



October 13, 2022

Via Electronic Mail – MTCARule@ecy.wa.gov

Washington Department of Ecology
c/o Clint Stanovsky
P.O. Box 47600
Olympia, WA 98504-7600

RE: Yakama Nation Preliminary-Draft Comments on the Washington State Department of Ecology's Exploratory Rule Making for the Model Toxics Control Act (MTCA) parts 1-6 and 8 (Preliminary Draft 2)

Dear Mr. Stanovsky:

Thank you for the valuable discussion at the fall 2022 series of MTCA STAG meetings. The Yakama Nation provides the following PRELIMINARY-DRAFT comments as part of the phased approach to reviewing Ecology's draft proposed MTCA updates provided to the MTCA STAG on 9/8/2022 (Preliminary Draft 2). Although Ecology was not able to grant our one-week comment extension request, we understand that we will have further opportunity to discuss these concerns on 10/17/2022 with Ecology staff and AAG representation. These comments were prepared in consultation with Tom Zeilman of Zeilman Law and Sherrie Duncan of Sky Environmental. We have also previously provided comments to earlier rule-making phases on 12/30/2020, 1/28/2020, and 7/10/2020.

1. Clear explanation of CERCLA applicability to all MTCA sites and tribes' legal authority is needed.

Problem - In its earlier comments in 2019-2020 the Yakama Nation expressed concern that the new MTCA rules do not explicitly refer to CERCLA with enough clarity for PLPs or Ecology site managers to understand that Indian tribes' legal authority to participate in MTCA cleanups derives not from state law but federal law. For the most part MTCA refers to CERCLA only as it applies to NPL sites; however, CERCLA also applies to all MTCA sites, even if the state is solely using MTCA. Despite what is says in the new draft WAC 173-340-620(1), nowhere in MTCA's statutory language are tribal governments or interests even mentioned. The current effort to include tribes in the new rules (which indeed is long overdue and appreciated) only derives from state statutes requiring all state agencies, whatever their duties and authorities, to collaborate with tribes and develop coordination frameworks for implementing environmental justice principles. RCW 43.376.020; RCW 70A.02.100. Indian tribes on the other hand derive their authority to engage in cleanups as support agencies from Sections 107 and 126 of CERCLA. These statutes allow tribes to recover both response costs and natural resource damages, as well as participate in cleanups on an equal basis with states. 42 U.S.C. §§ 9607(a), (f); § 9626(a).

Solution - Somewhere in the revised rules under WAC 173-340-620 the relevant CERCLA provisions should be cited so that PLPs and Ecology site managers have some clear idea of the tribes' legal authority.

2. Tribal funding expectations need to be stated.

Problem - As we have pointed out before, the sometimes herculean efforts that the Yakama Nation has had to make to recover its response costs for participating in MTCA cleanups in the Columbia Basin have severely hampered its engagement at some sites – merely because of the lack of knowledge among PLPs and their legal counsel regarding tribal authority in relation to state-led cleanups as already noted. Although Ecology currently has a Memorandum of Understanding with the Yakama Nation for all MTCA sites in Washington, the agency has been reluctant to support tribal efforts to get funding, with predictable results. This has led to, in the most recent case, litigation in U.S. District Court with one particular PLP over a site that should have been obviously of great tribal interest upstream from the Yakama Reservation. See *Confederated Tribes and Bands of the Yakima Nation v. City of Yakima*, E.D. Wash. No. 20-CV-03156, Order Denying Motions for Summary Judgment, ECF No. 87 (Aug. 1, 2022). Despite the directives in state statutes to collaborate with tribes, and to use environmental justice principles in cleanups that affect them, there will continue to be problems with tribal coordination if there is no staff or consultants available to tribes because the PLPs won't cough up the money to fund them. All the wonderful initiatives that are being planned to address Indian tribes' concerns about their health and resources, and to finally achieve true environmental justice, will get nowhere without direct communication between the tribes and the PLPs. This is nowhere to be seen in the new rules.

Solution - We suggest that the revised rules should require in a separate subsection WAC 173-340-130(6)(c) that PLPs immediately contact any affected tribes once Ecology has identified them at all Ecology-led sites, and also that they engage in negotiations for direct funding of tribal engagement if needed pursuant to Section 107(a) of CERCLA.

3. Clarity on reportable quantities is needed to ensure timely notification of tribes.

Problem - We have also asked Ecology in this process to make it clear that in Washington State the sheer number and broad geographic interests of Indian governments (especially regarding fishing, hunting, and gathering rights) mandate that PLPs notify the National Response Center (NRC) immediately so that EPA and concurrent federal authority is involved as soon as possible. We understand that the PLPs do not have to notify Ecology if the NRC has also been contacted, but under these rules it does not work the other way around. Which leaves potentially affected tribes in a situation where they may not know of a significant release until 90 days afterward under the new rule. Although for a major spill on a waterway this scenario is unlikely, it is still possible for other more remote areas and is not acceptable. Ecology may not even know of a tribe's status as "affected" under the new rules until some real damage to tribal interests and lands has been done already.

Solution - Therefore we suggest that the revised rules in WAC 173-340-300 require PLPs to check the EPA's reportable quantities for National Contingency Plan notification of releases in case they may trigger federal notice to the NRC. This will be helpful in educating PLPs on when national agency involvement is necessary (and help them avoid possible federal criminal prosecution under as well). This will also potentially give tribes an early heads up, which may also assist Ecology's response because it will allow site managers to identify affected tribes earlier through EPA.

4. The definition of "Tribal Lands" is problematic and needs clarification.

Problem - As expressed in our STAG webinar comments, the Yakama Nation also has some concerns about the definition of "tribal lands" in the revise rules, which has been lifted *verbatim* from the recent state environmental justice statute. Despite its seemingly broad language, this definition was not well thought out by the Washington Legislature and is poorly worded. First, the inclusion of the term "Indian country" as defined by federal law seems

to imply that Ecology has some authority to apply MTCA within tribally-controlled lands and on reservations. However, Ecology has no regulatory authority over hazardous waste within Indian country, and under jurisdictional principles should have no MTCA authority there as well. See *Department of Ecology v. EPA*, 752 F.2d 1465 (9th Cir. 1985) (RCRA authority of State of Washington within Indian reservations preempted by EPA and tribal authority). Though that may not be the intent of the rule, any misunderstandings by site managers may cause confusion in the future. The more likely legislative intent was to acknowledge that MTCA cleanups may have impacts within Indian country from outside its boundaries, particularly if those tribal lands are downstream or adjacent to a cleanup site.

Solution - A suggestion would be to note a disclaimer to state jurisdiction somewhere and make sure it is clear that there is no MTCA authority specifically over “Indian country.”

Problem - Second, the definition of “tribal lands” in RCW 70A.02.010(13), which is referenced in the revised rules, makes no mention of some of the most important sites for tribes in Washington – usual and accustomed treaty fishing areas, traditional treaty hunting and gathering areas, and treaty ceded lands. Nowhere are treaties even mentioned in the revised rules, which is astonishing given their significance to off-reservation tribal involvement in cleanups. Although these areas may be implicitly subsumed under the catch-all “other tribal sites protected by federal or state law,” the absence of these important qualifications also makes it difficult or impossible for PLPs and site managers to look out for possible impacts to tribal treaty interests.

Solution - The more specific references to fishing and other resource use rights would again assist those at Ecology and others to understand the significance of potential contamination from releases, and the probable effects on resources for which Indian tribes are both traditional users and trustees. At a minimum the definition should include the term “treaty usual and accustomed and ceded areas” in the definition rather than relying exclusively on the statutory language in RCW 70A.02.010.

5. Clearly stated habitat restoration and resource recovery goals are needed.

Problem - When it comes to protecting the resources, the focus of MTCA is mostly limited to reducing/eliminating toxicity exposure pathways to environmental “receptor(s)”, which is agreeably an important end-goal. Although habitat improvements are often a bi-product of cleanup, they are not an explicit or clearly stated goal of MTCA, nor is cleanup compatibility with local potential habitat restoration and resource recovery goals/opportunities explicitly considered within MTCA. As a result cleanup conversations surrounding habitat tend to be limited to habitat mitigation requirements resulting from cleanup alternatives permanently compromising habitat (ex. capping, containing, or hardscaping).

The reality is that capping/containing/hardscaping contamination in place at or adjacent to potential habitat improvement areas will often preclude the ability to fund and implement the habitat improvement. It is often too costly to go back and remove contamination and institutional controls or reduces the net environmental benefit of the project because of design considerations resulting from the proximity to sources of toxicity.

Solution - We are suggesting that Ecology state that habitat restoration and resource recovery are a goal of cleanup. The cleanup process should consider whether the cleanup alternatives are compatible with habitat restoration and resource recovery goals for the vicinity. Another way to say this is that **cleanups should facilitate/support/enable habitat restoration and recovery goals, and not preclude them.** The minimum mitigation requirements should not be the status quo.

For example, suggested edits (underlined) to MTCA include:

- WAC 173-340-360(3) Cleanup Action Requirements – addition of (e) **Future Use**. Consider compatibility with current and future human and environmental uses, including climate change resiliency*, habitat restoration, and resource recovery goals.
- * (3)(a) climate resilience is more specific to long-term cleanup effectiveness, not habitat.

Something as simple as having a habitat restoration/resource recovery compatibility goal statement within MTCA would help allow for more comprehensive conversations and evaluations to enter the cleanup process. It would allow for consideration of habitat restoration goals and resource recovery beyond cleanup mitigation and NRD.

Examples of Washington sites where Ecology and/or others have done a good job at comprehensively addressing or enabling habitat restoration and resource recovery as an end goal of cleanup:

- Port Gamble
- Commencement Bay

Background There are only a couple places where habitat is mentioned within MTCA WAC and RCW and this language is severely limited.

- WAC 173-340-200 Sensitive Environment definition – includes critical habitat, which is emphasized as a cleanup priority in SHAs 173-340-320(4)(g) and UST release site characterization reports (173-340-450(5)(b)(iii))
- WAC Table 749-1 Simplified TEE Exposure Analysis Procedures – prioritizes higher quality habitat areas for application of terrestrial cleanup criteria
- Reduction of “receptor(s)” exposure to toxicity is the focus of MTCA WAC, not “habitat” restoration or resource recovery
- RCW 70A.305.190(5)(f)(ii) MTCA capitol account - allows for Ecology to provide grants or loans to local governments to fund activities that could include habitat restoration

Other habitat ARARs outside of MTCA: During STAG conversations, a member indicated that habitat was addressed in other ARARs. However, these ARARs typically do not consider or are significantly limited in their consideration of habitat restoration goals or recovery of ESA listed species, tribally important species, or critical prey resources and habitat. For example:

- Habitat mitigation during cleanup – This is a helpful requirement, but is very limited in what it can provide. Inflexibility in mitigation requirements over time can even impede future natural process-based habitat restoration projects in the area.
- SEPA/NEPA – This process is helpful for protecting some types of existing habitat in a cleanup (unless outweighed in the DCA process). It does not evaluate compatibility of projects with habitat goals and resource recovery for an area.
- SMS/SCUM – Aside from “net adverse environmental impacts” and mitigation requirements, these regulations have similar limitations to upland MTCA cleanup regulations and goals.
- WQ Standards – Anti-degradation requirements and designated/aquatic-life uses prevent further degradation, but do not directly address habitat restoration or resource recovery.
- NRD – Although Ecology encourages the Cleanup and NRD planning processes occur simultaneously, this is rarely the case at cleanup sites. Most cleanups are completed absent the habitat and resource recovery evaluations, visioning or brainstorming that typically occur in the NRD process. In addition, this

6. Use of the terms tribes vs. vulnerable populations/overburdened communities needs clarification and consistency.

Problem - MTCA does not clarify how tribes do or do not fit into the definitions for vulnerable populations or overburdened communities. In addition, throughout MTCA mentions of vulnerable populations or overburdened communities do not include tribes.

Solution - Clarity needs to be added. Ex. RME, tribes, vulnerable populations, overburdened communities definitions (WAC 173-340-200), 173-340-310, 173-340-340(1), 173-340-360(multiple locations), and elsewhere.

Please do not hesitate to contact me with questions. I can be reached at (509) 985.3561 or shil@yakamafish-nsn.gov

Sincerely,



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