

MTCA Cleanup Rule Stakeholder & Tribal Advisory Group (STAG) Meeting Summary (Final)

Wednesday, September 25, 2019 – Embassy Suites Hotel, Bellevue WA

See References on last page for web addresses found in this document.

The [Stakeholder & Tribal Advisory Group \(STAG\)](#) met for the first time on September 25, 2019, in Bellevue, Washington. All [members](#) were present and participated, except for Jennifer Garcelon (Clallam County), who was unable to attend in person but observed by Zoom webinar. Observers were present at the meeting.

Agenda items included the following:

- Introductions
- STAG process, workplan, and objectives
- Our plan for updating the MTCA Cleanup Rule
- Rules for Rulemaking: The Administrative Procedure Act (APA)
- STAG aspirations for the first rulemaking
- An updated Site Hazard assessment and ranking process (SHARP)
- Updated communications & public participation for delisting
- Public Comments
- Wrap up, assignments, feedback

Jim Pendowski (Department of Ecology Toxics Cleanup Program Manager) welcomed people to the meeting and thanked them for their participation. The project team introduced itself and each STAG member then introduced themselves, shared their organization, and what they hope to get from the STAG group.

STAG process, workplan, and objectives

Jim Pendowski gave an overview of the Model Toxics Control Act (MTCA) rules and history. This will be the first substantial rule change since 2001. Jim emphasized the importance of thoughtful analysis and good listening on the part of his team, and engagement on the part of STAG members to getting the rule changes “right.” Jim noted that the STAG reflects a generational change from those who wrote and last updated the rule. The interests represented are familiar, but most of the faces are new. He emphasized the importance of rule changes that reflect lessons learned during decades of work under MTCA, for continued success in cleaning up sites.

Elizabeth McManus (facilitator) briefly went over the [draft STAG charter and ground rules](#), which had been distributed ahead of time. No changes were requested to the charter or ground rules.

Discussion included:

- Some STAG members were curious and interested in why the group was not established as an agreement (or consensus) seeking group. The reason is that Ecology is interested in the full range of input on potential changes to the MTCA rules. Although group consensus is valuable when we can achieve it, well-defined disagreements are also valuable input for updating the rule.
- The STAG was interested in the idea that if it did reach consensus on a topic it be recorded as such and that was agreed.

Science Advisory Board Discussion

Clint Stanovsky (Ecology) led a discussion about the Science Advisory Board. A Science Advisory Board provided input into the first MTCA rulemaking efforts; this board was subsequently disbanded by the Legislature, along with several other boards and commissions, during an efficiency exercise. Sections of the MTCA rule still refer to a Scientific Advisory Board and when they must be consulted, and these sections will need to be updated to reflect whether there is a Science Advisory Board (or not). Clint raised the question of how the role of the Science Advisory Board could be filled without a formal board. This will be especially important in the 2nd rulemaking, which will address the more technical standards.

STAG Discussion & Feedback:

- There was some interest from the group regarding the purpose of the Science Advisory Board. A suggestion was made about adding more STAG members with a scientific background for future meetings or possibly creating a subcommittee for the next rulemaking phase.
- Participants noted that if there were to be a science advisory board or panel, there needs to be clarity on the context of the group, structure, the rule, and how will the science be translated to the public.
- Participants suggested that if there was to be a Science Advisory Board it should consider individual's experiences and include environmental justice expertise and representation.
- There was discussion of the idea of a science ombudsperson, or a program ombudsperson more generally, who might have a role in "translating" science for a lay audience. Regional Citizen's Advisory Committees ([WAC 173-340-610](https://www.wa.gov/site/alias_1988/37514/default.aspx)) once had ombudspersons, but they are not currently available. Should and could they be reinstated? (Question was left open; although there was general support

for having people to support community engagement, and a related discussion of about the role of regional / program public outreach staff in this regard.)

- If there is a science advisory board or panel, the focus should be on having it advise on issues proactively rather than being used for “appeals” where there is disagreement on science.
- If there is a science advisory board or panel, it will be important for them to have a cross-section of expertise and have independence and credibility. There will be differences in interpretation of what “science” means.
- Participants questioned whether legislative action would be needed to establish and fund a new Scientific Advisory Board since the Legislature had disbanded the first one.

Overall, the majority of STAG members were interested in the idea of a new Science Advisory Board and a clear structure for determining when scientific advice is needed, defining the question, and seeking that advice. *Ecology will do additional research on options for reestablishing a Science Advisory Board or panel and report back to the STAG as staff time permits.*

Cleanup Rule Update Phases and Schedule

Clint Stanovsky presented Ecology’s current plan for updating the cleanup rule. In January 2018, Ecology began an [Exploratory Rulemaking Process](#) to scope updates to the Cleanup Rule and determine both what changes people believe are needed and which they believe are most urgent. The MTCA [Cleanup Rule](#) updates will be done in three phases as follows.

- Phase 1: 2018-2021: Process and Administration (Parts 100-600 and 800) and Rule review: Cleanup Standards (Parts 700 and 900)
- Phase 2: 2021-2023 Cleanup Standards will be updated. (Parts 700 and 900)
- Phase 3: 2023-2027 Deferred or Emerging Topics

The following criteria were used to determine which topics to prioritize:

- Rulemaking difficulty
- Effect on cleanup completion rate
- Stakeholder concern
- Demand on staff capacity
- Alternatives to rulemaking
- Urgency
- Environmental Justice benefit

Based on those criteria, the focus for the first phase of the rulemaking will be the Site Hazard Assessment and Ranking process, remedy selection and disproportionate cost analysis, and leaking underground storage tank (LUST) processes.

At the end, Ecology's goal is a cleanup rule that will protect human health and the environment; define a practical cleanup process; drive priority cleanup projects to completion; create incentives to return all sites to economic and environmentally productive use; and provide clear expectations to the regulated community and the public.

STAG Discussion & Feedback:

- One participant asked if the 150 internal ecology TCP staff comments are available to the STAG members. *Ecology has made both [internal and external comments](#) available on the Exploratory Rulemaking webpage. agreed to make these comments available.*
- One participant asked how environmental justice is being looked at during this whole process, not just in identifying the rulemaking focus. They indicated a need to raise Ecology's attention to environmental justice impacts throughout the cleanup process including in Site Hazard Assessment and Ranking, and ensuring staff have the appropriate skills and information to identify and consider this sort of information.

Rules for rulemaking: The Administrative Procedure Act (APA)

Clint Stanovsky gave an overview of the rules for the rulemaking process. Rulemaking is distinct from policy setting. Ecology, like all state agencies, must follow the Administrative Procedure Act for rulemaking. This is a formal process with multiple formal opportunities for public engagement and comment. Policy setting, on the other hand, may have opportunities for public engagement but is generally more within Ecology's discretion. The process of updating the Cleanup Rules will include both rulemaking and policy setting steps.

For rulemaking, following the Administrative Procedure Act includes the following:

- Approval of a rulemaking effort by Ecology's leadership
- Announcement of rulemaking to the public (CR-101—handout provided in meeting packet)
- Proposal of specific rule changes, after consultation with stakeholders and the public
- Public Comment
- Adoption
- Closing of the file.

The Washington [Administrative Procedure Act](#) and [Regulatory Fairness Act](#) require that the benefits of any rule change should exceed its likely costs. The rule change also must be the least burdensome approach that achieves the goals and objectives of the statute. Ecology is particularly interested in anything STAG members can share about potential economic impacts of rulemaking options and ideas. The following Economic questions are asked to help inform this discussion:

- How would the rule changes affect you?
- How have similar policies in other states impacted you or other organizations?
- How could we still achieve the goals of the rulemaking while using the following methods to reduce the costs of compliance with the rule changes?
- Are you a small business or local government? If so, is the rule change disproportionately burdensome for your organization?

STAG Group Discussion & Feedback:

- One participant suggested that the economic analysis should be both quantitative and qualitative.
- Participants suggested that all rulemaking documents be on the website and kept updated.
- A participant asked if the PowerPoint slides could be made available. *Ecology will add the PowerPoint slides to the meeting materials on the STAG website.*

STAG Aspirations for the first rulemaking

Participants were asked to answer the following question, “Based on your experience if you had one wish to improve the procedural and administrative sections of the MTCA cleanup rule what would it be?” Participants wrote their ideas down and then shared them with one another. Several themes came out of this activity.

- The cleanup process should go faster and be more predictable – speed up cleanups.
- Environmental Justice needs to be a priority of the rulemaking and through the whole process. Resources to support communities will be important.
- Tribal engagement and incorporating tribal governments into the cleanup process as well as people of color will be important to achieve.
- Source control and pollution prevention are important – prevent future cleanup sites.
- Revamp of the DCA system should emphasize making it more transparent and predictable – particularly the details of how the DCA are scored. The earlier these decisions can be made in the process the better in terms of focusing effort meaningfully going forward.
- Improve the voluntary and independent clean up processes so that people know what is expected and can move forward and so that decisions about the success (or not) of these cleanups can be made in a more timely way.

- Improve communication and transparency around sites that have the potential to need cleanup – make sure landowners understand if they have a site that could need cleanup and what their responsibilities are.
- There should be a more timely follow up / responsiveness from Ecology both in terms of active cleanups and in terms of sites in the independent or voluntary programs.
- Potential for third-party cleanup oversight should be considered.
- Clarify: the approach to determine clean-up levels when toxicity data doesn't exist; the whole process; and independent/voluntary cleanups at complex cleanup sites.
- Create more opportunities for public engagement and input and give the community certainty of a cleanup. The public review process should be clear for everyone.

See Attachment 1 for the full list of ideas written down by participants during the meeting.

An updated site hazard assessment and ranking process (SHARP)

Clint Stanovsky and Eileen Webb gave an overview on a new updated site hazard assessment and ranking process (SHARP). The update will involve both a rulemaking element and a policy setting element. Goals for the updated ranking and listing process including better, more predictable, timely, and transparent prioritization, progress tracking, and public communication. In particular:

- Initial rankings will be integrated into the initial investigation
- Rankings will be absolute rankings (no more quintiles; sites will be ranked based on their characteristics alone, not on how they relate to other sites)
- Rankings will be updated at cleanup milestones.

Ecology is proposing to remove the obsolete Washington Ranking Method (WARM) from the rule (without replacing it in the rule) with a detailed ranking procedure. Instead, the ranking method would be a procedure implementing an agency policy, to be developed with public input—but still outside the rule.

Components of the proposed ranking system will look at exposure potential from a A-D scale and severity of impact estimate ranked from 1-4. There will be both a ranking worksheet, which evaluators would fill out in the field, and a visual representation of the ranking showing potential exposure pathways, which could be used for public communication.

STAG Discussion & Feedback

- One participant commented that the evaluation should indicate if the land is included as part of a tribal reservation. The likelihood of cultural resources on the site also should be included.
- There were questions about how environmental justice issues would be noted. Ecology is planning to note environmental justice issues with a flag. The presence of sensitive populations would be noted in the same way. There were questions about how that flag would work and whether it would be effective.
- There were questions about how the transition from the current ranking and listing method to the new one would work. Will all sites be re-ranked? On what schedule? Ecology acknowledged that a deliberate transition will be needed. Participants suggested that examples of how the transition will work would be helpful.
- Participants suggested that it will be important for evaluators to include sources of information in their evaluations.
- One participant suggested that there needs to be a more effective way to make information on site hazard assessment and ranking available to communities, including (especially) communities of color.
- Some members requested more detail on the interactions of exposure, hazard, susceptibility, and severity.

Updated Communications & Public Participation for Delisting

Clint Stanovsky gave an overview of public involvement of and [reporting hazardous sites listings and de-listing](#). All listing decisions and rankings are published in the site register and online. The new anticipated workflow is:

- Streamline the initial investigation and site hazard assessment
- Eliminate the confirmed and suspected contaminated sites list after legacy unranked sites are added to the hazardous sites list
- Revive hazard ranking as a practical tool for prioritization
- Allow re-ranking and progress reporting

STAG Discussion & Feedback:

- Participants had questions about the actual numbers of the sites that are listed or delisted. As well as the sites that [PLIA](#) (the Pollution Liability Insurance Agency) oversees. There was some confusion about these numbers and where PLIA sites

are captured in the graphs. *Ecology later confirmed that the numbers presented in the PowerPoint do not include PLIA sites.*

- A participant had questions around Ecology staff capacity to carry out additional public notices. *Ecology agreed that the feasibility of the new system depends on it being much quicker and more flexible than WARM.*
- A participant asked about how often public comments on a proposed delisting decision results in changes to the decision. *Ecology will investigate this and provide additional information.*
- One participant suggested having a presentation on environmental justice from Department of Ecology's Environmental Justice Coordinator, Millie Piazza, to help others understand why this lens is so important to the whole process.

Public Comments

- A commenter asked where presentation materials will be posted. The materials will be uploaded onto the [STAG website](#).
- There were no other public comments provided.

Wrap Up and Next Steps

Clint Stanovsky and Jeff Johnston thanked participants for their time and engagement during the meeting. In early November, the Department of Ecology will provide and would like the group to review preliminary draft rule language and provide comments and questions on the proposed site hazard and ranking process. Input on the economic impact questions and the ranking tool are particularly desired.

The next meeting is November 21, 2019, at the Embassy Suites in Bellevue, WA. More details and logistics will be communicated in the next weeks via email.

Attachment 1: STAG member aspirations

- **Opportunities to speed completion of studies, remedy selection, and remedy implementation.**
 - Accomplishing cleanup is an EJ issue
 - DCA accounting for qualitative benefits.
 - Scaling evaluation criteria
 - Costs tend to overwhelm everything else
- **ESJ in warm (site ranking) on replacement approach to WARM**
 - Climate change and other natural hazards consideration explicitly considered in remedies and site ranking.
 - Clarity in approach to determining clean-up levels when toxicity data doesn't exist or is limited and when those chemicals substance should have clean-up level examples CEC's.
- **Achieving and maintaining clarity + harmony among law, regs, guidance, policies + tools and how these are developed. Value the role of SAB in working this issue (we need the SAB back)**
 - Preserving the substance of the DCA. It works well-don't break it.
 - Improving the ability of the rule to address sites in urban environments with regional contamination and where phasing is required.
 - Preserving and facilitating independent (not VCP) cleanup actions, both at simple sites and at complex sites (e.g. industrial cleanups)
 - Funding a workable place for source control (boundaries of MTCA widely applied/ interpreted differently)
- **More transparency with the DCA, especially when it comes to environment and environmental justice benefits**
 - More opportunity for meaningful public comment and input (i.e process is extremely rigid and doesn't weigh in public interest very high)
 - More consideration for climate change, earthquakes, convergence of natural disasters, etc. into the permanence of cleanups
 - More EJ through the whole process
- **Better understanding of background**
 - Considerations and geologic variability of especially metals throughout the state
 - Also, more acknowledgement of "urban" background concentrations for CPAHS, metals, dioxin and other vehicle combustion by product. Charles San Juan did an urban background study in Seattle and the draft report

was very revealing. However, that report was never finalized and was quashed.¹

- **Economics?**
 - Explore new clean-up
 - Funding sources for small businesses such as state underwriting of low-cost loans from lending institutions on incentive lenders
- **Clarifying role of PLIA (TPH cleanups)**
 - Continued improvements to the VCP process
- **Guarantee independent technical representation for communities**
- **Ensure tribes are consulted on sites within their entire traditional areas**
- **The cleanup process should be more directed for independent/ voluntary cleanup sites. It would move cleanups forward and make financial transactions more amenable.**
- **Revamp DCA**
 - Current system prioritizes economic development at the expense of impacted communities. Developers can "jump the line" by paying to clean-up low-priority sites, while PLPs can opt for lower cleanup standards and use high cost: benefit analysis as their defense
- **Complex sites:**
 - Opportunities for dividing up site and phasing cleanups
 - Exists but make more explicit change
- **Site volume: Support early actions to minimize risk/exit program**
 - Clarify requirements and options/tools
 - Streamline "simple" sites at front end
 - Creative options for NFAS, EJ, "deputizing" constraints

¹ Ecology completed a study of concentrations of cPAHs and dioxins in the soil of urban and rural areas of Washington State in 2011. Those results were published in an Initial Summary Report and a Frequently Asked Questions document, both of which are available on the Ecology website. See links below and please contact Jeff Johnston (jeff.johnston@ecy.wa.gov) with any questions.

<https://fortress.wa.gov/ecy/publications/SummaryPages/1109049.html>

<https://fortress.wa.gov/ecy/publications/documents/1109219.pdf>

- **173-340-310: initial investigation-this can be an extremely useful "off-ramp "for sites early in the process; further clarity as to how and what sites are eligible for an NFA, or expansion of this section would be beneficial.**
 - 173-340-360: further detail and clarity around the DCA.CC/GH5
 - SAB-Clarify role and reinstitute
- **DCA revisions- costs vs scoring. Ecology judgement, time and effort spent on DCA on ecology "disagrees" based on "best professional judgement"**
 - Ecology response time(timeline)
- **Explore the potential for in-lieu compensation tool for impacts where or cleanup is either not possible or not technically practicable or for other impacts.**
 - Use of a "scientific advisory like" entity that is independent and separate from Ecology to resolve disputes in the interest of expediting cleanups.
- **DCA: feasibility studies + disproportion is cost analysis don't take sustainability criteria into account.**
 - What changes to MTCA can be made so that sustainability can be a factor?
 - As an example, the preferred ecology cleanup technique is commonly to excavate contaminated soil and haul it to Oregon or central WA. But if looked at from a wholistic standpoint, the air particulate load + diesel use from thousands of trucks should be considered.
- **Added flexibility or tools to address sites with special concerns related to physical environment or other considerations or constraints.**
 - MTCA currently considers impacts to human health and the environment on a "micro" scale. Add tools to consider impacts to "macro" scale environment. (e.g. carbon/climate impacts) in decision making around cleanup.
- **Comprehensively, incorporate, environmental justice**
 - define terms, ensure developer incentives do not leave tribes, people of color, low-income people further behind backstops in place.
- **Streamline and clarify public review process, including project MTCA (i.e. SEPA rules)**

- **Speed up the process!**
 - Flesh out or formalize the role of tribes
 - Provide for greater input by current owners owned for remedy selection when the prior owner is conducting cleanup.

- **Meaningful environmental justice**
 - Incorporate rule changes that prioritize frontline communities in site ranking and resources

- **Not to sacrifice for streamlining speed for public input/ good cleanup.**

- **Incorporate ESI into site ranking and prioritization of ecology for cleanup**

- **Address importance of source control and pollution prevention**
 - 1 of 2 core elements of MTCA (PPGs, cleanup)
 - Known and emerging chemicals
 - Align with toxics in fish
 - Implementation strategy in development

- **Speed up process for "uncomplicated" sites**

- **Taking into consideration multiple effects on community**

- **Integration of NRD: Ensuring protectiveness of resources for perpetuity**
 - Interim actions: not comprise final remedy
 - DCA- not be a way out of providing a fully protective remedy
 - TEE - improve upon
 - SHA- improve prioritization of sites
 - Ensure protectiveness of susceptible and high consuming populations
 - Environmental justice incorporated throughout MTCA
 - Tribal allow for consumption rates (by tribe)
 - East-side incentives: property values/ development does not drive cleanup like they do on the west side
 - Cultural evaluation requirements: provide greater clarity

- **Community can have certainty of clean up**
 - I.e. DCA volunteer clean up
 - Protective of interim action

References

Site	Link
STAG website on EZView	https://www.ezview.wa.gov/site/alias_1988/37514/default.aspx
STAG member list	https://www.ezview.wa.gov/site/alias_1988/37516/contacts.aspx
STAG Charter	https://www.ezview.wa.gov/Portals/1988/Documents/Documents/STAG_Charter.pdf
STAG Facilitators	Elizabeth McManus, Ross Strategic emcmanus@rossstrategic.com https://www.rossstrategic.com/ Melissa Bañales, Ross Strategic mbanales@rossstrategic.com
Exploratory Rulemaking Scoping Comments from the public and staff (2009–2018)	https://ecology.wa.gov/DOE/files/1f/1fd4bd85-17d8-41f9-9394-5146b9d6ee10.pdf
Hazardous Sites List (access through this page)	https://ecology.wa.gov/Regulations-Permits/Guidance-technical-assistance/Site-Register-lists-and-data
Ecology’s rulemaking webpage, Chapter 173-340 WAC	https://ecology.wa.gov/Regulations-Permits/Laws-rules-rulemaking/Rulemaking/WAC-173-340
Ecology’s Exploratory Rulemaking webpage	https://ecology.wa.gov/Spills-Cleanup/Contamination-cleanup/Rules-directing-our-cleanup-work/Model-Toxics-Control-Act/Exploratory-rulemaking
Model Toxics Control Act Cleanup Regulations, Chapter 173-340 WAC (Cleanup Rule)	https://apps.leg.wa.gov/WAC/default.aspx?cite=173-340
Cleanup Rule language re: regional citizens’ advisory committees	https://apps.leg.wa.gov/WAC/default.aspx?cite=173-340-610
Model Toxics Control Act, Chapter 70.105D RCW (Cleanup Statute)	https://app.leg.wa.gov/rcw/default.aspx?cite=70.105D&full=true
Toxics Cleanup Program’s policies and procedures	https://ecology.wa.gov/Regulations-Permits/Plans-policies/Toxics-cleanup-policies