



HONOR. PROTECT. RESTORE.

December 30, 2019

Clint Stanovsky
Cleanup Rulemaking Lead
Washington Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

RE: Yakama Nation Comments on the Washington State Department of Ecology's Exploratory Rule Making for the Model Toxics Control Act parts 1-6 and 8.

Dear Mr. Stanovsky,

The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation or YN) is submitting these comments on the Exploratory Rule Making for the Model Toxics Control Act (MTCA) Chapter 173-340, parts 1-6 and 8 to support the ideas and positions taken as a member of the Stakeholder & Tribal Advisory Group (STAG). These comments were prepared in collaboration with McClure Tosch (YN, ERWM) and Tom Zeilman (legal consult).

General Comments:

In general, YN would like to see Washington State make the potentially liable parties (PLPs) and Ecology site managers explicitly aware of the concurrent Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authority at MTCA sites. YN's experience working at MTCA sites with Ecology is that we have had to first educate section managers and subsequently site managers of the concurrent authority which usually leads to delays in cleanups moving forward. Once a common understanding on this issue is reached it helps the PLP, Ecology, and YN understand the clear roles and responsibilities at the site.

In addition, we feel the MTCA's lack of integration with natural resource damages (NRD) also leads to cleanup decisions that do not fully consider the liability to the PLP and impacts to natural resources. We encourage Ecology to improve the consideration of impacts to natural resources and integration of NRD in MTCA cleanup decisions.

Lastly, we have concerns with reporting and notification at the site discovery and initial investigation phases. We suspect that many releases go unreported, partly due to lack of PLP understanding of the concurrent MTCA and CERCLA reporting requirements. In addition, the information and decision making involved in these initial phases occur completely outside of YN's knowledge, especially for those sites not carried forward. YN requests Ecology notification of this process (i.e., release information and Ecology decision(s)).

Below are some suggested changes to the rule to help address our general concerns. However, we would like to discuss our concerns and suggestions more fully with you at a later date.

Specific Comments: Edits are in blue, underlined text.

1. WAC 173-340-120 Overview

(2) Site discovery. Site discovery includes:

(a) Release reporting. An owner or operator who knows of or discovers a release of a hazardous substance due to past activities must report the release to the department as described in WAC 173-340-300. Most current releases of hazardous substances must be reported to the department under the state's hazardous waste, underground storage tank, or water quality laws. The term "hazardous substance" includes a broad range of substances as defined by chapter 70.105D RCW. [See 42 U.S.C. § 9603\(a\) and 40 CFR § 302.6 for notification requirements to federal agencies for reportable quantities of hazardous substances under CERCLA.](#)

2. WAC 173-340-130 Administrative principles

(7) Interagency coordination.

(a) If the department is conducting remedial actions or requiring remedial actions under an order or decree, the department shall ensure appropriate local, state, and federal agencies and [Indian tribes](#) are kept informed and, as appropriate [pursuant to concurrent federal and/or tribal CERCLA authority](#), involved in the development and implementation of remedial actions. The department may require a potentially liable person to undertake this responsibility. If the potentially liable person demonstrates that they are unable to obtain adequate involvement [by a particular government agency or tribe](#) to allow the remedial action to [proceed](#), the department shall request the involvement of the agency or tribe.

(b) The nature and degree of coordination and consultation shall be commensurate with the other agencies' and tribes' [interests, needs and legal authority](#) at the site. Interested agencies and tribes shall also be included in the mailing list for public notices under WAC 173-340-600. To facilitate coordination, it is important that agencies and tribes provide specific comments, including the identification of additional information

needed, [mitigating measures, or legally applicable requirements](#) that are necessary or desirable to satisfy their concerns. [See 40 CFR Subpart G for information regarding coordination with federal and tribal trustees for natural resources.](#)

(c) In order to provide for expeditious cleanup actions, all federal, state, local agencies, and tribes are encouraged to coordinate [with the department](#) when [it provides](#) notices, [holds](#) meetings and hearings, and [prepares](#) documents. Whenever reasonable, the department shall coordinate and combine its activities with other agencies and tribes to minimize the duplication of notices, hearings and preparation of documents, unless otherwise prohibited. [See 40 CFR Subpart F for information regarding the Department's involvement in hazardous substance response under CERCLA.](#)

3. WAC 173-340-200 Definitions

[“CERCLA” means the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et. seq.](#)

[“Indian tribe” or “tribe” means any Indian tribe, band, nation, or other organized group or community, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. \(See <https://www.law.cornell.edu/uscode/text/42/9601>, #36.\)](#)

4. WAC 173-340-300 Site discovery and reporting

(6) Other obligations. Nothing in this section shall eliminate any obligations to comply with reporting requirements that may exist in a permit or under other laws, [including reportable quantities of hazardous substances under 40 CFR § 302.6.](#)

5. WAC 173-340-360 Selection of Cleanup Actions

(3) Determining whether a cleanup action uses permanent solutions to the maximum extent practicable.

(f) Evaluation criteria. The following criteria shall be used to evaluate and compare each cleanup action alternative when conducting a disproportionate cost analysis under (e) of this subsection to determine whether a cleanup action is permanent to the maximum extent practicable.

(i) Protectiveness. Overall protectiveness of human health and the environment, including the degree to which existing risks are reduced, time required to reduce risk at the facility and attain cleanup standards, on-site and offsite risks resulting from implementing the alternative, [attainment of all legally applicable requirements under federal and state laws,](#) and improvement of the overall environmental quality, [including but not limited to integration of the cleanup action with natural resource and/or habitat restoration.](#)

6. **WAC 173-340-500** Determination of status as a potentially liable person

Insert new subsection:

(7) Nothing in this section shall affect the authority of federal agencies and tribes to determine the liability of potentially responsible parties pursuant to CERCLA.

7. **WAC 173-340-550** Payment of remedial action costs

(5) Natural resource damages. Nothing in this section shall affect the authority of the department and the office of attorney general, or the authority of federal agencies and tribes, to recover natural resource damages.

Please do not hesitate to contact me with questions. I can be reached at 509.985.3561 or shil@yakamafish-nsn.gov.

Regards,



Laura Shira, P.E.
Environmental Engineer