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VIA EMAIL ONLY

Clint Stanovsky
Cleanup Rulemaking Lead
TCP, Policy and Technical Support Unit
Department of Ecology
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Re: MTCA Cleanup Rule Stakeholder and Tribal Advisory Group
Comments on Draft Changes to Cleanup Rule dated September 8, 2022

Dear Mr. Stanovsky:

I am providing written comments on updated draft proposed changes to the MTCA Cleanup Rule, Chapter 173-340 WAC, provided to the MTCA Stakeholder and Tribal Advisory Group (STAG) on September 8, 2022 and discussed in several subsequent advisory group meetings.[1]

At the outset, thank you to Ecology for the opportunity to participate in the advisory group and to review and provide comments on the updated draft rule language. As with the prior rule drafts, I recognize the significant amount of effort and thought that Ecology put into developing and presenting this proposal for consideration. I applaud the Ecology team for their hard work and professionalism.

I have attempted to organize my comments around the themes and questions identified by Ecology in the "Briefing Paper" dated September 8, 2022.[2] I have answered the theme-related questions provided by Ecology in pages 37 to 44 of the briefing paper. Where I have identified additional comments that are related to those themes, I have tried to include those comments in the corresponding sections below. I have also included miscellaneous comments on the September 8 draft at the end.[3]

[1] As with prior submissions in my capacity as an advisory group member, I emphasize that these comments are not submitted on behalf of my firm or my firm's clients. The firm and/or its clients may take or express a different point of view as to the prudence or legality of any specific proposed requirements or other issues addressed in these comments.

[2] https://www.ezview.wa.gov/Portals/_1988/Documents/Documents/PD2_STAG_Review-Briefing_Paper.pdf.

[3] Some of my prior comments remain relevant to the content of the updated draft rule. For the sake of brevity and with the understanding that Ecology can reference my prior comments as needed, I have not attempted to incorporate them in any detail here.

"Questions for Discussion"

I. Q1. Balancing the functions of initial investigations

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

Consistent with my prior comments, I continue to believe that there is value in providing flexibility in the rule to encourage cleanups earlier in the contaminated site process.

The reason that Ecology provided for not allowing even more time to complete cleanups before a site is listed is the need to provide the public with notice of newly discovered releases. However, Ecology could provide this notice before listing a site, while still allowing time for the responsible party to complete an early cleanup.

The structure as proposed is also somewhat inflexible. The process outlined in draft WAC 173-340-310(5) illustrates this. The provision would require Ecology to complete an initial investigation within 90 days of receiving notice of a newly discovered release. The timeframe could be extended by up to 90 days if Ecology receives a remedial action report under draft WAC 173-340-515(4). This could allow Ecology more time to review an independent cleanup action report and, if warranted, move the site straight to the no further action sites list. But, would Ecology realistically have enough staffing capacity to review this report and make an NFA decision in 90 days? If not, as I read the draft language, within 30 days of the initial investigation, Ecology would need to make a listing decision. This could push the site onto the contaminated sites list for an administrative, not a substantive, reason, which has the potential to penalize good actors unnecessarily.

b. Additional related comments

Draft Section 300 – Site discovery and reporting

Threatened release example? Consider providing an example of when a "threatened release" is likely to require reporting. In my experience, without clarification as to what is meant by a threatened release, the requirement to report threatened releases could lead to over- or under-reporting, depending on circumstances.

Draft Section 310 – Initial investigation

Subparagraph (1)(c). Suggest clarifying edit that "the population **may be** threatened" to avoid perception that initial investigation has confirmed an actual threat.

Subsection (3). I understand the use of the term "advise" to indicate that Ecology's requests for additional information under this provision would not be binding (though parties may have an incentive

to collect additional information regardless). If that understanding is inaccurate, then Ecology may wish to consider another word choice, subject to limitations on Ecology's authorities under RCW 70A.305.030.

Subsection (5)(b)(i). There appears to be an "or" missing after clause (i).

Subsection (6)(d). Subsection (d) appears to be redundant with subsection (e). Suggest modifying subsection (e) to reflect that this subsection applies where further remedial action is needed to "**confirm or** address the threat...."

II. Q2. Developing site hazard assessment and ranking policies and procedures

a. "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?"

I do not have a categorical concern with Ecology removing the site hazard ranking system procedures from the rule and replacing them with the performance standards and public participation requirements. However, I encourage the following:

- Please include a disclaimer in the regulation noting that any given site hazard assessment may not accurately or completely characterize the public health and environmental risks posed by current site conditions. Multiple issues suggest that Ecology's site hazard assessment is likely to be an imperfect means of assessing and communicating risk, including, but not limited to, variability in quantity and quality of information available and the fact that under the draft rule Ecology would not be required to update the site hazard assessment when new information is available. Additionally, as conceived, the site hazard assessment process is intended primarily to facilitate Ecology planning and to provide a check to confirm that the listing is appropriate. It is not a risk assessment.

- Please refer to my prior comment suggesting that the term "threat" be replaced with the term "risk." This may avoid potential confusion or uncertainty from the public about the nature of the known hazards at a given site and the results of the site hazard assessment.

b. Additional related comments

Draft Section 320 – Site hazard assessment and ranking

Subsection (2)(a). Suggest including requirements:

- that date of each SHA be included in the ranking itself;
- that the level of confidence in each SHA must be easily identifiable; and
- that SHARP Tool "version" be identified in each SHA.

Subsection (2)(b). At minimum, when identifying a "substantive change to the process," Ecology should provide public notice and an opportunity to comment whenever a change to the process would require or result in a change to the substantive ranking of any given site.

Subsection (3)(d). Instead of the "notify a person" language, suggest more general alternative that "Ecology will provide notification...."[4]

Draft Section 330 – Contaminated sites list

Subsection (2). Suggest clarifying that whether a remedial action is necessary is determined by the standards in Section 310, and eliminate subparagraphs (a) and (b).

Partial NFAs. Suggest clarifying that Ecology may determine that no further action is required on property- and a media-specific basin in this section. The effect of the draft updates relating to site de-listing on partial NFA determinations is unclear. Suggest clarifying that even if a site remains on Ecology's contaminated sites list Ecology retains the authority to conclude that no further action is required on a property- and/or media-specific basis and that this may be reflected or applied at any site regardless of cleanup pathway.[5]

Subsection (6).

- Clarify that Ecology may remove a site from the contaminated sites list, even in the absence of a petition.

- Clarify that a party other than ones now listed in subsection (6) ("owner, operator, or potentially liable person") may petition Ecology to remove a site from a contaminated sites list.

- Clarify that Ecology will automatically de-list a site under an Ecology-conducted or -supervised clean up or when issuing a related no further action opinion as part of Ecology's or PLIA's technical assistance program even without a separate request for removal under this subsection.

[4] This comment applies generally as this formulation is present elsewhere in the draft rule.

[5] *See, e.g.*, Ecology, Voluntary Cleanup Program (VCP): Guidance for the Expedited VCP Process, at 34 (July 2020), https://apps.ecology.wa.gov/publications/documents/2009053.pdf; Ecology, Guidelines for Property Cleanups under the Voluntary Cleanup Program, at B-2 to B-3 (rev. July 2015), https://apps.ecology.wa.gov/publications/documents/0809044.pdf.

III. Q3. Program planning and assessment

a. "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?"

Ecology should set a specific date for developing a comprehensive and integrated strategic plan. Ecology similarly should identify a time period for providing plan updates and periodic performance assessments. Given Ecology's biennial reporting requirements under MTCA, it may make sense to align the strategic planning with the reporting time periods.

If Ecology determines that no update is necessary, it could maintain the existing plan. However, without a check-in timeline, Ecology may decide that the strategic planning process and performance assessments are not high priority and choose not to engage in this process. This would be detrimental to providing the public with information about the Toxic Cleanup Program's strategic priorities and allowing the public to monitor the program's progress toward reaching its goals, including an evaluation of related metrics.

While I strongly support the requirement to ensure that the strategic planning and assessment evaluation materials are available online, I am wary of complete reliance on a "dashboard." This leaves significant discretion to Ecology in determining what and how much information present to the public. This can create challenges in locating helpful information.[6] I suggest a minimum requirement that Ecology develop a written report containing its strategic plan, including all of the elements identified in subsection(1) of draft WAC 173-340-340, and an assessment of progress toward identified goals and program funding status and needs.

b. Additional related comments

Draft Section 340 – Program planning and assessment

Subsection (4).

- Suggest that subparagraph (4)(b)(ii) require include notification via alert and in the *Contaminated Site Register* of any additional resource allocation factors specified by the legislature and that such factors are identified prominently on Ecology's website.

- Suggest expanding the minimum public notice requirements for strategic plans and performance assessments to include alerts when new strategic planning or performance assessment material is posted to Ecology's website.

[6] For example, in my experience, the revamping of Ecology's website several years ago has increased the difficulty of locating relevant information in a number of areas.

IV. 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?"

As reflected in my prior comments, taking vulnerable populations and overburdened communities impacted by contaminated sites into account in Ecology's programmatic planning and resource allocation decisions is consistent with MTCA's goals. Regarding the specific prioritization of this factor in the weighting of the resource allocation factors under subsection (2) in draft Section 340, however, it is unclear if this factor is receiving or being singled out for special treatment relative to the other factors. If so, I encourage Ecology to look closely at MTCA as well as the HEAL Act, if the latter is being relied upon, to ensure that the prioritization of these resource allocation factors is supported by the applicable statutes. MTCA contains several provisions related to Ecology funding priorities, for example. Any strategic planning will need to consider these priorities.[7]

Whether the strategic planning and assessment process provides sufficient accountability and transparency for the goal of achieving reductions in environmental health disparities remains to be determined. The draft language in Section 340 provides a general framework. If implemented effectively, Ecology's progress toward achieving this goal should be capable of evaluation. Other changes in the draft rule would generate pertinent information for analysis. However, key issues, such as which metrics Ecology will use to measure progress and the reliability and availability of relevant information available to analyze issues, are not addressed by draft Section 340.

V. 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?"

Based on my review, the draft changes to the remedy selection requirements are likely to be effective in in incorporating environmental justice considerations into the cleanup process where applicable. Integrating these considerations directly into a familiar framework for analyzing cleanup alternatives will be more likely to support a functional application of these considerations without developing new and unproven analytical methodologies. It also will allow for learning to occur over time as Ecology,

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[7] E.g., RCW 70A.305.190(4) ("Moneys in the model toxics control capital account may be used only for capital projects and activities that carry out the purposes of this chapter and for financial assistance to local governments or other persons to carry out those projects or activities, including but not limited to the following, generally in descending order of priority ....") (emphasis added).

practitioners, and stakeholders continue to develop a better understanding of, and improve practices for addressing, these issues during the site cleanup process.[8]

VI. 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?"

See response to Q7 below.

VII. 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?"

I support the proposed public process and engagement distinctions between Ecology-conducted and -supervised cleanups and independent cleanups. This distinction will help to calibrate the public process aspect of site cleanups, while allowing appropriate efficiencies at sites where extensive public engagement is a less critical component. Along these lines, I agree with the comments from Ecology staff in meetings over the last month that Ecology retains the ability to enhance the public process and engagement process, as needed, by moving sites into formal cleanup pathways. This minimizes the potential for sites with significant public interest to avoid public process aspects of cleanup.

The additional notice requirements for all sites would also alleviate some of concerns about lack of public information regarding sites that are not under an order or decree. In contrast, requiring an enhanced public engagement process for all sites would likely result in unnecessary and unproductive delays at many sites in the independent cleanup pathway without yielding a proportionate benefit to the process or outcome.

VIII. Q8. Public notification and participation for independent remedial actions

a. "Do the proposed requirements in Section 600(20) provide adequate notice and information about independent remedial actions?"

Yes, generally-speaking the proposed requirements in draft Section 600(20) provide adequate notice and information about independent cleanups. However, please see additional comments below on Section 600.

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[8] I also recommend that Ecology develop guidance on investigation and analysis of impacts on vulnerable population and overburdened communities. This will help to align Ecology, environmental professionals, and site stakeholders when incorporating these considerations into 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?"

I also support Ecology's proposal to eliminate public comment for periodic reviews and amendment or removal of institutional controls, as well as the removal of the public comment for de-listing sites. The increased public notice preceding this stage in the contaminated site lifecycle should address public information needs. If a member of the public has information germane to periodic reviews or to the amendment or removal of institutional controls, they could provide that information to Ecology whether or not the action was subject to a formal public comment period.

IX. Q9. Updating public notification methods

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

The updated draft requirements and options for providing and receiving notice seem appropriate and would enhance transparency and the ability of the public to obtain current information about site status.

I encourage Ecology to develop an option to receive electronic alerts for sites within a specified geographical area (such as a ZIP Code or voting precinct).

b. Additional related comments

Draft Section 600 – Public notification and participation

Notification for guidance and policies. Suggest adding a notification requirement for whenever Ecology publishes new guidance or policy, or updates to existing guidance or policy, that applies to the Toxics Cleanup Program and/or state contaminated site cleanups.

Notification for new and de-listed sites. Suggest option to receive an electronic alert whenever a site is added to or de-listed from the contaminated sites list. This would be different than the site-specific alerts. In the draft right now, it looks like the only general notice of a site listing would be in the *Contaminated Sites Register*.

Subsections (5)-(6). If this is not already contemplated, I suggest making site-specific electronic alerts available for all actions requiring public notice for a given site. For example, for in subparagraph (10)(a)(b), "notice of negotiations" for a consent decree would be provided in the *Contaminated Sites Register*. But it's not clear to me that this step would generate a site-specific electronic alert as well. Same comment for notice for public hearings. There may be other situations as well where notice via a

site-specific electronic alert is not expressly considered. It's possible that subsection (2) is a catchall that would address my comment, but some further reconciliation may be required.[9]

Subsection (7). Recommend that Ecology publish the "*Contaminated Site Register*" at minimum one time per month.

Subsection (11). Suggest substituting the phrase "when discussing" and replace with "for."

Subsection (15)(c). I am not aware of a specific standard in MTCA or the Cleanup Rule for determining when a cleanup has failed. To the extent that proposed subparagraph (15)(c)(i) would set a standard for cleanup failure, it raises some questions about whether those are the right standards.[10] Alternatively, consider requiring notification only if the cleanup action cannot be completed as set out in a cleanup action plan and current site conditions pose an acute risk to human health or the environment. However, most circumstances in which there is a remedy failure are likely to be covered by the other notice requirements, such as during periodic reviews or when there may be an amendment or a departure from the cleanup action plan (e.g., WAC 173-340-400(7) ("If the department determines that any plans prepared under this section represent a substantial change from the cleanup action plan, the department shall provide public notice and opportunity for comment under WAC 173-340-600.")).

X. Q10. Sampling and analysis methods

While Ecology's desire to remove the sampling analysis methods from the rule is understandable, to the extent that such methods result directly or indirectly in changes to cleanup levels, these decisions can be impactful. Accordingly, I urge Ecology to consider whether it can maintain these methods outside of a rule.[11] I note that Ecology is proposing to retain the sampling analysis methods for petroleum constituents in the rule.

[9] For example, subsection (2) appears to apply only to notices for "proposed actions."

[10] In addition, it's not clear that the term "remediation level" is being used correctly in this section.

[11] *See* RCW 34.05.010(16) (defining a "rule" as "any agency order, directive, or regulation of general applicability ..." that fits one of five statutory categories). *Compare* draft WAC 173-340-830(2) ("All sampling and analysis activities conducted as part of a remedial action must comply with the requirements in this section ...") (emphasis added) *with cf. Loyal Pig, LLC v. Washington State Dep't of Ecology*, 13 Wash. App. 2d 127, 145 (2020) ("An administrative agency's practice does not qualify as a rule ... when the practice does not create a new standard, formula, or requirement ....").

Miscellaneous Comments[12]

Draft Section 200 – Reasonable maximum exposure definition

I am uncertain how the proposal to consider vulnerable populations and overburdened communities in identifying a "reasonable maximum exposure" scenario under Section 200 will impact cleanup actions. This term is foundational to risk assessments in the rule.[13] Does Ecology anticipate that this change will lead to different risk assessment methodologies? Different cleanup levels? Different cleanup standards? With this in mind, it may be appropriate to defer this proposed change until the next phase in the rule-making, so that the technical ramifications can be vetted thoroughly. In the meantime, other proposed changes to the rule should ensure that potential exposures to vulnerable populations and overburdened communities are identified and managed.

Draft Section 350 - Remedial investigation

Independent cleanup reporting recommendations. Consider encouraging (but not requiring) independent cleanup actions to use the reporting requirements in draft subsection 5(g) as a guide to ensure that the reports submitted to Ecology are sufficient to confirm that substantive requirements under the cleanup rule have been met.

RI steps. The specific steps identified for the RI may create some confusion to the extent that the term "step" implies a sequence. Certain "steps" may be completed at the same time and reflected in single report.

Subparagraph 6(c). Suggest removing the word "the" before the word "geology" in the first sentence.

Subparagraph 6(e). It is unclear why the need for potential sampling is called out for air and soil vapor, but not with respect to other environmental media.

Draft Section 351 – Feasibility study

Subparagraph (2)(a)(i): The references to the code provisions in the parentheses at the end of the subparagraph may be misleading as referenced provisions do not contain specific criteria for demonstrating that an FS is not required; they instead require that the exemption be documented sufficiently. Also, the reference to WAC 173-340-350(5)(g)**(v)** may be in error. Was (g)**(vi)** intended?

Subparagraph (4)(b). This language suggests that an FS for an independent cleanup must be reported separately to Ecology. However, draft Section 515 is not clear that an FS must be reported separately.

Subparagraph (6)(a). Has Ecology defined the term "cleanup goal" anywhere?

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[12] The order of the following comments is not intended to suggest any particular priority.

[13] *See* WAC 173-340-357; WAC 173-340-708.

Draft Section 355 – Development of cleanup action alternatives that include remediation levels

Subsection (1). Note that it is possible that different cleanup approaches may be taken in different areas of sites based on the same remediation levels, but considering different site conditions. The proposed language does not preclude this it may be helpful to track the definition of "remediation level" more closely here.

Subsection (3). Consider rephrasing as "all soil above a specified concentration will be treated" rather than referencing an unknown quantity "X".

Draft Section 360 – Cleanup action requirements

Subparagraph (2)(a). Suggest change to "comply with the **applicable** requirements."

Subsection (3). Do not delete the phrase "of this section" in the second sentence of this subsection. The phase clarifies the applicable requirements.

Subparagraph (3)(a)(vii). I realize the language relating to use of ICs and monitoring is parroting the existing rule. However, the requirement that ICS and monitoring cannot be used "where it is technically possible to implement a more permanent cleanup action" is in tension with the requirement in MTCA that a permanent solutions will be favored only "to the maximum extent practicable," which is a different standard.[14]

Subparagraph 4(c)(i). Suggest clarifying revision as follows: "including **where applicable**, vulnerable populations…"

Subsection 5 – Clarification of Ecology discretion in weighting DCA for independent cleanups? The proposed language in the subparagraph (5)(c)(i)(B) suggests that Ecology is intending to retain substantial latitude in determining whether a DCA has been performed adequately. This may invite second-guessing at independent cleanups where the selected cleanup action is reasonable but different than what an individual site manager might prefer. Suggest including language clarifying that Ecology generally will not require a DCA revisions where a DCA reflects a reasonable exercise of best professional judgment.[15]

Subsection 5)(c)(i)(C). Suggest clarifying Ecology's determination or weighting of benefits in the DCA for these sites is not limited to public concerns and tribal rights and interests (which I do not believe is Ecology's intent).

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[14] RCW 70A.305.030(b).

[15] Ecology previously indicated that it plans to develop DCA guidance. This would help with consistent implementation.

Subparagraph (5)(c)(iv)(B). The intended meaning of the clauses in this subparagraph may be clearer if the word "then" is inserted after the conditional clause for each clause. For example: "If the incremental costs are not disproportionate to the incremental degree of benefits, **then** the baseline alternative uses permanent solutions to the maximum extent practicable and the analysis under this subsection is complete."

Draft Section 510 – Administrative options for remedial actions.

Subsection (1). Suggest including an explicit reference to Ecology's voluntary cleanup program as an option for obtaining technical advice and assistance from Ecology. Suggest also clarifying that a party is not required to obtain technical advice and assistance, but that Ecology will not de-list a site unless the requirements in draft WAC 173-340-330(5) are met.

Draft Section 515 – Independent remedial actions

Subparagraph 4(b). Suggest including a recommendation that parties reporting independent remedial action reports review the reporting requirements for formal cleanups to ensure the reports contain sufficient information for Ecology to determine the remedial action meets relevant substantive requirements.

Subparagraph 5(b). See comment above regarding need to preserve ability to provide property- and/or media-specific NFA determinations. Removal of the phrase "or portions of sites" could create some uncertainty as to whether and how Ecology may implement that option.

Subsection 6. Suggest referencing the voluntary cleanup program explicitly. It may also be helpful to clarify whether a separate petition to delist a site is necessary when Ecology issues an NFA opinion.

I hope that Ecology continues to find the input from the advisory group helpful. Thank you again for your dedication and for the opportunity to participate.

Sincerely,

Augustus E. Winkes

cc: Elizabeth McManus, Ross Strategic, emcmanus@rossstrategic.com