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October 23, 2020

VIA EMAIL ONLY

Clint Stanovsky
Cleanup Rulemaking Lead
TCP, Policy and Technical Support Unit
Department of Ecology
Clinton.stanovsky@ecy.wa.gov

Re: MTCA Cleanup Rule Stakeholder and Tribal Advisory Group
Comments on Draft Cleanup Rule: WAC 173-340-340 (Biennial Program Plans and Expenditures)

Dear Mr. Stanovsky:

I am providing written comments on draft proposed changes to the MTCA Cleanup Rule concerning Ecology's biennial program planning and reporting, which were discussed during the MTCA Cleanup Rule Stakeholder Tribal and Advisory Group ("STAG") meeting on March 5, 2020. These comments are submitted in connection with my role on the MTCA STAG.¹

References in the comments to the preliminary draft rules are to the following version: Ecology, MTCA Cleanup Rulemaking Chapter 173-340 Preliminary Draft – Section 340 (Feb. 25, 2020).² As an interpretive note, I have included questions in the comments below. I am not expecting Ecology to respond to the questions, but anticipate that any questions will highlight relevant issues.

As always, thank you to Ecology for the time and energy spent in developing the proposed revisions to the Cleanup Rule addressed below. The background materials and explanations provided by Ecology continue to be very helpful.

Please do not hesitate to let me know if you have questions. Thank you for considering my comments.

¹ These comments are not submitted on behalf of any clients of Beveridge & Diamond P.C. and do not preclude the firm, any of the firm's attorneys, or any of the firm's clients from taking different or inconsistent positions with respect to any of the issues addressed in these comments or to the comments themselves.

² For the March 5, 2020 meeting, Ecology also posed questions related to the environmental justice in the RI/FS and remedy selection process. These questions overlap substantially with the questions prepared in connection with the May through July 2020 STAG meetings. Accordingly, I will address these issues separately in comments on the environmental justice materials distributed on May 28, 2020.

Questions on WAC 173-340-340: Biennial program plans and expenditures

- 1. When allocating financial assistance, the MTCA statute currently requires Ecology to consider both threats to human health and the environment and land reuse potential and planning (RCW 70.105D.030(1)(i)). When prioritizing remedial action projects for grants or loans, Ecology is also required to consider “whether the site is located within a highly impacted community” (see, e.g., WAC 173-322A-320(3)(d)). Under the draft rule, this requirement would also apply when prioritizing other types of financial assistance.**
- Should Ecology always consider effects on highly impacted communities when allocating financial assistance?**

Yes. The fact that a highly impacted community is affected by a contaminated site is a relevant consideration in allocating financial assistance and is consistent with MTCA’s goal of protecting human health.

Note that the mandate to consider land reuse potential is a statutory requirement and should be a factor in all funding decisions.³

- The draft rule defines “highly impacted community” the same as in Chapter 173-322A WAC. Does the definition provide an adequate basis for identifying metrics and evaluating impacts on such communities?**

Ecology has updated the original proposed draft definition of “highly impacted community” based on prior feedback from the STAG. The proposed draft definition from May 28, 2020 includes possible examples of highly impacted communities. However, Ecology still appears to retain wide discretion outside of the rule to define what constitutes a highly impacted community for funding priorities and other purposes in the draft rule.

While flexibility may be helpful to Ecology, involving the public in developing the functional definition of highly impacted community is critical. Three specific comments:

- Consider adding a regulatory definition for the phrase “disproportionate burden of public health risks from environmental pollution.” This may help in defining metrics for current status and progress and evaluating impacts.
- Consider committing Ecology’s determination of what constitutes a highly impacted community, including the metrics for identifying and evaluating impacts, to a formal policy subject to public review and comment. If Ecology’s policy appears useful, convert it to a rule.
- Ecology’s “determination” of what constitutes a highly impacted community should be applied consistently across the TCP, as the definition would be relevant for issues beyond funding priorities.

³ RCW 70A.305.030(1)(i).



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- **To allow consideration of actual impacts, the draft rule requires consideration of whether the site affects a highly impacted community, not just whether the site is located within such a community as under Chapter 173-322A WAC. Is that change appropriate?**

This change is reasonable. Though, as discussed in separate comments on the RI/FS and remedy selection process, it is unclear how Ecology is expecting threshold effects from a site to be determined.

2. **Under the draft rule, Ecology maintains the discretion to consider other factors when prioritizing expenditures (such as those specified in withdrawn TCP Policy 340). Those factors may differ depending on the funding program (such as affordable housing grants vs. mixed funding agreements). Do you have any concerns with Ecology specifying such factors in policy?**

To promote consistency and transparency, consider clarifying in the rule that the “other factors” would be identified in policy that is subject to public review and comment.

As a related comment, I am uncertain of the basis under MTCA for Ecology’s proposal to “first protect investments in cleanups at sites where the state is required to provide assurance under section 104 of the federal cleanup law.” Draft WAC 173-340-340(1)(a). MTCA provides that Ecology will use the model toxics control operating account for “matching funds required under federal cleanup law.” RCW 70A.305.180(2)(d). How are these matching funds different from the funding that Ecology is proposing to allocate as “remedial action projects ... under the model toxics control capital account” in the draft rule?

3. **Under the MTCA statute, Ecology is required to report on program expenditures from the model toxics control operating and capital accounts (RCW 70.105D.030(5)). The draft rule incorporates that statutory requirement.**
- **How should Ecology incorporate the results of the new Site Hazard Assessment and Ranking Process (SHARP) in the report?**

The SHARP scores could be listed in an appendix similar to Appendix H of the MTCA Biennial Report of Expenditures: 2017-19 Biennium.

Ecology should also include this information online, which likely would require only minor modifications to the Contaminated and Suspected Contaminated Sites List.⁴

⁴ Available at <https://apps.ecology.wa.gov/cleanupsearch/reports/cleanup/contaminated>.



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- **How should Ecology report on progress in reducing disparate public health effects on highly impacted communities?**

As specified in draft Section 340, Ecology is subject to regular planning and reporting requirements. At minimum, Ecology should describe the status of efforts to reduce disparate public health effects in these materials.

Ecology likely will need to develop multiple metrics to evaluate reductions in disparate public health effects on highly impacted communities from contaminated sites. A single metric is unlikely to tell the whole story. Here are some suggestions:

- Number of open contaminated sites per capita by community.
- Estimated acreage of open contaminated sites per capita by community.
- Number of open contaminated sites per capita in residential areas.
- Acreage of open contaminated sites per capita in residential areas.
- Number and/or percentage of contaminated sites closed per capita by community each year.
- Percentage of residents by community with drinking water above applicable standards for human consumption.

- 4. **How should Ecology notify the public when it submits reports to the Legislature and budget requests to the Governor's Office? Is notice in Ecology's Site Register adequate? If not, what other means would you suggest?**

Notice of the reports and budget requests only in Ecology's Site Register is inadequate. Ecology should publish a press release and also provide notice on the TCP's email lists. The reports and budget request are key mechanisms by which the public is able to gain insight into MTCA and the TCP.

Also, I recommend putting a proposed financing plan (or even a draft outline) out for public comment notwithstanding the legislative changes ending this requirement. This would promote transparency, accountability, and public engagement. Along these lines, Ecology should also include in the financing plan at least a brief overview of its intended use of funds in the operating account.

WAC 173-340-340: Questions about economic impacts

- 1. **What, if any, economic effects might the draft rule changes have on you or your constituents?**

The economic effects of the proposed changes on attorneys and PLPs are uncertain, particularly since Ecology would retain wide discretion in allocating financial assistance. The extent to which the draft rule changes would affect funding for Ecology's site managers and cleanup oversight expenditures generally is unclear. In addition, the recent changes to the MTCA funding and account structure may alter the availability of funds as compared to past years. As a general observation, directing more funding to clean up "orphan" sites or to cover "orphan shares" would be beneficial for the public and for PLPs. Of the \$300 million or more in MTCA revenue during the 2017-2019 biennium, only \$56 million appears to



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have been applied to “direct site-specific cleanup investments,” including “state contracts, grants, and loans.”⁵ Increasing this figure would reduce the overall economic burden of the cleanup program.

2. Can you identify a less burdensome regulatory approach for program planning that complies with statutory requirements?

Not at this time.

3. Would the draft rule changes have a disproportionate impact on small businesses or local governments?

I do not have a view on this issue at this time.

4. Would the draft rule changes provide an advantage or disadvantage to Washington businesses compared to businesses in other states?

I do not have a view on this issue at this time.

Thank you again for the opportunity to provide these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Aug E Winkes", written in a cursive style.

Augustus E. Winkes

cc: Elizabeth McManus, Ross Strategic, emcmanus@rossstrategic.com

⁵ Ecology, MTCA Biennial Report of Expenditures: 2017-2019 Biennium, at pp. 55 and 95 (Nov. 2019).