



December 20, 2019

Clint Stanovsky, Cleanup Rulemaking Lead
Washington State Department of Ecology

Subject: Comments on the interim materials presented at the November 21 STAG meeting

Dear Mr. Stanovsky:

Thank you for the opportunity to provide feedback on the preliminary draft sections of the MTCA Cleanup Rulemaking, including sections 200, 310, 320, and 330. Please accept these comments on behalf of Citizens for a Healthy Bay, Duwamish River Cleanup Coalition, RE Sources for Sustainable Communities, and Washington Environmental Council. We worked together to offer these comments and suggestions on the interim materials presented at the November 21, 2019 STAG meeting. The comments and suggestions are arranged by section number and the questions the Washington State Department of Ecology (Ecology) included in the meeting packet.

Section 200: Definitions

For all definitions, we suggest that the Toxics Cleanup Program collaborate with the Environmental Justice Task Force so that definitions may be standardized across state agencies. We encourage Ecology to include definitions for the following terms in the rule:

- Environmental Justice
- Disproportionate Impacts
- Source Control and Prevention

We encourage Ecology to replace the term “vulnerable population.” The term “vulnerable population” under emphasizes the factors that contribute to the disproportionate environmental harms and risks felt by Tribes, communities of color, and low-income communities. The use of the term “vulnerable population” should be updated in the existing draft rule and SHARP memorandum and the preferred term should be defined in Section 200.

Section 310: Initial investigation and assessment

Q1. Ecology is proposing to incorporate an existing policy that allows Ecology to extend the deadline for completing an initial investigation to encourage quick cleanups. Do you have any concerns with the policy, including the circumstances under which Ecology may provide an extension or how long Ecology may extend the deadline?

Our response to the proposed language regarding Section 310(3) is that if the possibility to provide a 180-day extension can motivate quicker cleanups without compromising the quality and integrity of the resulting permanent cleanup, or the extension promotes collecting additionally needed information to accurately assess the site in the initial investigation, then we generally agree with the proposed language.

However, we do wonder what might be lost by sites not being added to the Contaminated Site List (CSL).

Q2. Should Ecology always notify owners and operators of the result of an initial investigation even if no further action is necessary under MTCA? And should such notice be in the form of a letter sent by mail, or are other methods adequate?

Owners and operators should be notified of the results of an initial investigation even if no further action is necessary under MTCA as stated in Section 310(6) in the preliminary draft. This is simply clear communication and ensures that owners and operators are kept apprised of the current status of their site to avoid confusion. This communication should be in the form of a letter sent by mail *and* email at the very least. We recommend that Ecology investigate further into what forms of communication with owners and operators are most effective to capture a variety of communication styles as well as ensure translation services are offered.

In addition to owners and operators, we would like to consider employees, renters, and other affected people who possibly could be impacted by the contaminated site be informed under Section 310(6) along with information on the nature of the contaminants at the site and any potential health and environmental risks and exposures associated with the site. Identifying potentially affected people should be added to Section 310(1)(c). We would encourage Ecology to consult the Environmental Justice Task Force for additional feedback.

Finally, we recommend ensuring that Tribal governments are afforded the opportunity to opt into receiving any communications related to initial investigations and assessments within their usual and accustomed areas. Ecology already has a Tribal notification process across multiple Ecology programs, and we suggest that a similar process be applied for sites identified under WAC 173-340-310(6)(a) through (e).

Other considerations for Section 310:

Performance

Section 310(4) no longer requires Ecology to perform site visits. We generally support efficiency, but are concerned about enough information being gathered for each site to accurately assess contamination risks. The site visits are important to make sure that what is on paper is consistent with what is happening on site. We recognize there may be some cases where site visits are not necessary, but want to ensure that the lack of a site visit does not result in a contaminated site inaccurately listed as needing no further action and that Ecology staff is not pressured to skip a site visit due to tight funding or other capacity pressures. We recommend the implementation of a policy that identifies the procedures Ecology staff will utilize in order to determine if a site visit is necessary. The steps outlined in the policy should be repeatable and consistent across sites. Additionally, we are concerned that codifying the removal of initial site visits could be deemed as a decrease in workload by the State legislature, and could justify a budget cut, further impacting an already-tight budget.

Initial Investigation Offramp

While the initial investigation does not need to be as extensive as a remedial investigation, we want to ensure that enough information is gathered during the initial investigation to ensure sites are correctly identified and categorized for cleanup and that truly contaminated sites are not overlooked in this process. With the current language, we worry that data poor sites may fall to the bottom of the priorities list, and request Ecology clarify the specific scenarios in which further data collection and/or investigation

will be required. This is of special concern in frontline communities who are often significantly impacted by the presence of contaminated sites, but may have not been given the resources needed to adequately characterize the contamination. We recommend the implementation of a policy that identifies the procedures Ecology staff will utilize in order to determine if further investigation and/or data collection is needed for site assessment and ranking. The steps outlined in the policy should be repeatable and consistent across sites.

Reservation of rights

Section 310(7) contains important language that allows for emergency actions to protect the public no matter where a site is in the cleanup process, at any time. We want this language to stay. We also want to ensure that the public will be adequately informed when these emergency actions take place.

Section 320: Site hazard assessment and ranking process (SHARP)

Q3. Do you agree that the current site hazard assessment and ranking process should be replaced?

Yes, the current process, WARM, should be replaced. It is important that Ecology have a standardized method to prioritize their workload and WARM no longer accomplishes this goal.

Q4. Do you have any concerns with Ecology developing a new process outside of the rule guided by performance standards in the rule? Do the performance standards in the draft rule provide sufficient direction? Does the draft rule strike the right balance between specificity and flexibility?

Given the need for adaptive management in the site ranking and prioritization process, we understand the value of developing a new process outside of the rule. However, we do not believe the existing performance standards in the draft rule provide sufficient direction to develop the process, and reiterate our recommendation that Ecology implement a policy that identifies the procedures staff will utilize in order to determine if further investigation and/or data collection is needed for site assessment and ranking. The steps outlined in the policy should be repeatable and consistent across sites

To date, Ecology has provided limited information on how the site hazard and ranking process will be used to prioritize site cleanups. To ensure the public interest is being served, we would seek to provide input on how the proposed site hazard assessment and ranking process will be used to prioritize cleanups. We recommend that Ecology simultaneously develop a formal policy for how SHARP will be used to prioritize cleanups with the opportunity for our additional input.

In addition to the performance standards included in the draft rule (see Section 320(5)), we would encourage Ecology to include performance standards for evaluating cumulative impacts of multiple environmental exposures.

We also encourage Ecology to include performance standards for addressing the disproportionate number of MTCA sites located in communities of color and low-income communities. It is critical that Ecology establish institutional backstops to ensure environmental justice concerns are being met. For more information, please see the response to Q6.

We would also like Ecology to consider the potential of future releases of hazardous substances, the potentially present hazardous substances associated with historical and current land use, as well as consider chronic exposure, not just acute exposure when evaluating possible receptors and contaminants as additional performance measures in Section 320(5).

Q5. Does the draft rule provide the right level of public involvement for developing a new site hazard assessment and ranking process?

We do not have concerns about the level of public involvement for the development of a new site hazard assessment and ranking process at this time.

We encourage the Toxics Cleanup Program to collaborate with the Environmental Justice Task Force to ensure public involvement is conducted in culturally and linguistically appropriate ways that allow for meaningful participation of communities of color and low-income communities.

Q6. Does the new process properly account for environmental justice concerns?

We appreciate that Ecology recognizes the importance of incorporating environmental justice considerations into the site ranking process. We would encourage Ecology to work with the Environmental Justice Task Force to ensure that the proposed processes align with the Task Force's recommendations.

First, we recommend Ecology include and update several definitions related to environmental justice. Please see our comments to Section 200.

At this time we cannot comment on whether the new process properly accounts for environmental justice concerns given there is no description on how the environmental justice "flag" will be incorporated in the site prioritization process. We would seek to provide input on the policy drafting for the prioritization process. As we understand it currently, the environmental justice "flag" is just that, and does not mandate any further action, nor a higher ranking in the SHARP tool. We request that as this flag is developed, consistent, repeatable indicators are used to trigger flagging, ensuring the tool is meaningful and that it drives action. Alternatively, we ask Ecology to consider a ranking system specifically for environmental justice, instead of a flag, that could be incorporated into the SHARP tool, with a distinct ranked score separate from the route scores for exposure potential and severity.

We encourage Ecology to establish institutional backstops to ensure environmental justice concerns are being met. This includes ensuring that while private funding accelerates some cleanups, the disparity in the number and severity of contaminated sites in frontline communities not only disappears but also drives cleanup priorities in those areas. We encourage Ecology to establish target dates and other metrics for reducing the disproportionate number of toxic waste sites located in communities of color and low-income communities in the rule. Ecology should consider a statement in rule that implementation should not result communities of color or low-income communities bearing a disproportionate number of contaminated sites.

Lastly, we express our concerns regarding sites with limited data availability. Many communities of color and low-income communities located near contaminated sites do not have the resources necessary to adequately characterize the contamination. If Ecology does not have a system in place to identify if a site is data poor, the site may be overlooked and inaccurately characterized under the proposed process. We would encourage Ecology to develop a standardized system to identify and collect more information if a site has limited data.

Q7. Should Ecology always assess and rank the hazard of sites before listing or de-listing sites?

We encourage Ecology to always assess and rank the hazard of sites before listing and de-listing sites. See comments below about re-ranking.

Q8. Should Ecology re-rank sites when new information becomes available or site conditions change? Do you think any other situations should trigger re-ranking?

We encourage Ecology to re-rank sites when new information becomes available or site conditions change. It is important for sites to accurately reflect the threats to human health and the environment. Re-ranking may also help prioritize funding to move a site along that's further behind, to help a cleanup to the "shovel ready" phase, or to push the site through that final cleanup phase. Re-ranking can help site managers better communicate what they need and why they need it.

We encourage Ecology to include new information regarding contaminants of emerging concern, including but not limited to toxic flame retardants, highly fluorinated or polyfluoroalkyl substances (PFAS) chemicals, dioxins, and phthalates, during the re-ranking process.

Other considerations for Section 320:

We encourage Ecology to include options for Tribal governments to receive all SHARP results within their usual and accustomed areas.

Addition factors to consider

Climate change represents a significant threat to Washington state and may adversely affect MTCA sites. We would encourage Ecology to incorporate site-specific climate vulnerability assessments in the site hazard assessment and ranking process.

Ecology should consider how long a site has been on the list without any cleanup, in the prioritization process. We believe that sites that have been listed for an extended length of time should be prioritized over a site with equal contamination that was just added to the list. We would also like to raise our concerns regarding the prioritization of "easier sites." If sites that are easier to clean up consistently get prioritized over more complicated cleanups, then complicated sites may never reach the top of the list.

Lastly, we encourage Ecology to consider cumulative impacts in the ranking and prioritization process. The current SHARP process includes a "flag" for multiple contaminant types, however we would encourage Ecology to consider the multiple and potentially synergistic effects from other environmental *and* social factors as well. The ranking and prioritization process should reflect the fact that a site's threat to human health and the environment is highly dependent on outside factors. For example, we believe that a site located in close proximity to several other MTCA sites should be prioritized over an isolated site with equal contamination.

Section 330: Contaminated sites list

Q9. Does the draft rule provide the right level of public involvement for removing a site from the contaminated sites list?

All sites, not just Ecology-conducted or Ecology-supervised sites should provide the public an opportunity to comment before removing a site from the contaminated sites list.

We encourage the Toxics Cleanup Program to collaborate with the Environmental Justice Task Force to ensure public involvement is conducted in culturally and linguistically appropriate ways that allow for meaningful participation of communities of color and low-income communities.

Q10. How Ecology should inform the public when it:

- a. Adds or removes a site from the contaminated sites list**
- b. Ranks or re-ranks the hazard of a site on the contaminated sites list**
- c. Specifies or updates the cleanup status of a site on the contaminated sites list**

The *Site Register* is a useful tool for those who regularly work within the MTCA framework and/or are familiar with the process and should remain in place, but this should not be the only form of communication. The *Site Register* is not an effective form of communication to the majority of the public.

We believe that Ecology must update their Site Register and how it is published to reflect modern communication practices and best practices for reaching more communities, especially communities of color and low-income communities who currently disproportionately located near MTCA sites.

We suggest coordination with the Environmental Justice Task Force to determine the most effective methods of communication, which could include mailers, emails, print media such as local newspapers, postings on online media, postings in public community areas, notifications posted physically at the site, and more.

Additionally, site owners should be required to notify tenants and renters if they are occupying a site that is on or added to the list of contaminated sites when a site is added or removed from the contaminated sites list.

Other considerations for Section 330:

No Further Action Sites List

Section 330(5) in the preliminary draft refers to the no further action sites list while 330(6) refers to notifications. There should be a separate registry of sites that have environmental covenants. The current rule means that new property owners often do not realize that there are still cleanup obligations associated with the site as “no further action” implies that no further actions are required, which is not always the case. Property owners should be notified and have access to the full records of what cleanup actions were previously taken and be given a clear understanding of what requirements come with owning the property prior to property purchase.

Additionally, for “no further action sites” we are concerned about the longevity of cleanup actions. Permanence of site cleanups is not actually considered forever. Ecology should consider that sites may need to be revisited or re-ranked after 100 years to ensure the effectiveness of the cleanup action. Additionally, consideration for how to address or follow up on potentially compromised cleanup sites on the no further action list needs to be considered for things like climate change and special events like high intensity storms, flooding, earthquakes, and industrial accidents (such as a boat collision with a cap), etc.

General Comments

Environmental Justice

We encourage Ecology to coordinate with the Environmental Justice Task Force to ensure that all outreach and communications in the MTCA process are conducted in culturally and linguistically appropriate way to allow for meaningful participation of communities of color and low-income communities.

We encourage Ecology to conduct and update an equity analysis that compares the overall distribution of MTCA sites and programs to demographic data including race and income. This will provide performance measures to determine if racial disparities decline or worsen so that Ecology can adaptively manage the system.

We also encourage Ecology to conduct an equity analysis on how programs that receive pollution and prevention funding from MTCA serve communities that are overburdened by toxic pollution and face barriers of social and economic disadvantages. The results should be published publicly on the Ecology website and shared digitally with relevant entities such as past and present Public Participation Grant recipients.

Economic Impacts

The current system leads to prioritizing economic development drivers at the expense of communities impacted by toxic pollution. Developers can “jump the line” by paying for cleanup of sites prioritized as a lower hazard. While this has the benefit of incorporating private funding into cleanups, an unintended consequence may be that this leaves tribes, communities of color, and low-income communities further behind if those developers tend to favor more affluent white communities. As mentioned above, we encourage Ecology to establish institutional backstops to address the disproportionate number of toxic waste sites in communities of color and low-income communities.

We also encourage Ecology to work with local community members, especially communities of color and low-income communities, to prevent unwanted displacement and gentrification that may occur as a result of a cleanup for redevelopment. This should also be considered for the Disproportionate Cost Analysis.

Finally, we acknowledge that the MTCA process requires a significant investment to ensure staffing capacity needs are met. We encourage Ecology to conduct an analysis to determine the staffing capacity needed to carry out the MTCA process so that the number of sites addressed is greater than the number of sites added to the list each year; otherwise, we will continue to fall further behind, which is not the intent of MTCA.

Thank you for your consideration of this feedback. We look forward to the upcoming sections for review and the webinar on SHARP at which point we may submit additional comments.

Sincerely,

Erin Dilworth, **Citizens for a Healthy Bay**
James Rasumssen, **Duwamish River Cleanup Coalition**
Eleanor Hines, **RE Sources for Sustainable Communities**
Michelle Chow and Mindy Roberts, **Washington Environmental Council**

Cc:

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