Model Toxics Control Act was excluded in the new law. Additionally, the term environmental laws as used in this new law does not include any provision of the Revised Code of Washington, or of any municipal ordinance or enactment, that regulates the selection of a location for a new facility.

While federal laws are not affected by this new state law, the terms and conditions of federal permits issued by the state for delegated programs may be affected.

Additionally, in no case can an environmental excellence agreement allow any of the following: (1) the release of water pollutants that will cause to be exceeded, at points of compliance in the ambient environment established pursuant to law, numeric surface water or ground water quality criteria or numeric sediment quality criteria adopted as rules under chapter 90.48 RCW; or (2) the emission of any air contaminants that will cause to be exceeded any air quality standard as defined in RCW 70.94.030(3); or (3) a decrease in the overall environmental results achieved by

the participating facility compared with results achieved over a representative period before the date on which the agreement is proposed by the sponsor.

The Act does not alter in any way the authority of the state agencies, the Attorney General or county prosecuting attorneys to bring enforcement actions for violations of the legal requirements under which a facility must operate. This includes regulatory requirements that are not affected by an agreement, as well as the enforceable provisions of an agreement. The legal requirements superseded or replaced by an agreement are no longer applicable to or enforceable for that facility.

The Act does not increase or diminish any citizen's right to file a lawsuit for a facility's violation of applicable legal requirements.

#### Agency's Role

If multiple agencies have jurisdiction to administer state environmental laws affected by an environmental excellence agreement, the Department of Ecology shall designate or act as the coordinating agency.

The coordinating agency has the following responsibilities during the developmental phase of any proposal: extend an invitation to participate in the development of the proposal to a broad and representative sector of the public likely to be affected by the environmental excellence program agreement, select participants to be included in the stakeholder process that are representative of the diverse sectors of the public that are interested in the agreement, identify any additional provisions that would improve the stakeholder process, provide for notice to the United States Environmental Protection Agency or other responsible federal agency of each proposed environmental excellence program agreement that may affect legal requirements of any program administered by that agency, provide public notice, opportunity for public comment and prepare a responsiveness summary to any public comments.

The coordinating agency also has the following responsibilities during the implementation phase of any proposal: make a determination to approve or reject agreements; where appropriate modify permits and or enter into court agreements to insure legal requirements are adequately monitored, reported, and have authorized enforcement repercussions for violations of such legal requirements; for the goals stated in the approved agreements insure that substantial progress is being made; track and assess fees to cover all the processing expenses associated with the agreement; track and assess any additional fees identified in the agreement.

#### Sponsor's Role

The sponsor or authorized representative proposes an environmental excellence program agreement. In the proposed agreement, at a minimum, the following information must be provided:

(a) A statement that describes how the proposal is consistent with the purpose of the new law and the project approval criteria in section 3 of the new law;

(b)(i) For a site-specific proposal, a comprehensive description of the proposed environmental excellence project that includes the nature of the facility and the operations that will be affected, how the facility or operations will achieve results more effectively or efficiently, and the nature of the results anticipated; or

(ii) For a programmatic proposal, a comprehensive description of the proposed environmental excellence project that identifies the facilities and the operations that are expected to participate, how participating facilities or operations will achieve environmental results more effectively or efficiently, the nature of the results anticipated, and the method to identify and document the commitments made by individual participants;

(c) An environmental checklist, containing sufficient information to reasonably inform the public of the nature of the proposed environmental excellence program agreement and describing probable significant adverse environmental impacts and environmental benefits expected from implementation of the proposal;

(d) A draft environmental excellence program agreement (this draft agreement would need to have as appropriate, the information stated in section 7 of the new law);

(e) A description of the stakeholder process as provided in section 6 of the new law;

(f) A preliminary identification of the permit amendments or modifications that may be necessary to implement the proposed environmental excellence program agreement.

The sponsor must also provide information and agree to specific terms in the final agreement. Specific information and terms which at a minimum must be included in a final agreement includes the following:

(1) An identification of all legal requirements that are superseded or replaced by the environmental excellence program agreement;

(2) A description of all legal requirements that are enforceable as provided in section 13(1) of the new law that are different from those legal requirements applicable in the absence of the environmental excellence program agreement;

(3) A description of the voluntary goals that are or will be pursued by the sponsor;

(4) A statement describing how the environmental excellence program agreement will achieve the purposes of this chapter;

(5) A statement describing how the environmental excellence program agreement will be implemented, including a list of steps and an implementation schedule;

(6) A statement that the proposed environmental excellence program agreement will not increase overall worker safety risks or cause an unjust or disproportionate and inequitable distribution of environmental risks among diverse economic and cultural communities;

(7) A summary of the stakeholder process that was followed in the development of the environmental excellence program agreement;

(8) A statement describing how any participating facility shall measure and demonstrate its compliance with the environmental excellence program agreement including, without limitation, a description of the methods to be used to monitor performance, criteria that represent acceptable performance, and the method of reporting performance to the public and local communities. The facility's compliance with the agreement must be independently verifiable;

(9) A description of and plan for public participation in the implementation of the environmental excellence program agreement and for public access to information needed to assess the benefits of the environmental excellence program agreement and the sponsor's compliance with the environmental excellence program agreement;

(10) A schedule of periodic performance review of the environmental excellence program agreement by the directors that signed the agreement;

(11) Provisions for voluntary and involuntary termination of the agreement;

(12) The duration of the environmental excellence program agreement and provisions for renewal;

(13) Statements approving the environmental excellence program agreement made by the sponsor and by or on behalf of directors of each state, regional, or local agency administering legal requirements that are identified according to section 7(1) of the new law;

(14) Additional terms as requested by the directors signing the environmental excellence program agreement and consistent with the new law;

(15) Draft permits or permit modifications as needed to implement the environmental excellence program agreement;

(16) With respect to a programmatic environmental excellence program agreement, a statement of the method with which to identify and document the specific commitments to be made by individual participants.

The sponsor must pay all processing fees assessed by the agency, as well as any additional fees identified in the final agreement.

The sponsor must meet or exceed all the legal requirements established in the agreement or be exposed to enforcement.

The sponsor must also demonstrate substantial progress in meeting the goals stated in the agreement or face having the agreement terminated.

#### Approval/Rejection of Proposed Projects

The decision to not approve an environmental excellence program agreement is not subject to appeal, and is at the sole discretion of the respective director(s). But, state agencies which have delegated federal programs, can not approve an agreement containing terms to which the delegating federal agency has objected. Similarly, local agencies which have delegated state programs, can not approve an agreement containing terms to which the delegating state agency has objected.

The decision to approve or terminate an agreement is subject to judicial review in superior court. But to grant relief from such decisions the court must find that the action: (a) Violates constitutional provisions; (b) exceeds the statutory authority of the agency; (c) was arbitrary and capricious; or (d) was taken without compliance with the procedures provided in the law. However, the decision of the director or directors shall be accorded substantial deference by the court.

#### Evaluation of Success/Funding/Sunset

The Director of the Department of Ecology is required to appoint an advisory committee, to review the effectiveness of this program.

Ecology can assess fees for the "processing" of an environmental excellence agreements. Processing is defined broadly, so basically extra work created during the development of agreements can be charged to the sponsor.

Fees also may include, to the extent specified by the agreement, the agency's direct costs of monitoring compliance with those specific terms of an agreement not covered by permits issued to the participating facility.

None of the assessed fees can be spent by the agency unless appropriated.

The law sunsets in June 30, 2002. But, agreements entered into before that date are in effect for the duration stated in the agreement.

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## Environmental Excellence Program Agreements

June 5, 1997

### 1. Environmental Excellence Program Agreements authorized by ESSHB 1866

In its most recent session, the Washington legislature authorized an entirely new approach to environmental regulation. Engrossed Second Substitute House Bill 1866 authorizes state agencies administering environmental regulatory programs to enter into "Environmental Excellence Program Agreements" ("EEPAs") that set facility-specific regulatory requirements. The terms of an EEPA supersede and replace otherwise applicable requirements under Washington's environmental laws--including statutes, regulations and guidance.

### 2. Common Sense, Innovative, Results-oriented Environmental Regulation

As signed by the Governor, ESSHB 1866 ("the Act") provides state agencies and the regulated community with the opportunity to use common sense, ingenuity, and good management to craft environmental regulatory programs that will achieve the State's environmental goals better, faster, and less expensively than otherwise possible. The Act provides regulated facilities with the incentive to be better environmental managers. In his message to the legislature on the bill, Governor Locke emphasized his commitment to improving government service, and his belief that the bill would help to achieve it:

"One element of better performance is a willingness to be innovative and creative in the pursuit of objectives. Engrossed Second Substitute House Bill 1866 reflects just such an approach. It promotes a more efficient and results-oriented regulatory system for state, local and regional agencies that administer a host of environmental and resource protection laws."

### 3. Based on the Federal XL Program

The Act is based on Project XL ("Excellence and Leadership"), a federal initiative from EPA designed to provide regulated entities with flexibility in meeting environmental requirements while reducing pollution. It is, in effect, a Washington XL Act. EPA has authorized Project XL agreements in Georgia, Florida and Arizona. No agreements have been adopted in Washington or EPA Region 10. The absence of a clear legislative basis for the XL Program has been perceived as a limitation on its appeal and use. Project XL exists only as a result of an executive order from the Clinton Administration, and some have questioned the legal effect of the XL agreements. Washington joins Illinois, Minnesota and New Hampshire in Adopting legislation to support this innovative regulatory approach.

### 4. EEPAs are Voluntary

Entering into an EEPA is entirely voluntary. Anyone owning operating a facility subject to regulation under Washington's environmental laws may propose an EEPA. However, no one is obligated to accept the alternative regulation available under an EEPA.

### 5. Covered Environmental Regulatory Programs

The director of an agency may enter into an EEPA with any person regulated under the environmental laws of the State. The Act defines "Environmental laws" to include the laws regulating air pollution, solid waste and hazardous waste management, water pollution, drinking water, waste water treatment, shorelines management, and other responsibilities assigned to state, regional and local agencies. The definition of "environment laws" specifically excludes the Model Toxics Control Act, leaving the cleanup of hazardous waste sites unaffected by this legislation.

### 6. Standards for Approving EEPAs

State agencies are authorized to enter into an EEPA with any person regulated under the environment laws of the State. The Act defines "more effective environmental results" as results that are better overall than those that would be achieved when compared to the legal requirements that are superseded or replaced by the EEPA. "More efficient environmental results" are defined as results that are achieved at reduced cost but do not decrease the overall environmental results achieved by the participating facility.

#### 7. Requirements for Proposing an EEPA

A proposal must describe the terms of the proposed EEPA and how it meets the statutory requirements for agency approval. The Act specifically requires that a proposal include information on: 1) the nature of the facility and the operation that will be affected; 2) the nature of the results that are anticipated from the EEPA; 3) how the facility or operations will achieve the desired results; 4) how the proposal is consistent with the purposes of the Act and approval criteria; 5) an environmental checklist to inform the public of the probable impacts and benefits expected from the EEPA; 6) a draft environmental agreement; and 7) a preliminary identification of permit amendments or modifications that are needed to implement the EEPA.

#### 8. Stakeholder Process is Key to the successful EEPA Proposal

The Act is emphatic that the participation of stakeholders--community organizations, nearby residents, employees, local governments, environmental organizations, etc--is vital to the development of an EEPA. Stakeholder participation is considered necessary to an informed agency decision, and is essential to public acceptance. As a consequence, an EEPA proposal must include a plan for substantial stakeholder involvement. The agency may require changes to the stakeholder process, to ensure that it is appropriate to the proposal.

#### 9. Terms of the EEPA

The Act provides a detailed list of the terms that must be included in an EEPA. These include: 1) an identification of all legal requirements that are superseded or replaced by the EEPA; 2) a description of each of the enforceable requirements contained in the EEPA and how they differ from otherwise applicable legal requirements; 3) a statement of any voluntary goals of the project that go beyond regulatory requirements; 4) an implementation schedule; 5) a description of the stakeholder process that was followed in the development of the EEPA; 6) a statement of the methods that will be used to measure and demonstrate compliance with the EEPA; 7) a further plan for public participation in overseeing the implementation of the EEPA and for public access to information to access the benefits of and compliance with the EEPA; 8) a schedule for periodic review; 9) provisions for termination; and 10) draft permits or permit modifications.

#### 10. Multiple Program Covered by an EEPA

An EEPA can cover environmental regulatory programs administered by more than one agency. For example, it may establish the regulatory requirements for a shoreline project (administered by a county), air emissions (administered for some sources by a regional air authority), and discharges to surface waters (administered by the Department of Ecology). In other cases, each agency will sign the EEPA.

#### 11. Programmatic EEPAs for Multiple Facilities

An EEPA also can cover more than one facility, under a programmatic EEPA. Examples of possible programmatic EEPAs could include a business with more than one stationary or mobile facility, a trade association with multiple members that would use a common set of regulatory requirements, or a site with more than one regulated facility. The use of a programmatic EEPA may make the opportunities of the EEPA more available to small businesses that individually could not afford to bear the costs of development.

#### 12. Public Notice and Comment

Before an EEPA can be approved by a state agency, the agency must provide public notice of the proposed EEPA, substantial information about the facility and the proposed agreement, and an opportunity for written and oral comments. Amend other information, the agency must provide a fact sheet describing the EEPA and explaining its reasons for proposing approval.

### 13. Judicial Review in Superior Court

The approval of an EEPA is subject to judicial review. Any dissatisfied party may appeal the approval in Superior Court. The court will review the agency decision based on the written record that was before the agency. The court can overturn it only if the approval violates constitutional provisions, exceeds the statutory authority of the agency, was arbitrary and capricious, or was taken without compliance with the procedures identified in ESSHB 1866. The Act directs the court to give substantial deference to the agency analysis and decision.

It is notable that a person proposing an EEPA does not have any right to an appeal of an agency decision not to approve an EEPA. If, for example, an agency rejects a proposal on the grounds that it does not meet the standards of the Act, or that the stakeholder process was not adequate, the facility cannot dispute that decision through an appeal to the courts.

### 14. Permit or Modification Required by the EEPA

State agencies are required to modify any affected permits to conform to the provisions of the EEPA. These actions should be largely ministerial, since the permits or permit modifications are attached to the EEPA at the time it is approved by the agency and, where an appeal is filed, reviewed by the court.

### 15. Relationship to Federal Programs

The Act recognizes that many of the State's environmental programs are intertwined with programs delegated to it under federal law. Regulatory requirements required by these delegated programs cannot be changed over the objection of the responsible federal agency, generally EPA. As a consequence, early in the EEPA review process, a state agency is required to provide a copy of an EEPA proposal to any federal agency whose programs may be affected by the EEPA. Prior to approval, the state agency also must provide the federal agency with a copy of a proposed EEPA along with the state agency's public notice. The federal agency must be given an opportunity to object to those terms of an EEPA that conflict with requirements of federal law. A state agency may not approve an EEPA containing terms to which a federal agency has objected.

### 16. Enforcement Authorities Unaltered by EEPAs

The Act does not alter in any way the authority of the state agencies, the Attorney General or county prosecuting attorneys to bring enforcement actions for violations of the legal requirements under which a facility must operate. This includes regulatory requirements that are not affected by an EEPA, as well as the enforceable provisions of an EEPA. The legal requirements superseded or replaced by an EEPA are no longer applicable to or enforceable for that facility.

The Act does not increase or diminish any citizen's right to file a lawsuit for a facility's violation of applicable legal requirements.

### 17. Governor Locke Directs Ecology to Adopt Guidance

Governor Locke signed the Act, with a partial veto. The Governor struck three sections of the Act, including a section that would have exempted EEPAs from review under the State Environmental Policy Act and a section specifying the minimum circumstances under which an EEPA could be terminated.

In addition, the Governor took a relatively unusual step in sending a letter to the Director of the Department of Ecology, Tom Fitzsimmons, concerning the implementation of the EEPA program. Governor Locke expressed concern that mistrust of the EEPA program could undermine efforts to make it successful. He directed the

Department of Ecology to develop guidance for the implementation of the EEPA program, set a deadline of October 1, 1997, and directed that Ecology consult with a broad stakeholder group in developing the guidance.

## 18. EEPA Opportunities

Apart from providing broad tools to Ecology and other state agencies, what does the EEPA program really do? The best way to understand the possibilities of the EEPA program is to consider some of the projects that have progressed through the federal XL Program.

### Intel, Chandler, Ariz

The first project approved under Project XL was for the Intel semiconductor manufacturing plant in Chandler, Arizona. That agreement replaces limitations on air emissions from individual sources within the manufacturing facility with a facility-wide cap. The cap is set at a relatively low level for air pollutants presently regulated under the Clean Air Act. The agreement also goes beyond current regulatory programs by establishing a process for setting emissions limitations on air pollutants not regulated under the Clean Air Act, and establishing programs for reducing water consumption and the generation of solid, nonhazardous chemicals, and hazardous waste. In exchange, Intel is relieved from the permitting procedures required to create or modify many of the emissions sources within the plant. This permits Intel to rapidly change its product manufacturing in response to market conditions. The benefit is significant, since permitting of new or modified emissions sources can be time consuming.

### Weyerhaeuser, Flint River, Ga

At its Flint River Plant, Weyerhaeuser agreed to adopt a variety of pollution reduction programs that go beyond currently applicable regulatory requirements. These include reduced waste water discharges from its bleach plant, reduced water consumption and solid waste generation, reduced energy use, improved forest management practices for over 300,000 acres, and an environmental management program meeting ISO 14000 standards. In exchange, Weyerhaeuser will have flexibility to consolidate its regular monthly reporting to two reports per year, the opportunity to use alternative means to meet new MACT (Maximum Available Control Technology) requirements, and a waiver of certain review requirements for plant modifications that do not exceed agreed emission levels.

### Jack M. Berry, Fla

At the Jack M. Berry, Inc. facility in south Florida, the XL agreement will permit the consolidation of all twenty five of the operating and regulatory permits applicable to the Berry facility into a "Comprehensive Operating Permit." Berry also committed to implementing an environmental management program under the ISO 14000 program. Berry expects to realize significant cost savings by reducing paperwork and administration in permit processing and reporting. It will reinvest a portion of its savings in new equipment that will reduce air emissions in a way not required by any regulatory program.

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## Principles

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During its 1997 session, the Washington State Legislature adopted a law creating the Environmental Excellence Program--giving rise to both opportunities and challenges for the regulated community, for regulatory agencies, and for public interest groups. This law outlines a voluntary program for pursuing environmental objectives under a results-oriented regulatory system. It sets certain boundaries and limits, but encourages flexibility in designing the legal requirements that assure protection of human and environmental health.

The success of the Program depends upon the regulated community's motivation to change its operations, and upon the regulators ability to accommodate those changes. The Department of Ecology will solicit proposals for, and support implementation of, Environmental Excellence Program Agreements that favor or promote innovative technologies or operating procedures. Our agency will seek submittal of appropriate proposals that can be adapted by other facilities, that increase efficiencies, that improve waste management or treatment results, that prevent pollution and decrease worker exposure, and/or that increase worker or community involvement in planning and design. But it is incumbent upon the regulated community to work with us to develop alternative paths to better resource protection.

The following principles are not intended to be a "rule book" or instructions on "how to be innovative"; they merely explain how the Department of Ecology interprets this law. As this program matures, so may the principles be refined. Eventually, we may deem it useful to adopt rules or to propose additional legislation defining the program.

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## PRINCIPLES

1. The terms of an Environmental Excellence Program Agreement (EEPA) must assure that the participating facility will meet or exceed current overall environmental results.

The baseline used to evaluate proposals is the most stringent of three measures -- the sponsor's performance or industry performance during the previous two (or more) years, or the performance standards created by existing laws, regulations, orders, or permits.

We may agree to an EEP proposal that would enable the participating facility to:

- a) Improve upon its overall environmental results; or
- b) Maintain its current overall baseline performance, at a reduced cost.

We cannot agree to an EEP proposal or EEPA term allowing a participating facility to release pollutants in amounts that would result in surpassing established:

- a) Numeric surface or ground-water criteria; or
- b) Numeric sediment quality criteria; or
- c) Numeric ambient air quality criteria.

We will not agree to an EEP proposal if:

- a) A regulating federal agency objects; or
- b) State or local agencies that enforce environmental requirements, object.

2. The sponsor and the agency must insure opportunities for informed stakeholder participation during the development, evaluation, and implementation stages of any proposed agreement.

Meaningful stakeholder involvement is essential to the success of any proposal. Both the sponsor and the coordinating agency have specific legal obligations to provide adequate stakeholder notice, and to promote stakeholder involvement. Stakeholder involvement includes the opportunity for discussion and comment at multiple stages of the process, as well as access to all of the information relied upon by the agency in approving or rejecting any EEP proposal.

The sponsor must follow an approved stakeholder participation plan. The plan must describe how the participating facility will:

- a) Identify and contact stakeholders;
- b) Inform stakeholders about the facts and nature of the proposed agreement;
- c) Induce stakeholders to participate in the development, evaluation, and implementation stages of any proposed project.

The agency must assure broad public representation and informed stakeholder participation. At minimum, the agency will:

- a) Directly invite affected persons to participate;
- b) Provide access to all of the information relied upon by the agency approving or rejecting any EEP proposal;
- c) Provide at least 30 days written notice of the agency's intent to approve or modify an EEP Agreement. This notice will be published electronically, on an Internet web site; and published in hard copy, through the Washington State Register and through a newspaper of general circulation in the vicinity of the facility or facilities proposing the EEP Agreement. (If responses to the written notice demonstrate considerable public interest in the agreement, Ecology will hold public meetings or hearings on the matter.)
- d) The agency will prepare and make available a Responsiveness Summary explaining the reasoning behind agency actions responding to comments submitted by stakeholders and public interest groups.

3. The terms of any Environmental Excellence Program Agreement must insure effective monitoring and accessible reporting of the participating facility's environmental performance.

The specific terms of the agreement cannot diminish the regulator's authority or duty to verify a facility's compliance with any applicable legal requirement. The amount and type of monitoring and reporting required, will depend upon such factors as:

- a) Characteristics of the regulated pollutant(s);
- b) The facility's compliance history; and
- c) Specific federal requirements.

All data used to prepare monitoring reports will be available to the public, through the regulating agency.

4. Environmental Excellence Program Agreement terms must include effective enforcement mechanisms.

a) Environmental performance standards embodied in EEPA terms fall into two categories:

1 - "Legal requirements" are subject to the same enforcement mechanisms and policy applications as any permit, order, or other legally binding documents they replace.

2 - A participating facility must also demonstrate progress toward environmental performance improvement "goals" - or risk agency termination of the EEPA. (The legal and practical effects of such termination would be stated in the terms of the Agreement.)

b) Pre-existing permit requirements remain enforceable after execution of an EEPA, until the permit has been modified through the usual process.

c) Pre-existing legal requirements that are not specifically superseded by a term in an EEPA, remain in effect and fully enforceable through the usual mechanism.

d) An EEPA cannot supersede the authority of, or impose additional duties upon, state agencies, the Attorney General, or county prosecutors. Nor can an EEPA increase or decrease any citizen's right to sue a facility for noncompliance with legal requirements.

5. Sponsors will pay the additional agency costs attributable to Environmental Excellence Program Agreements.

No funding was allocated to the Department of Ecology to cover costs of administering the EEP. Instead, the law authorizes agencies to recover both direct and indirect costs associated with processing an EEP proposal.

a) Administrative costs of modifying a permit, are calculated into the permit fee; no additional cost will be assessed.

b) The EEP Agreement will specify any fee the agency will charge for monitoring the facility's compliance with requirements that are not covered by permits.

c) The agency may waive all, or part, of a fee.

d) This law allows sponsors to make voluntary contributions to the agency's EEP administrative fund; but

e) All fees collected and voluntary contributions deposited into the EEP account are controlled by legislative appropriation.

6. Participants will act in good faith, to develop and review Environmental Excellence Program proposals.

Anyone participating in the development of an EEPA must commit to a process characterized by courtesy, and by the assumption that all participants share an interest in protecting human health and the environment.

a) The development process will be structured according to a reasoned public involvement plan and schedule. An individual's failure to attend, comment, or otherwise participate in a timely manner, will not delay or stop the process.

b) Any person reviewing a proposed EEPA must evaluate its potential to benefit the environment, against the backdrop of immediate impacts and the practical realities demonstrated by defensible data.

c) The authority to accept or reject a proposed EEPA lies with the regulating agency. The Department of Ecology will rely solely upon defensible data in evaluating a proposed EEPA. All information weighed in agreeing to, or rejecting, a proposal will be available to the public.

7. The Department of Ecology will evaluate the impacts of each Environmental Excellence Program Agreement the agency executes.

Each EEPA will be evaluated to determine how opportunities afforded by this law were used. The Department of Ecology's evaluation will examine:

a) How the pre-existing regulatory system obstructed achievement of the environmental results attained under an EEPA;

b) Actual pollution loads to the environment, measured before and after the agreement's implementation;

c) The sponsor's actual environmental protection compliance costs, measured before and after the agreement's implementation; and

d) An accounting of any EEP-specific cost to regulators that was not recovered.

**Bill text:**

**55th Legislature**

**1997 Regular Session**

**ENVIRONMENTAL EXCELLENCE PROGRAM AGREEMENTS**

**EFFECTIVE DATE:** 7/27/97

AN ACT Relating to the establishment of voluntary programs creating environmental excellence program agreements; amending RCW 90.54.020;

adding a new section to chapter 43.21A RCW; adding a new section to chapter 70.94 RCW; adding a new section to chapter 70.95 RCW; adding a new section to chapter 70.105 RCW; adding a new section to chapter 70.119A RCW; adding a new section to chapter 75.20 RCW; adding a new section to chapter 90.48 RCW; adding a new section to chapter 90.52 RCW; adding a new section to chapter 90.58 RCW; adding a new section to chapter 90.64 RCW; adding a new section to chapter 90.71 RCW; adding a new chapter to Title 43 RCW; and creating new sections.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

Sec. 1. The purpose of this act is to create a voluntary program authorizing environmental excellence program agreements with persons regulated under the environmental laws of the state of Washington, and to direct agencies of the state of Washington to solicit and support the development of agreements that use innovative environmental measures or strategies to achieve environmental results more effectively or efficiently. Agencies shall encourage environmental excellence program agreements that favor or promote pollution prevention, source reduction, or improvements in practices that are transferable to other interested entities or that can achieve better overall environmental results than required by otherwise applicable rules and requirements. In enacting this act it is not the intent of the legislature that state environmental standards be applied in a manner that could result in these state standards being waived under section 121 of the federal comprehensive environmental response, compensation, and liability act

Sec. 2. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "State, regional, or local agency" means an agency, board, department, authority, or commission that administers environmental laws.

(2) "Coordinating agency" means the state, regional, or local agency with the primary regulatory responsibility for the proposed environmental excellence program agreement. If multiple agencies have jurisdiction to administer state environmental laws affected by an environmental excellence agreement, the department of ecology shall designate or act as the coordinating agency.

(3) "Director" means the individual or body of individuals in whom the ultimate legal authority of an agency is vested by any provision of law. If the agency head is a body of individuals, a majority of those individuals constitutes the director.

(4) "Environmental laws" means chapters 43.21A, 70.94, 70.95, 70.105, 70.119A, 75.20, 90.48, 90.52, 90.58, 90.64, and 90.71 RCW, and RCW 90.54.020(3)(b) and rules adopted under those chapters and section.

The term environmental laws as used in this chapter does not include any provision of the Revised Code of Washington, or of any municipal ordinance or enactment, that regulates the selection of a location for a new facility.

(5) "Facility" means a site or activity that is regulated under any of the provisions of the environmental laws.

(6) "Legal requirement" includes any provision of an environmental law, rule, order, or permit.

(7) "Sponsor" means the owner or operator of a facility, including a municipal corporation, subject to regulation under the environmental laws of the state of Washington, or an authorized representative of the owner or operator, that submits a proposal for an environmental excellence program agreement.

(8) "Stakeholder" means a person who has a direct interest in the proposed environmental excellence program agreement or who represents a public interest in the proposed environmental excellence program agreement. Stakeholders may include communities near the project, local or state governments, permittees, businesses, environmental and other public interest groups, employees or employee representatives, or other persons.

Sec. 3. An environmental excellence program agreement entered into under this chapter must achieve more effective or efficient environmental results than the results that would be otherwise achieved. The basis for comparison shall be a reasonable estimate of the overall impact of the participating facility on the environment in the absence of an environmental excellence program agreement. More effective environmental results are results that are better overall than those that would be achieved under the legal requirements superseded or replaced by the agreement. More efficient environmental results are results that are achieved at reduced cost but do not decrease the overall environmental results achieved by the participating facility. An environmental excellence program agreement may not authorize either:

(1) the release of water pollutants that will cause to be exceeded, at points of compliance in the ambient environment established pursuant to law, numeric surface water or ground water quality criteria or numeric sediment quality criteria adopted as rules under chapter 90.48 RCW; or

(2) the emission of any air contaminants that will cause to be exceeded any air quality standard as defined in RCW 70.94.030(3); or

(3) a decrease in the overall environmental results achieved by the participating facility compared with results achieved over a representative period before the date on which the agreement is proposed by the sponsor. However, an environmental excellence program agreement may authorize reasonable increases in the release of pollutants to permit increases in facility production or facility expansion and modification.

Sec. 4.

(1) The director of a state, regional, or local agency may enter into an environmental excellence program agreement with any sponsor, even if one or more of the terms of the environmental excellence program agreement would be inconsistent with an otherwise applicable legal requirement. An environmental excellence program agreement must meet the requirements of section 3 of this act. Otherwise applicable legal requirements identified according to section 7(1) of this act shall be superseded and replaced in accordance with section 9 of this act.

(2) The director of a state, regional, or local agency may enter into an environmental excellence program agreement only to the extent the state, regional, or local agency has jurisdiction to administer state environmental laws either directly or indirectly through the adoption of rules.

(3) Where a sponsor proposes an environmental excellence program agreement that would affect legal requirements applicable to the covered facility that are administered by more than one state, regional, or local agency, the coordinating agency shall take the lead in developing the environmental excellence program agreement with the sponsor and other agencies administering legal requirements applicable to the covered facility and affected by the agreement. The environmental excellence program agreement does not become effective until the agreement is approved by the director of each agency administering legal requirements identified according to section 7(1) of this act.

(4) No director may enter into an environmental excellence program agreement applicable to a remedial action conducted under the Washington model toxics control act, chapter 70.105D RCW, or the federal comprehensive environmental response, compensation and liability act (42 U.S.C. Sec. 9601 et seq.). No action taken under this chapter shall be deemed a waiver of any applicable, relevant, or appropriate requirements for any remedial action conducted under the Washington model toxics control act or the federal comprehensive environmental response, compensation and liability act.

(5) The directors of state, regional, or local agencies shall not enter into an environmental excellence program agreement or a modification of an environmental excellence program agreement containing terms affecting legal requirements adopted to comply with provisions of a federal regulatory program and to which the responsible federal agency objects after notice under the terms of section 8(4) of this act.

(6) The directors of regional or local governments may not enter into an environmental excellence program agreement or a modification of an environmental excellence program agreement containing terms affecting legal requirements that are subject to review or appeal by a state agency, including but not limited to chapters 70.94, 70.95, and 90.58 RCW, and to which the responsible state agency objects after notice is given under the terms of section 8(4) of this act.

#### Sec. 5.

(1) A sponsor may propose an environmental excellence program agreement. A trade association or other authorized representative of a sponsor or sponsors may propose a programmatic environmental excellence program agreement for multiple facilities.

(2) A sponsor must submit, at a minimum, the following information and other information that may be requested by the director or directors required to sign the agreement:

(a) A statement that describes how the proposal is consistent with the purpose of this chapter and the project approval criteria in section 3 of this act;

(b)(i) For a site-specific proposal, a comprehensive description of the proposed environmental excellence project that includes the nature of the facility and the operations that will be affected, how the facility or operations will achieve results more effectively or efficiently, and the nature of the results anticipated; or

(ii) For a programmatic proposal, a comprehensive description of the proposed environmental excellence project that identifies the facilities and the operations that are expected to participate, how participating facilities or operations will achieve environmental results more effectively or efficiently, the nature of the results anticipated, and the method to identify and document the commitments made by individual participants;

(c) An environmental checklist, containing sufficient information to reasonably inform the public of the nature of the proposed environmental excellence program agreement and describing probable significant adverse environmental impacts and environmental benefits expected from implementation of the proposal;

(d) A draft environmental excellence program agreement;

(e) A description of the stakeholder process as provided in section 6 of this act;

(f) A preliminary identification of the permit amendments or modifications that may be necessary to implement the proposed environmental excellence program agreement.

#### Sec. 6.

(1) Stakeholder participation in and support for an environmental excellence program agreement is vital to the integrity of the environmental excellence program agreement and helps to inform the decision whether an environmental excellence program agreement can be approved.

(2) A proposal for an environmental excellence program agreement shall include the sponsor's plan to identify and contact stakeholders, to advise stakeholders of the facts and nature of the project, and to request stakeholder participation and review. Stakeholder participation and review shall occur during the development, consideration, and implementation stages of the proposed environmental excellence program agreement. The plan shall include notice to the employees of the facility to be covered by the proposed environmental excellence program agreement and public notice in the area of the covered facility.

(3) The coordinating agency shall extend an invitation to participate in the development of the proposal to a broad and representative sector of the public likely to be affected by the environmental excellence program agreement, including representatives of local community, labor, environmental, and neighborhood advocacy groups. The coordinating agency shall select participants to be included in the stakeholder process that are representative of the diverse sectors of the public that are interested in the agreement. The stakeholder process shall include the opportunity for discussion and comment at multiple stages of the process and access to the information relied upon by the directors in approving the agreement.

(4) The coordinating agency will identify any additional provisions for the stakeholder process that the director of the coordinating agency, in the director's sole discretion, considers appropriate to the success of the stakeholder

process, and provide for notice to the United States environmental protection agency or other responsible federal agency of each proposed environmental excellence program agreement that may affect legal requirements of any program administered by that agency.

Sec. 7. An environmental excellence program agreement must contain the following terms and conditions:

- (1) An identification of all legal requirements that are superseded or replaced by the environmental excellence program agreement;
- (2) A description of all legal requirements that are enforceable as provided in section 13(1) of this act that are different from those legal requirements applicable in the absence of the environmental excellence program agreement;
- (3) A description of the voluntary goals that are or will be pursued by the sponsor;
- (4) A statement describing how the environmental excellence program agreement will achieve the purposes of this chapter;
- (5) A statement describing how the environmental excellence program agreement will be implemented, including a list of steps and an implementation schedule;
- (6) A statement that the proposed environmental excellence program agreement will not increase overall worker safety risks or cause an unjust or disproportionate and inequitable distribution of environmental risks among diverse economic and cultural communities;
- (7) A summary of the stakeholder process that was followed in the development of the environmental excellence program agreement;
- (8) A statement describing how any participating facility shall measure and demonstrate its compliance with the environmental excellence program agreement including, without limitation, a description of the methods to be used to monitor performance, criteria that represent acceptable performance, and the method of reporting performance to the public and local communities. The facility's compliance with the agreement must be independently verifiable;
- (9) A description of and plan for public participation in the implementation of the environmental excellence program agreement and for public access to information needed to assess the benefits of the environmental excellence program agreement and the sponsor's compliance with the environmental excellence program agreement;
- (10) A schedule of periodic performance review of the environmental excellence program agreement by the directors that signed the agreement;
- (11) Provisions for voluntary and involuntary termination of the agreement;
- (12) The duration of the environmental excellence program agreement and provisions for renewal;
- (13) Statements approving the environmental excellence program agreement made by the sponsor and by or on behalf of directors of each state, regional, or local agency administering legal requirements that are identified according to section 7(1) of this act;
- (14) Additional terms as requested by the directors signing the environmental excellence program agreement and consistent with this chapter;
- (15) Draft permits or permit modifications as needed to implement the environmental excellence program agreement;
- (16) With respect to a programmatic environmental excellence program agreement, a statement of the method with which to identify and document the specific commitments to be made by individual participant.

Sec. 8.

- (1) The coordinating agency shall provide at least thirty days after notice has been published in a newspaper under subsection (2) of this section for public comment on a proposal to enter into or modify an environmental excellence program agreement. The coordinating agency may provide for an additional period of public comment if required by the complexity of the proposed environmental excellence program agreement and the degree of public interest. Before the start of the comment period, the coordinating agency shall prepare a proposed agreement, a public notice and a fact sheet. The fact sheet shall:
  - (a) Briefly describe the principal facts and the significant factual, legal, methodological and policy questions considered by the directors signing the agreement, and the directors' proposed decisions; and
  - (b) briefly describe how the proposed action meets the requirements of section 3 of this act.
- (2) The coordinating agency shall publish notice of the proposed agreement in the Washington State Register and in a newspaper of general circulation in the vicinity of the facility or facilities covered by the proposed environmental excellence program agreement. The notice shall generally describe the agreement or modification; the facilities to be

covered; summarize the changes in legal requirements that will result from the agreement; summarize the reasons for approving the agreement or modifications; identify an agency person to contact for additional information; state that the proposed agreement or modification and fact sheet are available on request; and state that comments may be submitted to the agency during the comment period. The coordinating agency shall order a public informational meeting or a public hearing to receive oral comments if the written comments during the comment period demonstrate considerable public interest in the proposed agreement.

(3) The coordinating agency shall prepare and make available a responsiveness summary indicating the agencies' actions taken in response to comments and the reasons for those actions.

(4) With respect to an environmental excellence program agreement that affects legal requirements adopted to comply with provisions of a federal regulatory program, the coordinating agency shall provide a copy of the environmental excellence program agreement, and a copy of the notice required by subsection (1) of this section, to the federal agency that is responsible for administering that program at least thirty days before entering into or modifying the environmental excellence program agreement, and shall afford the federal agency the opportunity to object to those terms of the environmental excellence program agreement or modification of an environmental excellence program agreement affecting the legal requirements. The coordinating agency shall provide similar notice to state agencies that have statutory review or appeal responsibilities regarding provisions of the environmental excellence program agreement.

#### Sec. 9.

(1) Notwithstanding any other provision of law, any legal requirement identified under section 7(1) of this act shall be superseded or replaced in accordance with the terms of the environmental excellence program agreement. Legal requirements contained in a permit that are affected by an environmental excellence program agreement will continue to be enforceable until such time as the permit is revised in accordance with subsection (2) of this section. With respect to any other legal requirements, the legal requirements contained in the environmental excellence program agreement are effective as provided by the environmental excellence program agreement, and the facility or facilities covered by an environmental excellence program agreement shall comply with the terms of the environmental excellence program agreement in lieu of the legal requirements that are superseded and replaced by the approved environmental excellence program agreement.

(2) Any permits affected by an environmental excellence program agreement shall be revised to conform to the environmental excellence program agreement by the agency with jurisdiction. The permit revisions will be completed within one hundred twenty days of the effective date of the agreement in accordance with otherwise applicable procedural requirements, including, where applicable, public notice and the opportunity for comment, and the opportunity for review and objection by federal agencies.

(3) Other than as superseded or replaced as provided in an approved environmental excellence program agreement, any existing permit requirements remain in effect and are enforceable.

(4) A programmatic environmental excellence program agreement shall become applicable to an individual facility when all directors entering into the programmatic agreement approve the owner or operator's commitment to comply with the agreement. A programmatic agreement may not take effect, however, until notice and an opportunity to comment for the individual facility has been provided in accordance with the requirements of section 8 (1) through (3) of this act.

#### Sec. 10.

(1) A decision by the directors of state, regional, or local agencies to approve a proposed environmental excellence program agreement, or to terminate or modify an approved environmental excellence program agreement, is subject to judicial review in superior court. For purposes of judicial review, the court may grant relief from the decision to approve or modify an environmental excellence program agreement only if it determines that the action:

- (a) Violates constitutional provisions;
- (b) exceeds the statutory authority of the agency;
- (c) was arbitrary and capricious; or
- (d) was taken without compliance with the procedures provided by this chapter.

However, the decision of the director or directors shall be accorded substantial deference by the court. A decision not to enter into or modify an environmental excellence program agreement and a decision not to accept a commitment under section 9(4) of this act to comply with the terms of a programmatic environmental excellence

agreement are within the sole discretion of the directors of the state, regional, or local agencies and are not subject to review.

(2) An appeal from a decision to approve or modify a facility specific or a programmatic environmental excellence program agreement is not timely unless filed with the superior court and served on the parties to the environmental excellence program agreement within thirty days of the date on which the agreement or modification is signed by the director. For an environmental excellence program agreement or modification signed by more than one director, there is only one appeal, and the time for appeal shall run from the last date on which the agreement or modification is signed by a director.

(3) A decision to accept the commitment of a specific facility to comply with the terms of a programmatic environmental excellence program agreement, or to modify the application of an agreement to a specific facility, is subject to judicial review as described in subsection (1) of this section. An appeal is not timely unless filed with the superior court and served on the directors signing the agreement, the sponsor, and the owner or operator of the specific facility within thirty days of the date the director or directors that signed the programmatic agreement approve the owner or operator's commitment to comply with the agreement. For a programmatic environmental excellence program agreement or modification signed by more than one director, there shall be only one appeal and the time for appeal shall run from the last date on which a director approves the commitment.

(4) The issuance of permits and permit modifications is subject to review under otherwise applicable law.

(5) An appeal of a decision by a director under section 11 of this act to terminate in whole or in part a facility specific or programmatic environmental excellence program agreement is not timely unless filed with the superior court and served on the director within thirty days of the date on which notice of the termination is issued under section 11(2) of this act.

#### Sec. 11.

(1) In addition to any termination provisions contained in an environmental excellence program agreement, a director of an agency may terminate an environmental excellence program agreement in whole or in part with respect to a legal requirement administered by that agency, if the director finds:

(a) That after notice and a reasonable opportunity to cure, the covered facility is in violation of a material requirement of the agreement;

(b) that the facility has repeatedly violated any requirements of the agreement;

(c) that the operation of the facility under the agreement has caused endangerment to public health or the environment that cannot be remedied by modification of the agreement; or

(d) the facility has failed to make substantial progress in achieving the voluntary goals identified under section 6(4) of this act, and these goals are material to the overall objectives of the agreement.

(2) A director of an agency terminating an environmental excellence program agreement in any respect shall provide each of the parties to the agreement with a written notice of that action specifying the extent to which the environmental excellence program agreement is to be terminated, the factual and legal basis for termination, and a description of the opportunity for judicial review of the decision to terminate the environmental excellence program agreement.

(3) If a director terminates less than the entire environmental excellence program agreement, the owner or operator of the covered facility may elect to terminate the entire agreement as it applies to the facility.

(4) If a director decides to terminate an environmental excellence program agreement because the facility has not been able to meet the legal requirements established under the agreement, or because operation of the facility under the agreement has caused endangerment to public health or the environment, as provided in subsection (1)(c) of this section, the director may establish in the notice of termination:

(a) Practical interim requirements for the facility that are no less stringent than the legal requirements that would apply to the facility in the absence of the agreement; and

(b) a practical schedule of compliance for meeting the interim requirements. The interim requirements and schedule of compliance shall be subject to judicial review under the provisions of section 10(5) of this act. The facility shall comply with the interim requirements established under this subsection after they are final and no longer subject to judicial review until applicable permits or permit modifications have been issued under section 12 of this act.

Sec. 12. After a termination under section 11 of this act is final and no longer subject to judicial review, the sponsor has sixty days in which to apply for any permit or approval affected by any terminated portion of the environmental excellence program agreement. An application filed during the sixty-day period shall be deemed a timely application

for renewal of a permit under the terms of any applicable law. Except as provided in section 11(4) of this act, the terms and conditions of the environmental excellence program agreement and of permits issued will continue in effect until a final permit or approval is issued. If the sponsor fails to submit a timely or complete application, any affected permit or approval may be modified at any time that is consistent with applicable law.

Sec. 13.

(1) The legal requirements contained in the environmental excellence program agreement in accordance with section 7(2) of this act are enforceable commitments of the facility covered by the agreement. Any violation of these legal requirements is subject to penalties and remedies to the same extent as the legal requirements that they superseded or replaced.

(2) The voluntary goals stated in the environmental excellence program agreement in accordance with section 7(3) of this act are voluntary commitments of the facility covered by the agreement. If the facility fails to meet these goals, it shall not be subject to any form of enforcement action, including penalties, orders, or any form of injunctive relief. The failure to make substantial progress in meeting these goals may be a basis on which to terminate the environmental excellence program agreement under section 11 of this act.

(3) Nothing in this chapter limits the authority of an agency, the attorney general, or a prosecuting attorney to initiate an enforcement action for violation of any applicable legal requirement. However, no civil, criminal, or administrative action may be brought with respect to any legal requirement that is superseded or replaced under the terms of an environmental excellence program agreement.

(4) This chapter does not create any new authority for citizen suits, and does not alter or amend other statutory provisions authorizing citizen suits.

Sec. 14. An environmental excellence program agreement may contain a reduced fee schedule with respect to a program applicable to the covered facility or facilities.

Sec. 15. A decision to approve an environmental excellence program agreement is not subject to the requirements of the state environmental policy act, chapter 43.21C RCW, including the requirement to prepare an environmental impact statement under RCW 43.21C.031. However, the consideration of a proposed environmental excellence program agreement will integrate an assessment of environmental impacts.

Sec. 16. Any state, regional, or local agency administering programs under an environmental law may adopt rules or ordinances to implement this chapter. However, it is not necessary that an agency adopt rules or ordinances in order to consider or enter into environmental excellence program agreements.

Sec. 17. The director of the department of ecology shall appoint an advisory committee to review the effectiveness of the environmental excellence program agreement program and to make a recommendation to the legislature concerning the continuation, termination, or modification of the program. The committee also may make recommendations it considers appropriate for revision of any regulatory program that is affected by an environmental excellence program agreement. The committee shall be composed of one representative each from two state agencies, two representatives of the regulated community, and two representatives of environmental organizations or other public interest groups. The committee must submit a report and its recommendation to the legislature not later than October 31, 2001. The department of ecology shall provide the advisory committee with such support as they may require.

Sec. 18.

(1) Agencies authorized to enter into environmental excellence program agreements may assess and collect a fee to recover the costs of processing environmental excellence program agreement proposals. The amount of the fee may not exceed the direct and indirect costs of processing the environmental excellence program agreement proposal. Processing includes, but is not limited to: Working with the sponsor to develop the agreement, meeting with stakeholder groups, conducting public meetings and hearings, preparing a record of the decision to enter into or modify an agreement, and defending any appeal from a decision to enter into or modify an agreement. Fees also may include, to the extent specified by the agreement, the agencies' direct costs of monitoring compliance with those specific terms of an agreement not covered by permits issued to the participating facility.

(2) Agencies assessing fees may graduate the initial fees for processing an environmental excellence program agreement proposal to account for the size of the sponsor and to make the environmental excellence program agreement program more available to small businesses. An agency may exercise its discretion to waive all or any part of the fees.

(3) Sponsors may voluntarily contribute funds to the administration of an agency's environmental excellence program agreement program.

Sec. 19. The authority of a director to enter into a new environmental excellence program agreement program shall be terminated June 30, 2002. Environmental excellence program agreements entered into before June 30, 2002, shall remain in force and effect subject to the provisions of this chapter.

Sec. 32. The environmental excellence account is hereby created in the state treasury. All fees and voluntary contributions collected by state agencies under section 18 of this act shall be deposited into the account. Moneys in the account may be spent only after appropriation. Expenditures from the account may be used only for purposes consistent with the environmental excellence program created under sections 2 through 19 of this act. Moneys in the account may be appropriated to each agency in an amount equal to the amount each agency collects and deposits into the account.