



Communities
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Bay



WASHINGTON
ENVIRONMENTAL
COUNCIL

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Clint Stanovsky (via email)

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Rulemaking Lead – Cleanup Rule Update AO# 18-09

Policy and Technical Support Unit, Toxics Cleanup Program

Department of Ecology

RE: Responses to MTCA Cleanup Rulemaking Chapter 173-340 WAC Preliminary Draft 2

Dear Clint,

Thank you again for providing a pre-proposal on the Model Toxics Control Act (MTCA) rules. Duwamish River Community Coalition, RE Sources, Communities for a Healthy Bay, and Washington Environmental Council offer these comments as members of the Stakeholder and Tribal Advisory Group. We have invested significant time since 2019 because MTCA is such a critical element for clean and healthy communities. We urge Ecology to continue ensuring that the public's interests are protected, and that historical inequities are addressed directly and transparently. Our members and communities care deeply about cleaning up toxic pollution expediently and fairly.

In addition to the questions that you pose below, we did want to suggest that Ecology develop a clear policy on how the agency will communicate with communities to ensure notification of people impacted by MTCA sites. From the standpoint of public engagement and environmental justice, it is important that all members of the public know how and where to find information on MTCA sites, particularly those that may impact them individually. It is also important that this information is reasonably accessible to all. Input on best ways to engage with communities that do not have access to the internet or may not otherwise easily access or know how to access relevant and current information on cleanup sites impacting them should be sought to ensure proper communications happen. We still argue that in addition to owners and operators that tenants, renters, lessees, employees, vulnerable communities, tribal members, and those who may otherwise be impacted by the contaminated site should automatically be included in communications concerning updates to the site, such as when a site is listed, cleaned up, has a public comment period, or other information that may impact with how they could interact with the site. As forms of communication continue to evolve, this should be included as a policy to be updated regularly to ensure the most effective forms of communication are used and those most impacted by contaminated sites receive those updates and information.

Q1. Balancing the functions of Initial Investigations

Question: Does the Initial Investigation process proposed in Section 310 strike the right balance between providing timely public information and promoting early independent cleanups?

Response:

No, we do not believe that the Initial Investigation process proposed in Section 310 strikes the right balance between providing timely public information and promoting early independent cleanups. In addition to owners and operators, we would like to consider employees, renters, and other affected people who possibly could be impacted by the contaminated site be informed under Section 310(6) along with information on the nature of the contaminants at the site and any potential health and environmental risks and exposures associated with the site.

Section 310 no longer requires Ecology to perform site visits. We recommend the implementation of a policy that identifies the procedures Ecology staff will utilize in order to determine if a site visit is necessary. The steps outlined in the policy should be repeatable and consistent across sites. Additionally, we are concerned that codifying the removal of initial site visits could be deemed as a decrease in workload by the State legislature, and could justify a budget cut, further impacting an already-tight budget.

We do agree with the expansion of the purpose in Section 310(1), including whether the site would impact a vulnerable or overburdened community.

Finally, we recommend ensuring that Tribal governments are afforded the opportunity to opt into receiving any communications related to initial investigations and assessments within their usual and accustomed areas.

Q2. Developing site hazard assessment and ranking policies and procedures

Question: Do you support Ecology's proposal in Section 320 to remove the site hazard ranking system procedures from the rule, replacing them with performance standards and public participation requirements?

Response:

We appreciated the commitment Ecology expressed at the STAG briefing that Ecology will conduct an independent public comment on the policies and procedures around the Site Hazard and Ranking System, which Ecology proposes to remove from the rule. We were initially concerned that SHARP would languish and remain vague. We urge you to ensure that the public review of SHARP parallels the public comment period on proposed MTCA rule changes so that they can be considered concomitantly. We intend to engage deeply in the SHARP public process.

While we generally agree with removing the details of the site hazard ranking system procedures from the rule, we do not agree that the existing performance standards in the draft rule provide sufficient direction to develop the process. We reiterate our recommendation that Ecology implement a policy that identifies the procedures staff will utilize in order to determine if further investigation and/or data collection is needed for site assessment and ranking. The steps outlined in the policy should be repeatable and consistent across sites.

We generally agree with the rule updates to describe the Purpose in Section 320(1) and its Development in Section 320(2), including explicitly naming vulnerable populations and overburdened communities. As described below, we do not believe that the Public Participation description suffices to engage communities impacted by contaminated sites.

We are glad to see that Section 320(2)a(iii) includes “Identify whether the population exposed may be a vulnerable population or an overburdened community”, but there needs to be some description of how this will be used. For example, will Ecology use this information to inform overall ranking or prioritization criteria for the program strategic plan? Or will Ecology consider this in other ways to ensure that these communities are not disproportionately impacted?

We appreciate that Ecology intends to provide the public with the opportunity to comment, as it is important to have public input on the SHARP tool (section 320(2)b). Regarding 173-340-320(3)(d) what are Ecology’s plans for making sure the community knows about notification options?

We also want to reiterate the comments we made for Preliminary Draft 1 regarding the SHARP tool - these comments are below:

To ensure the public interest is being served, we would seek to provide input on how the proposed site hazard assessment and ranking process will be used to prioritize cleanups. We recommend that Ecology simultaneously develop a formal policy for how SHARP will be used to prioritize cleanups with the opportunity for our additional input.

In addition to the performance standards included in the draft rule, we would encourage Ecology to include performance standards for evaluating cumulative impacts of multiple environmental exposures. We would also like Ecology to consider the potential of future releases of hazardous substances, the potentially present hazardous substances associated with historical and current land use, as well as consider chronic exposure, not just acute exposure when evaluating possible receptors and contaminants as additional performance measures.

Ecology should consider how long a site has been on the list without any cleanup, in the prioritization process. We believe that sites that have been listed for an extended length of time should be prioritized over a site with equal contamination that was just added to the list. We would also like to raise our concerns regarding the prioritization of “easier sites.” If sites that are easier to clean up consistently get prioritized over more complicated cleanups, then complicated sites may never reach the top of the list.

Lastly, we encourage Ecology to consider cumulative impacts in the ranking and prioritization process. The SHARP tool we last reviewed included a “flag” for multiple contaminant types, however we would encourage Ecology to consider the multiple and potentially synergistic effects from other environmental *and* social factors as well. The ranking and prioritization process should reflect the fact that a site’s threat to human health and the environment is highly dependent on outside factors. For example, we believe that a site located in close proximity to several other MTCA sites should be prioritized over an isolated site with equal contamination.

Q3. Program planning and assessment

Question: 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?

Response:

Thank you for clarifying at the STAG discussion that the strategic planning and performance assessment process proposed in Section 340 is not in lieu of reporting on the program to the legislature, and is intended to be a supplement to other information required in the biennial report. The strategic planning and performance assessment would provide transparency on cleaning up contaminated sites. We cannot yet comment on its efficiency. Accountability will be achieved only after a well-constructed plan is produced and performance assessed, and we urge Ecology to report back to the STAG or other public-facing convening on a regular basis. This could be in parallel with the biennial report to the legislature.

We do not agree with completely eliminating references to the biennial report to the legislature in this section. Instead, we urge you to explain in rule how this strategic plan and performance assessment process will dovetail with the biennial report so that they are not completely decoupled.

We agree that the plan must explicitly prioritize vulnerable communities as a whole, but it also needs to prioritize communities of color explicitly rather than lumped in with other vulnerable communities. As described below, the status of sites should be tracked separately by each of the six sociodemographic factors of the environmental justice flag to ensure that progress in one factor does not mask a lack of progress on other factors.

As discussed in other sections, communities have a right to know what is in their neighborhoods, and Ecology must update strategies and tactics for reaching communities in this modern era.

An online dashboard of performance metrics would be helpful to communicate with the public on program process. Because Ecology currently defines vulnerable communities as including but not solely based on race, we urge Ecology to develop a clear metric based on race. The 2017 Front and Centered report found a clear disparity between frequency of MTCA sites in communities of color and in white communities. Eliminating that disparity is of utmost importance to achieve racial equity and environmental justice in the future. This specific disparity needs to be distinguishable from other metrics involving vulnerable communities.

The dashboard needs to include information that can be searched at a community level and also aggregated to other geopolitical units, such as counties. Again, the status of sites should be tracked separately by each of the six sociodemographic factors of the environmental justice flag to ensure that progress in one factor does not mask a lack of progress on other factors.

Lastly, we urge Ecology to be transparent in how factors identified in guidance are used for prioritizing funding, possibly through the Biennial Report of Expenditures.

We believe transparency in MTCA funding must be improved. The proposed language does not take enough steps to improve funding transparency. In particular, funding prioritization and allocation should be transparent for both operating and capital costs. Without identifying operating cost needs, there will be no documentation to support higher appropriation for operating funds, which is critical for Ecology to make progress towards cleanups.

Q4. Environmental Justice in program planning

Question: 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?

Response:

As described above, we agree that the plan must explicitly prioritize vulnerable communities as a whole, but it also needs to prioritize communities of color explicitly rather than lumped in with other vulnerable communities. To eliminate racial disparities identified in the 2017 report published by Front and Centered, the status of sites should be tracked separately by each of the six sociodemographic factors of the environmental justice flag to ensure that progress in one factor does not mask a lack of progress on other factors. We strongly urge you to explicitly prioritize communities of color in the program planning. We will focus subsequent accountability on how the disparity is reduced.

While the program plan provides for some transparency, accountability can only be determined after implementing that plan. As described above, we urge Ecology to report back to the STAG or other public-facing convening on a regular basis and in parallel with the biennial report to the legislature.

As described above, Ecology needs to go beyond just identifying these populations. The strategic plan would be a good place to explicitly state what is Ecology doing with this information. We also encourage Ecology to identify more details on what metrics will be used to implement strategies and measure progress.

Ecology can increase their accountability for their EJ goals by adopting the following:

- Establish institutional backstops to ensure environmental justice concerns are being met. This includes ensuring that while private funding accelerates some cleanups, the disparity in the number and severity of contaminated sites in frontline communities not only disappears but also drives cleanup priorities in those areas. We encourage Ecology to establish target dates and other metrics for reducing the disproportionate number of toxic waste sites located in communities of color and low-income communities in the rule. Ecology should consider a statement in rule that implementation should not result in communities of color or low-income communities bearing a disproportionate number of contaminated sites.
- Identify metrics to measure disproportionality, analyze both current MTCA sites and MTCA sites identified in the future, and report to the legislature its progress toward eliminating disproportionate impacts.
- Track and report on progress made towards cleanups for all sites that fall within or are adjacent to vulnerable populations or overburdened communities. The status of sites should be tracked

separately by each of the six sociodemographic factors to ensure that progress in one factor does not mask a lack of progress on other factors.

See comments below on tribal engagement for further recommendations.

Q5. Environmental Justice in site remedy selection

Question: 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?

Response:

The following are our recommendations for ensuring cleanup actions are transparent, equitable, and protective of vulnerable populations and overburdened communities.

Section 350 Remedial Investigation

(5)(g)(i) Report Results. General information about the site. Because site ownership and operational history is required as part of this subsection, the Usual and Accustomed Areas of tribal nations should also be included to ensure the most complete and accurate understanding of the site's historical and current use.

(6) Investigations (f) Climate, (g) Land and resource use, (h) Human Receptors, and (i) Natural resources and ecological receptors. All of these subsections state "sufficient information must be collected on..." The term "sufficient" is subjective. What is required during a remedial investigation needs to be documented in policy or guidance. The steps outlined in the policy or guidance should be repeatable and consistent across sites.

Ecology eliminated the requirement to conduct a cumulative impact analysis of existing burdens on vulnerable populations or overburdened communities for the specific purpose of remedy selection. We are very concerned about the elimination of this requirement and perceive it as a backstep. From their 2020 Environmental Justice Glossary, the Environmental Protection Agency acknowledged that vulnerable and overburdened communities may "experience disproportionate environmental harms and risks. This disproportionality can be as a result of greater vulnerability to environmental hazards, lack of opportunity for public participation, or other factors. Increased vulnerability may be attributable to an accumulation of negative or lack of positive environmental, health, economic, or social conditions within these populations or places. The term describes situations where multiple factors, including both environmental and socio-economic stressors, may act cumulatively to affect health and the environment and contribute to persistent environmental health disparities."

Cumulative impacts need to be considered early and often to ensure that the communities impacted most by environmental harms receive the benefits of this rule. From our August 4, 2020, comment letter, we reiterate our concern that sites adjacent to- or surrounding overburdened or vulnerable communities may be data poor. Removing the requirement to perform a cumulative impacts analysis will only exacerbate the disparity in the quantity, quality, and types of data we have on these sites and the people who live there or utilize the space, and will result in less equitable outcomes.

Section 351 Feasibility Study (FS)

(2) Applicability. Ecology needs to clarify how Potentially Liable Parties (PLP) will qualify for the exemption to not conduct an FS, including the timeline for when they must report to Ecology to confirm their exemption.

(6)(b) Identify alternatives. One alternative must clean up the contamination to the maximum extent practicable. If this is not the case, please provide an explanation, as we were under this assumption.

(6)(c) Screen alternatives and components. If a PLP screens out an alternative because of disproportionate costs or technical reasons, Ecology must review what was screened out to ensure the alternatives were not removed erroneously.

Section 360 - Cleanup action requirements

(3)(d) Public concerns and tribal interests. We appreciate the language that “Ecology must consider public concerns, including the concerns of vulnerable populations and overburdened communities.... And Indian tribes’ rights and interests in their tribal lands...” However, the term “consider” is subjective. We recommend Ecology develop guidance or a policy for how staff and practitioners will weigh public and tribal concerns for considerations in the Disproportionate Cost Analysis (DCA).

(5)(d)(iii)(A) Effectiveness over the long-term, Factors. We recommend Ecology add the following factor when assessing the long-term effectiveness of an alternative: Resilience to natural phenomena, including but not limited to earthquakes, liquefaction events, lahars, landslides (submarine and terrestrial), and sea level rise.

Given the amount of time and effort spent on discussing benefits while participating in the STAG, we are very disappointed to see that the proposed rule only lists specific costs to be included in the DCA, but not benefits. This will grossly underestimate the ecosystem and public health benefits of a thorough, more protective cleanup. And, because Ecology has no method to monetize ecosystem services and public health, but can easily tally the costs to the PLP for cleanup - finite costs like labor, construction equipment, and mileage, for example - costs will always be overrepresented in a DCA.

We understand that the exercise of monetizing ecosystem services and improvements in public health is time consuming and costly. These barriers should not however, be used as a reason to not perform the most accurate DCA possible. Can Ecology complete this task using something similar to a model remedy? – use known factors and costs to plug in values to come up with a more complete picture of the benefits provided by a properly functioning, healthy ecosystem?

Q6. Tribal engagement

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

Response: While we do not represent Tribal Nations, we do not believe that the information provides for adequate engagement with Indian Tribes. We urge Ecology to work directly with tribal representatives to finalize this language.

Changes to WAC 173-340-200 define tribal lands as those in RCW 70A.02.010(13):

(13) "Tribal lands" has the same meaning as "Indian country" as provided in 18 U.S.C. Sec. 1151, and also includes sacred sites, traditional cultural properties, burial grounds, and other tribal sites protected by federal or state law.

This language then refers to 18 U.S.C. Sec 1151, which has a narrow definition of "Indian Country:"
Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

The geographic extent identified in (a) and (c) would not encompass broader geographic areas that are within tribal lands and waters defined by Executive Order or within Usual and Accustomed Areas. Resources that are used by Tribes, including fish and shellfish, extend well beyond reservation boundaries, and solely limiting this definition to narrow geographic boundaries would not appear to capture the intent of the proposed rule.

Section 620 explicitly identifies elements of tribal engagement. Part (2), however, too narrowly defines "Indian tribes' rights or interests in their tribal lands," which is still too limited due to the definition in Section 200. One option may be to strike "in their tribal lands" because their rights and interests extend beyond reservation boundaries, or to add "... including in their tribal lands" for clarity. Again, we defer to tribal representatives on better wording.

In addition to the engagement elements listed in the pre-proposal rule, we also urge Ecology to include tribal engagement in the Department's proposed Strategic Plan described in 173-340-340(1). One option would be to include a new Part (5) that describes tribal engagement, and cross reference that in 173-340-620. Engaging with tribal representatives during strategic plan development and assessment would be an effective opportunity to plan more broadly than the individual sites that are referenced in Part (4) of this section, where cumulative impacts to natural resources could be identified and addressed strategically.

WAC 173-340-360 (3)(d)(ii), (4)(c)(xi), and (5)(c)(i), as well as 173-340-380(4)(c), regarding consideration of tribal rights and interests, also limit the geographic scope of engagement and need language fixes in the definition of tribal lands to avoid an unintended limit to that engagement.

Q7. Public concerns and tribal rights and interests in remedy selection

Question: Do the proposed changes to the cleanup action requirements in Section 360 provide for adequate consideration of public concerns and tribal rights and interests for Ecology-conducted and Ecology-supervised remedial actions?

Response:

We agree with Ecology shifting the requirement to protect vulnerable populations and overburdened communities in Section 360(3)(a)(i), with a specific requirement that potential risks must be considered

when determining whether a cleanup action is permanent to the maximum extent practicable. However, we remain concerned that the changes to 173-340-600 may not suffice to provide sufficient information and in an appropriate manner for nearby populations to engage in the public process in order to express concerns. Please see feedback in Questions 5 and 8.

We do not believe that tribal rights and interests are adequately considered. Please see response to Question 6 regarding tribal engagement. Because “tribal lands” are so narrowly defined as reservation boundaries, the changes to Section 360(4)(c)(ii) do not provide adequate consideration of tribal rights and interests; we defer to tribal representatives on appropriate language.

Q8. Public notification and participation for independent remedial actions

Questions: For independent remedial actions:

- a. Do the proposed requirements in Section 600(20) provide adequate notice and information about independent remedial actions?
- b. Do you support Ecology’s proposal to eliminate public comment opportunities for periodic reviews and amendment or removal of institutional controls, consistent with Ecology’s proposal in Preliminary Draft 1 for eliminating such opportunities when delisting sites?

Again, these proposals are limited to sites where independent remedial actions are performed.

Response:

Proposed requirements in section 600(20) raise some concerns. Marginalized communities disproportionately face the impacts of exposure to toxic pollution and resulting health consequences, and because of this, will benefit the most from notification about independent remedial actions. These communities also often face institutional barriers that make consistent access to electronic devices and internet difficult. Considering a community’s ability to access resources is essential to centering environmental justice principles and is a critical restraint in many community’s ability to obtain information. As a result, we would like Ecology to consider the limitations of electronic notifications when creating notice and information requirements for independent remedial actions.

While we recognize the administrative burden that current notification requirements have on the Department, we also have some concern about removing public comment requirements for independent sites because this could limit public participation and community member’s ability to engage in the listing and cleanup process. For this reason, we strongly recommend that Ecology retain the authority to require public comment for sites that are being delisted.

We also ask that more details be provided as to how community members will be informed that they have the opportunity to receive notifications and updates. This is especially important if public comment requirements are removed. The public must be aware of the notification and public outreach options that are available to them including public meetings, comment periods, and other forms of communication.

Q9. Updating public notification methods

Question: Do you support Ecology’s proposed changes in Section 600 to how notice is provided and information is communicated to the public?

Response:

We appreciate Ecology updating public notification methods from the outdated versions in the current rule. However, we remain concerned that the methods identified still may not be able to provide marginalized communities with sufficient information. Please see response to Question 8. A community member would need to opt into an alert list, but most people have no idea that the list exists. Ecology may want to consult usage statistics for the “What’s in my neighborhood” web tool. Unless that tool receives extensive traffic, then it would not suffice to reach the neighbors.

Once a community member opts into the notification, we urge Ecology to explore options including text messaging, emails, and other channels - details that do not need to be in rule.

In addition, given that a site may influence a broader geographic area, notification options should include a way to select more than a single site.

Q10. Sampling and analysis methods

Question: Do you support Ecology’s proposal in Section 830 to replace the list of Ecology-approved sampling and analytical methods in the rule with a requirement to maintain and make publicly available a list of Ecology-approved methods outside of the rule?

Response:

In general, we agree with Ecology’s proposal to shift approved sampling and analytical methods outside of rule, which does not currently keep up with the science. However, “in guidance” may be insufficient if data will be used for any regulatory decision. All data used for regulatory decision making must be subject to stringent quality assurance and quality controls using standard and acceptable methodologies.

In conclusion, we appreciate that Ecology is moving forward with this stage of rulemaking. We urge you to consider each of our comments before sending the rule for the economic evaluation as a precursor to the formal public comment period. We deeply appreciate the focus on environmental justice and engagement with Tribes. While we agree with some of the directions that has taken, we still have serious concerns about the implementation of the changes, especially regarding reducing disparities across the many communities we serve.

Sincerely,

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