October 13, 2022

Via E-mail

Clint Stanovsky
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Washington State Department of Ecology
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Re: MTCA Cleanup Rule – Stakeholder & Tribal Advisory Group (STAG) Comments on Preliminary Draft 2

Dear Mr. Stanovsky,

Thank you for the opportunity to provide these comments on Preliminary Draft 2 of the Model Toxics Control Act (MTCA). It is clear that Ecology has made substantial effort over the past years of revisions and updates to provide clarity, consistency, and efficiency to the updated sections and those efforts are appreciated. The materials and presentations made by the agency have been very useful in understanding the preliminary draft changes, though I as a general note, I observe that the volume of changes made to the many sections of MTCA over the past two years by Ecology in sections previously unreviewed by STAG are substantial, and the roughly one month provided to obtain comments from Stakeholders and our constituents felt very abbreviated and inadequate. Indeed, as of the time of this writing, recordings of the final two meetings had not yet been made available on the STAG website, so it was impossible to review any missed portions of those meetings. As such, the comments provided here or in those meetings should not be considered comprehensive.

Ecology provided an excellent list of discussion questions in the September 8, 2022 briefing paper. I will frame my initial overall review of the changes primarily through the lens of those questions.

RESPONSE TO DISCUSSION QUESTIONS

In general, the changes proposed by Ecology appear to successfully fit with Ecology's stated objectives of updating outdated portions of the rule, clarification, improved integration with other applicable rules, and language alignment; within the identified six themes. Indeed – it is clear that Ecology has been responsive to many of the comments submitted by STAG members; including my own. Changes such as those to separate previously-combined sections for clarity appear very effective in achieving that goal.

However, a theme will emerge in these responses – while the draft language generally appears to be in line with the intended objectives, much of the language appears to be acting as a placeholder for Ecology to later develop tools (such as SHARP) and guidance documents that will be far more impactful to managing cleanups in Washington State – it will be critical for Ecology to seek and obtain sufficient guidance from the appropriate Stakeholders as those tools and guidance are developed.

Ecology Questions and Responses

> ***Ecology Question 1. Balancing the functions of Initial Investigations – Does the Initial Investigation process proposed in Section 310 strike the right balance between providing timely public information and promoting early independent cleanups?***

The updated proposed process in the sections (300 and 310) constitutes a shift away from providing implicit flexibility to enact early cleanups in favor of earlier notice and explicit reporting requirements. However, the bar for the initial investigation selection is set relatively low in terms of specific requirements and in practice the notification itself should not interfere significantly with the execution of cleanups.

> ***Ecology Question 2. Developing site hazard assessment and ranking policies and procedures – 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?***

Generally speaking, replacing the outdated WARM process in the rule with a more flexible requirement to develop and implement a replacement (of some sort) constitutes a positive change. However, as noted generally during the STAG meetings and in comments submitted during the prior rulemaking effort, it will be critical to make the SHARP tool available for public comment prior to implementation as described by Ecology in the briefing paper.

> ***Ecology Question 3. Program planning and assessment – 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 on 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?***

I am delighted by this development, and an online dashboard could indeed provide a level of transparency and communication as yet unseen from the agency. Ecology's proposed process for performance assessment appears to contain a sufficient starting point for the dashboard. The types of charts, graphs, and tables that have traditionally been submitted as part of the biennial review should be integrated into the dashboard, along with links to the specific cleanup projects sites where the public can "trace the dollar" to the cleanup efforts and successes.

Ecology Question 4. Environmental Justice in program planning – 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?

The proposal appears to adequately incorporate vulnerable populations and overburdened communities as a factor. It remains unclear how Ecology will enact this consideration, but the proposed framework appears sufficient to ensure transparency and accountability.

Ecology Question 5. Environmental Justice in site remedy selection – 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?

The new proposed requirements appear to constitute an increase in flexibility and adaptability in determining how to evaluate for the presence of vulnerable populations and overburdened communities, which is a positive change in the absence of specific guidance from the agency. Such guidance would still be welcomed, however, to ensure clarity and consistency. The change to section 351(6)(f)(vii), for instance, will likely take a variety of disparate forms, ranging in effectiveness, as parties work to interpret this requirement and implement the screening process.

Ecology Question 6. Tribal Engagement – Do the proposed requirements in new Section 620 adequately provide for engagement with Indian tribes during Ecology-conducted and Ecology-supervised remedial actions?

Ecology's efforts to develop specific engagement plans with tribes are very much appreciated, and the proposed requirements appear to be significant improvements over the current rule.

Ecology Question 7. Public concerns and tribal rights and interests in remedy selection – 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?

Changes to address consideration of public concerns and tribal rights and interests for Ecology-supervised remedial actions appear adequate and much more clear than prior iterations of the rule.

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Ecology Question 7. Public notification and participation for independent remedial actions – 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?

The new proposed requirements for Ecology public notice and review for independent remedial actions appear adequate; and removing the public comment opportunity for periodic review and removal of institutional controls appears consistent with the rest of the independent remedial action process and may serve to speed up that part of the remedial process.

However, some of the new language proposed for Section 515(4) is very concerning and ambiguous. The section lists three actions (remedial investigations, interim actions, or cleanup actions) that require the submittal of a written report within 90 days of the completion of the action in Section 515(4)(a). The same section includes a definition of what "completion" of an interim action and a cleanup action would be, which is critical to understanding when the 90 days would begin. However, there is no such language defining when a remedial investigation would be deemed "complete." This is understandable, as remedial investigations can be complex and require substantial time to complete – indeed, the definition included for completion of an interim action/cleanup action (that is to say, a period of no action other than compliance monitoring for 90 days) would not be effective for determining if a remedial action is "complete" as there can be many periods during an investigation where monitoring is the only activity. Indeed, many sites require a full year or more of observing seasonal changes and fluctuations during monitoring as part of the investigation process. Further, Section 515(4)(b) seems to require the submittal should include sufficient information to determine if the action (which appears now to include an investigation) meets the substantive requirements of MTCA – which an investigation almost certainly would not, as investigations are typically just beginning the process.

Ecology should consider removing this new requirement to submit remedial investigation reports within 90 days of "completing" the investigation. If Ecology intends to keep this requirement and increase reporting of remedial investigations under independent remedial actions, they should develop a definition for when a remedial investigation is "complete" (perhaps referring to completion of the substantive requirements of Section 350 for the completion of a remedial investigation, which would mean that the intent of this would be to trigger a single report during an independent remedial action following the investigation phase). If Ecology's intent is to require multiple reports over the course of the remedial investigation phase, there should be a separate list of (significantly fewer) requirements for Content under Section 515(4)(b) for such remedial investigation reports – and Ecology should realize that such a requirement could significantly increase costs for those undertaking cleanup efforts under an independent remedial action, increase the time it takes to complete such an action, and thus negatively impact cleanup efforts under this section.

Ecology Question 9. Updating public notification methods – Do you support Ecology's proposed changes in Section 600 to how notice is provided, and information is communicated to the public?

Ecology's proposed changes are an excellent step in modernizing the agency and the remedial process. I echo one of the other STAG members during Meeting 1 when they noted that the agency should ensure that they take into consideration that much electronic communication is now done via mobile devices and not on desktop computers, and should consider specific changes to the web site, the *Contaminated Site Register* (the current PDF format is unwieldy to review on a phone, to say the least), and other notices.

Ecology Question 10. Sampling and analysis methods – 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?

I am very much in favor of this proposal. Analytical methods are changing rapidly, particularly regarding new and emerging contaminants – the ability to update Ecology's methods outside of rulemaking will be critical to maintain flexibility and timeliness.

OTHER NOTES REGARDING SECTION 360

During this review of the updated language in Section 360, three additional specific notes regarding the new language were identified. Firstly, as I have indicated previously, I remain disappointed that Ecology has not addressed explicit inclusion of an evaluation of the net environmental impacts of remedial actions, including emission of greenhouse gasses, as part of the feasibility study. Such an evaluation is required for many capital and construction projects around the state of Washington and elsewhere but has not been widely used for cleanup projects.

As previously noted, there is abundant guidance and many resources readily available from EPA and organizations such as the Sustainable Remediation Forum and the Interstate Technology and Regulatory Council that demonstrate how to do conduct such an evaluation. In my experience, however, these approaches have not been included in Washington cleanups despite acceptance elsewhere. Incorporation of these approaches in the feasibility study would enable a better understanding of the environmental effects some cleanups can have relative to the incremental benefit they achieve toward protecting human health and the environment for this and future generations. Ecology should include this as a consideration in the disproportionate cost analysis, as part of the evaluation of implementation risks of a given action in Section 360(5)(d)(iv) at a minimum. It is notable that the current proposed language includes a method to discount future financial costs using present worth analysis in Section 360(5)(d)(vi), but no requirement to quantify or even consider the future environmental impact of the emissions associated with a remedy.

Second, I noted the reworked language associated with Section 360(3)(c)(iii)(A) which notes that source containment may be appropriate when free product consists of a dense nonaqueous phase liquid (DNAPL) that is unable to be recovered after reasonable efforts have been made. This is very true; however, I would add that current science and my own professional experience indicates that LNAPL can often be just as resistant to removal, particularly in a glacial till environment. As LNAPL is often just as immobile and stable as DNAPL in the subsurface, the agency should consider noting that source containment may also be appropriate for LNAPL (assuming again that reasonable efforts at recovery have been made).

Third, the new proposed language in Section 360(4)(c)(ii) is concerning and could be read to indicate that a restoration time frame is not reasonable if there is a remedy that could be taken that has a faster restoration time frame. The inclusion of the word “practicable” is critical in this section and should be expanded to clearly indicate the term as defined in Section 200. I would note that the proposed addition in Section 360(4)(c)(iii) is excellent.

I very much appreciate the amount of time and clear effort apparent in Preliminary Draft 2 and thank you for providing the opportunity for the STAG to weigh in at this stage.

I am providing these comments in my role as a STAG member representing my firm and NAIOP; however, these comments should be taken as my own and may not necessarily represent the view of anyone else with SLR, nor necessarily those of NAIOP or any of its members.

Sincerely,

John H. McCorkle, CEP
Principal