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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 Changes to Cleanup Rule: WAC 173-340-300 (Site Discovery & Reporting)
and -450 (Releases from Regulated Underground Storage Tank Systems)

Dear Mr. Stanovsky:

I am providing written comments on draft proposed changes to the MTCA Cleanup Rule concerning site discovery and reporting and releases from regulated USTs, which were discussed during the MTCA Cleanup Rule Stakeholder and Tribal Advisory Group (“STAG”) meeting on January 30, 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 versions: Ecology, MTCA Cleanup Rulemaking Chapter 173-340 Preliminary Draft – Section 300 (Jan. 16, 2020) and Ecology, MTCA Cleanup Rulemaking Chapter 173-340 Preliminary Draft – Section 450 (Jan. 16, 2020). As an interpretive note, I have included a few questions in the comments below. I am not expecting Ecology to respond to the questions, but anticipate that they 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.



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Comments on Draft Cleanup Rule –
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I. Comments on Draft WAC 173-340-300 (Site Discovery and Reporting)

Questions on WAC 173-340-300: Site discovery and reporting

- 1. Do the examples and exemptions provided in subsections (2) and (3) of the preliminary draft rule provide sufficient guidance for determining whether a release must be reported? What guidance should be included in rule versus guidance?**

Generally, yes.

Would Ecology require reporting if sampling indicates that contaminated media are below applicable cleanup levels? A cleanup level is considered “protective of human health and the environment” WAC 173-340-200.

Please also retain language in Section 300 specifying that a release from a UST system must be reported within 24 hours.

- 2. In cases where an owner or operator completes an independent remedial action within 90 days of release discovery, Ecology proposes reducing the timeframe for submitting a combined release and action report from 90 to 60 days after completing the action. Is 60 days enough time?**

A 90-day timeframe would be preferred. While 60 days is likely sufficient under many scenarios, depending on the number of parties involved and the efficiency and availability of the consultants preparing the report, the process can take longer.

The draft rule would benefit from clarification that a combined release and cleanup action report would extend the reporting deadline to 90 days plus the timeframe allowed for completing the report. Draft subsection (2) states that the 90-day requirement must be met unless an exception under subsection (3) applies. The combined report provisions are in subsection (5).

Also, please consider clarifying any specific information that should be contained in the combined report so that Ecology can issue an efficient NFA determination after receiving the report (e.g., sampling demonstrating compliance with cleanup levels). WAC 173-340-515(4)(b), which is referenced in draft WAC 173-340-300(5), does not clarify best practices for these reports, yet, Ecology inevitably requires some sampling and technical analysis to demonstrate that further cleanup is not required even for very minor releases.

Finally, to encourage timely cleanups, Ecology should commit to reviewing combined reports and making an NFA / de-listing determination within 90 days of receiving the report. Ecology should also consider waiving any fees associated with this initial review. (Footnote 10 on p. 12 of the preliminary



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draft rule materials indicates that Ecology will move Ecology’s obligations to respond to these reports to WAC 173-340-515.)

WAC 173-340-300: Questions about economic impacts

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

The draft rule changes do not appear to be significant modifications to the existing rule. Accordingly, marginal economic impacts for PLPs would be expected to be limited.

2. Can you identify a less burdensome regulatory approach for reporting releases 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?

Again, the draft rule changes do not appear to be significant modifications to the existing rule. Accordingly, marginal economic impacts for PLPs – small and large – would be expected to be limited.

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.

II. Comments on Draft WAC 173-340-450 (Releases from Underground Storage Tanks)

Questions on WAC 173-340-450: Releases from underground storage tanks

1. Ecology proposes eliminating from Section 450 the overview of steps in the cleanup process following the specified interim actions since UST sites must be cleaned up the same way as every other site. Do you have any concerns with eliminating the overview?

Clarification regarding the applicability of the rest of the Cleanup Rule if the interim actions are insufficient would be helpful. The current rule states that an RI/FS may be required “if initial cleanup actions ... do not achieve cleanup levels throughout the site.” WAC 173-340-450(6)(a). Similar language at the beginning of Section 450 would communicate expectations and assist with planning response efforts, especially if the interim actions under Section 450 are unlikely to result in an NFA determination. The broad statements in draft WAC 173-340-450(1) and (2) that “[t]his section does not alter the



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applicability of requirements in other sections in this chapter” and that “UST system owners and operators must comply with the requirements in this section in addition to the other requirements in this chapter” are vague. Additional specificity regarding next or additional steps would be preferred.

2. Should Ecology require investigation of possible vapor intrusion pathways as part of the initial site characterization?

Yes. This change is consistent with the proposed modifications to the general RI requirements and with Ecology’s vapor intrusion guidance.

3. If a release from an UST system has been confirmed, under what circumstances should groundwater be investigated as part of the initial site characterization? Do you have any concerns with the circumstances specified by Ecology?

Generally, the circumstances identified by Ecology for groundwater investigations in draft WAC 173-340-450(5)(b)(iii) are appropriate. However, subparagraph (E) raises questions about how a responsible party will know that Ecology is not satisfied that the release does not pose a threat to groundwater despite the lack of other evidence specified in the rule. Based on the draft rule, the interim action report would appear to be submitted after the responsible party makes a decision not to complete a groundwater investigation during the initial site characterization phase.

4. Should Ecology specify in the rule whether and what type of professional license is required to demonstrate that a release from an UST system does not pose a threat to groundwater?

No. A professional license does not appear to be a requirement for other similar demonstrations in the Cleanup Rule. Depending on the supply of licensed persons, this also may impede with efforts to complete the interim action report within 90 days of release confirmation. Lastly, Ecology must agree with the demonstration; so the burden is on the performing party to retain a credible and qualified professional to complete the work.

5. Should Ecology set a deadline for initiating free product recovery? Is 60 days after release confirmation reasonable?

Yes. Other jurisdictions impose similar (or shorter) timelines. However, consider including an option for Ecology to set a different timeline upon request.

6. Should Ecology require at least quarterly monitoring and reporting of free product recovery?

As with the 60-day timeline for initiating free product removal, consider including a provision that allows Ecology to approve an alternate timeline. Depending on site-specific conditions and progress on free product removal, quarterly monitoring and reporting may be unnecessary.



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- 7. If UST owners and operators are cleaning up a site independently without any technical assistance from Ecology or the Pollution Liability Insurance Agency, should Ecology require them to provide periodic updates on the status of the cleanup and what is known about the hazards posed by the site? If so, how frequently?**

The proposed five year reporting requirement in draft WAC 173-340-450(7) is reasonable.

WAC 173-340-450: Questions about economic impacts

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

As a whole, the draft rule changes may increase the costs of responding to UST releases. However, setting clear expectations for short-term response, monitoring, and reporting requirements may promote more efficient cleanups, thereby saving costs for responsible parties in the long run.

- 2. Can you identify a less burdensome regulatory approach for responding to releases from UST systems that complies with the federal requirements for state program approval in 40 C.F.R. Sec. 281.35?**

As suggested above, Ecology should allow deviations from some of the timelines identified in the draft rule if these deviations are approved on a site-specific basis.

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

Many USTs are owned or operated by small businesses and local governments, and the costs of complying with cleanup requirements are likely to represent a much greater percentage of their revenue. Thus, any additional expense is likely to result in a disproportionate impact.

- 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".

Augustus E. Winkes

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