

October 11, 2022

**Comments from the Confederated Tribes of the Colville Reservation regarding
the MTCA Cleanup Rulemaking Chapter 173-340 WAC Preliminary Draft 2
Dated September 8, 2022**

Following are comments from the Confederated Tribes of the Colville Reservation (CCT) on the MTCA Cleanup Rulemaking Chapter 173-340 WAC Preliminary Draft 2 as provided for review and consideration by the Stakeholder and Tribal Advisory Group (STAG). These comments were reviewed and approved by Rebecca Hunt, Natural Resources Director for the CCT (signature at bottom).

Concurrent with the preliminary draft, Ecology posed some specific questions to the STAG. Those questions along with comments from the CCT are provided below. If a question was not included, the CCT have no comments on that topic.

Q3. Program planning and assessment

Question from Ecology: Does the proposed strategic planning and performance assessment process provide a satisfactory level of management accountability, transparency, and efficiency in cleaning up contaminated sites? Would an online dashboard be a satisfactory means of communicating our strategic plans and performance assessments? What level and kind of information would you like to see in an online dashboard?

References: Section 340.

Comment from the CCT: The wording of proposed Section 340 is vague in relation to the questions Ecology is asking. The proposed language is certainly a reasonable start, but the actual accountability, transparency, and efficiency will come in the “comprehensive and integrated strategic plan” once it is written, not in the WAC. To that end:

1. additional language that should be explicitly included in the Section is consideration of “cumulative environmental health impacts,” and
2. in addition to periodic performance assessment of metrics specified in Section 340(3), there should be an explicitly stated goal of improving metrics.

Q4. Environmental Justice in program planning

Question from Ecology: Do you support Ecology’s proposal in Section 340 to prioritize vulnerable populations and overburdened communities impacted by contaminated sites? Does the proposed strategic planning and assessment process provide a satisfactory level of management accountability and transparency for achieving the goal of reducing environmental health disparities related to contaminated sites?

References:

- ❓ Sections 310(1)(c) and 320(2)(a)(iii), regarding assessing whether vulnerably populations or overburdened communities are likely threatened by a release
- ❓ Section 340(1)(c), regarding prioritizing vulnerable populations and overburdened communities impacted by contaminated sites
- ❓ Section 340(2)(b), regarding consideration of such impacts when allocating resources
- ❓ Sections 340(1)(b) and (3), regarding assessing progress in cleaning up sites impacting vulnerable populations and overburdened communities.

Comment from the CCT: Yes, the Confederated Tribes of the Colville Reservation support prioritization of vulnerable populations and overburdened communities impacted by contaminated sites. The proposed. In many of the referenced sections, the language used is about whether an exposed population “may be” or “is” a vulnerable population or an overburdened community. We recommend changing that language to ask whether a population exposed “includes” a vulnerable population or overburdened community to make it clearer that the population’s vulnerability or degree of burden should not be averaged out over multiple distinct areas or demographic groups.

Q5. Environmental Justice in site remedy selection

Question from Ecology: Do the proposed changes to the remedy selection requirements in Part 3 of the rule emphasizing protection of vulnerable populations and overburdened communities provide sufficient accountability and transparency? Will they help provide more equitable outcomes? Is compliance with these requirements doable?

References:

- ❓ Section 200, regarding definitions of “vulnerable populations,” “overburdened communities,” and “reasonable maximum exposure”
- ❓ Sections 350(6)(g) and (h), regarding investigating threats
- ❓ Section 351(6)(b)(i), regarding developing cleanup action alternatives
- ❓ Section 351(6)(f)(vii), regarding documenting feasibility studies
- ❓ Section 360(3)(a)(i) (4)(c)(i), and (5)(d)(i), (iii), and (iv), regarding cleanup action requirements

Comment from the CCT: The requirements in Sections 350(6)(g) and (h) are nonspecific. The details are pushed off into how vulnerability or degree of burden will be determined. It’s great that these provisions are in here, but Ecology’s questions asking STAG members whether the provisions will result in greater accountability/transparency or will provide more equitable outcomes are not answerable until we see how the actual policies and procedures will play out.

Q6. Tribal engagement

Question from Ecology: Do the proposed requirements in new Section 620 adequately provide for engagement with Indian tribes during Ecology-conducted and Ecology-supervised remedial actions?

References:

- ❑ Section 200, regarding definitions of “Indian tribes” and “tribal lands”
- ❑ Sections 620, and conforming changes in Section 130(6), regarding tribal engagement
- ❑ Sections 360(3)(d), (4)(c)(xi), and (5)(c)(i), regarding consideration of tribal rights and interests
- ❑ Section 380(4)(c), regarding documenting consideration in cleanup action plan

Comments from the CCT:

1. The definitions related to Tribes are in proposed WAC 173-340-200: “‘Indian tribe’ means the term as defined in RCW 43.376.010(1).” That RCW says, “Any federally recognized Indian tribe whose traditional lands and territories included parts of Washington.” “‘Tribal lands’ means the term as defined in RCW 70A.02.010(13).” That RCW reads: “‘Tribal lands’ has the same meaning as “Indian country” as provided in 18 U.S.C. Sec. 1151 [which describes three specific types of land: reservations, dependent Indian communities, and allotments], and also includes sacred sites, traditional cultural properties, burial grounds, and other tribal sites protected by federal or state law.”

These definitions come into play with proposed WAC 173-340-620(2), which reads: “Applicability. This section applies to Ecology-conducted and Ecology-supervised remedial actions affecting Indian tribes’ rights or interests in their tribal lands.”

The definitions from Section 200 are inconsistent with each other and insufficient to fulfill the intended purpose of meaningfully consulting with Tribes who are impacted by Ecology remedial actions.

Regarding the inconsistency, the definition of ‘Indian tribe’ includes recognition of “traditional lands and territories.” However, the boundaries of those traditional lands are generally far more expansive than the limited categories listed in the definition of ‘Tribal lands.’ The definition of ‘Tribal lands’ must be expanded to include self-determined areas that each ‘Indian tribe’ considers traditional territory and for which it decides it should be consulted. Given the definition of ‘Indian tribe’ this may include Tribes whose official ‘Tribal lands’ are not in Washington state but who do have traditional territory here.

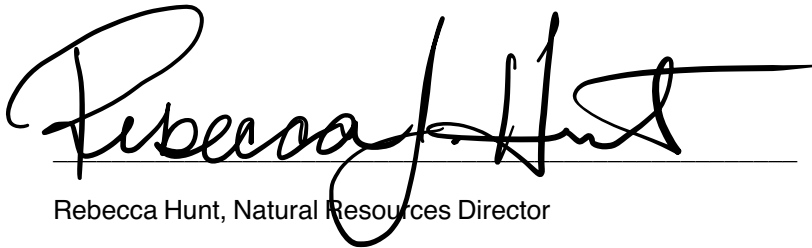
Potential existing language could be repurposed from RCW 68.60.055 defining “affected tribes” (in that case, for the purpose of notification regarding human remains). We recommend using wording along the lines of the following:

“ ‘Affected tribes’ are: (i) Those federally recognized tribes with traditional territories in the jurisdiction where the [site under remedial action is located];
(ii) Those federally recognized tribes that submit to the department maps that reflect the tribe's geographical area of cultural affiliation; and
(iii) Other tribes with historical and cultural affiliation in the jurisdiction where the [site under remedial action is located].”

This language is almost anticipated by proposed WAC 173-340-815(b)(i), which reads: “Consult with the department of archaeology and historic preservation and affected Indian tribes on the potential effects of planned remedial actions on cultural resources at the site...”

2. Proposed WAC 173-340-130(6)(b) reads: “To facilitate collaboration, it is important that Indian tribes provide specific comments, including the identification of other applicable state and federal laws and any additional information or mitigating measures that are necessary or desirable to satisfy their concerns.”

It is not appropriate to put this note in the WAC. It is not a requirement; it reads like patronizing advice.



Rebecca Hunt, Natural Resources Director

Confederated Tribes of the Colville Reservation

