



April 15, 2020

Clint Stanovsky, Cleanup Rulemaking Lead  
Washington State Department of Ecology

**Subject: Comments and suggestions on the interim materials presented at the March 5 STAG meeting**

Dear Mr. Stanovsky:

Thank you for the opportunity to provide feedback on the preliminary draft of Section 340 and on the discussion questions for Sections 350 and 360 of the MTCA Cleanup Rulemaking. 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 March 5, 2020 STAG meeting.

First, we would like to reiterate the importance of incorporating environmental justice and equity in the current rulemaking process. The current system has led to a disparity in the location of MTCA sites - 56 percent of MTCA sites are located in low-income communities and 46 percent are located in communities of color, despite these communities only making up a fraction of the state population.<sup>1</sup> The communities located near MTCA sites are not the ones responsible for the contamination, yet they bear the burden of the health, social, and economic impacts.

The current rulemaking process provides an opportunity for Ecology to reconsider their policies and procedures to incorporate equity and reduce economic and racial disparities. We thank Ecology for incorporating environmental justice and equity in the rulemaking process so far and encourage Ecology to continue working through an equity lens.

The remaining comments and suggestions are arranged by section number and the questions Ecology included in the meeting packet.

**Questions about Section 340: Biennial program plans and expenditures**

1. When allocating financial assistance, the MTCA statute currently requires Ecology to consider both threats to human health and the environment and land reuse potential and planning (RCW [70.105D.030\(1\)\(i\)](#)). When prioritizing remedial action projects for grants or loans, Ecology is also required to consider “whether the site is located within a highly impacted community” (see,

---

<sup>1</sup> <http://frontandcentered.org/mtca-report/>

e.g., WAC [173-322A-320\(3\)\(d\)](#)). Under the draft rule, this requirement would also apply when prioritizing other types of financial assistance.

**a. Should Ecology always consider effects on highly impacted communities when allocating financial assistance? See Section 340(1)(a)(ii)(B) of the preliminary draft rule.**

Yes, Ecology should always consider effects on highly impacted communities when allocating financial assistance. Funding availability is one of the primary drivers for site cleanups and lack of available funding has contributed to the disproportionate number of MTCA sites located in communities of color. To address this disparity, it is essential that sites located in highly impacted communities are prioritized for financial assistance. Ecology should also consider cumulative impacts by prioritizing highly impacted communities that possess multiple sociodemographic factors for the EJ flag.

**b. The draft rule defines “highly impacted community” the same as in Chapter [173-322A](#) WAC. Does the definition provide an adequate basis for identifying metrics and evaluating impacts on such communities? See Section 200 of the preliminary draft rule and WAC [173-322A-100\(24\)](#). As additional background, see: [Remedial Action Grant and Loan Guidance for the 2021-23, Section 4.5](#).**

No, we do not believe that the definition for highly impacted communities is adequate. The provided definition is vague and leaves too much discretion in interpretation. At a minimum, the definition should include the metrics that will be considered in defining a “highly impacted community.” We encourage Ecology to consult the EPA definitions on environmental justice, in particular the definition used for overburdened communities, for specific language.<sup>2</sup> EPA also provides a definition for “disproportionate effects” that Ecology may want to consider including.

**c. To allow consideration of actual impacts, the draft rule requires consideration of whether the site affects a highly impacted community, not just whether the site is located within such a community as under Chapter [173-322A](#) WAC. Is that change appropriate? See Section 340(1)(a)(ii)(B) of the preliminary draft rule. Compare with, for example, WAC [173-322A-320\(3\)\(d\)](#).**

Yes, impacts to a highly impacted community should be considered even if the site is not geographically located in the community. For example, a workplace, cultural or other public center, or a park that is frequented by a highly impacted community may not fall within the geographic boundaries of such a community to normally be considered, but the community is still being impacted. Communities may also be affected by a contaminated site that impacts the fishing ability of certain communities who may not reside within or adjacent to the contaminated site. The impact of MTCA sites to communities is not limited to communities geographically adjacent to a site, therefore effects should be considered more broadly. This provision must also

---

<sup>2</sup> <https://www.epa.gov/environmentaljustice/ej-2020-glossary>

extend to consider the impacts of MTCA sites throughout the Usual and Accustomed areas of Tribes.

**2. Under the draft rule, Ecology maintains the discretion to consider other factors when prioritizing expenditures (such as those specified in withdrawn *TCP Policy 340*). Those factors may differ depending on the funding program (such as affordable housing grants vs. mixed funding agreements). Do you have any concerns with Ecology specifying such factors in policy? See *Section 340(1)(a)(ii)(D) of the preliminary draft rule*. As additional background, see: [TCP Policy 340, Priority Setting for Sites under Formal Ecology Oversight \(Withdrawn\)](#), Section 2.**

We support specifying the factors currently listed in the draft rule (Section 340(1)(a)(ii)(A-C)). In regards to specifying other factors in policy (Section 340(1)(a)(ii)(D)). We understand that some flexibility is needed in prioritizing funding for cleanup sites, but are concerned that this flexibility could lead to inconsistencies across Ecology staff in how sites are addressed, which could cause further disparities in the locations of cleanup sites and the communities who are impacted by them.

Overall, the factors to consider outlined in withdrawn TCP Policy 340 are reasonable, with a few exceptions:

- “Resource Commitments. When the department has previously committed or allocated resources to the site and has made a commitment to complete the work done at the site, then the priority of that site may be raised.”
  - This will likely exacerbate the existing disparity in the locations of cleanup sites. If Ecology shows a trend of spending more resources in white, affluent communities, then continuing to spend funds in those communities - especially for sites where there are less exposure pathways or immediate threats - reliance on this factor will worsen disparities along sociodemographic lines.
- “Funding Agreements. Sites at which the PLP is willing to pre-pay for Ecology staff to work on, or sites at which there is a federal funding agreement, may be given higher priority than their rank would indicate...”
  - We understand that funding is a major factor for how quickly and effectively sites can be cleaned up. However, we are again concerned that relying on this factor will only continue the trend of focusing cleanup dollars in white, affluent communities, rather than in low-income communities or communities of color, who bear a disproportionate burden of the impacts from contaminated sites.
- “Potentially Liable Person (PLP) Readiness. If the potentially liable person(s) has indicated a willingness to participate in negotiations for a consent decree, discussions for

an agreed order, or has had previous cooperative participation under an order or decree, the program may raise the priority of the site.

- The readiness of the PLP to participate in the cleanup process should not be factored into funding prioritization. We urge Ecology to use their full legal authority to identify sites that pose the greatest risk to human and environmental health, and direct funding and resources to those sites, regardless of the PLP's readiness.

Lastly, we urge Ecology to be transparent in how factors identified in guidance are used for prioritizing funding, possibly through the Biennial Report of Expenditures.

**3. Under the MTCA statute, Ecology is required to report on program expenditures from the model toxics control operating and capital accounts (RCW [70.105D.030\(5\)](#)). The draft rule incorporates that statutory requirement. See *Section 340(2) of the preliminary draft rule and RCW [70.105D.030\(5\)](#). As additional background, see: [Model Toxics Control Accounts Biennial Report of Expenditures: 2017-19 Biennium](#).***

**a. How should Ecology incorporate the results of the new Site Hazard Assessment and Ranking Process (SHARP) in the report?**

The results of SHARP need to be transparent and available to the public. Ecology should report on the number of sites receiving flags, in addition to the status of sites for each of the six sociodemographic factors for the EJ flag. Ecology should also report how SHARP has been used to prioritize sites and address disparities.

**b. How should Ecology report on progress in reducing disparate public health effects on highly impacted communities?**

Ecology should identify metrics to measure disproportionality, analyze both current MTCA sites and MTCA sites identified in the future, and report to the legislature its progress toward eliminating disproportionate impacts.

Specifically, we believe Ecology should track and report on progress made towards cleanups for all sites that receive an EJ flag. The status of sites should be tracked separately by each of the six sociodemographic factors of the EJ flag to ensure that progress in one factor does not mask a lack of progress on other factors.

We also recommend Ecology provide a definition for “public health effects”, or clarify the language in the draft rule text. See below for more information.

**4. How should Ecology notify the public when it submits reports to the Legislature and budget requests to the Governor's Office? Is notice in Ecology's *Site***

**Register adequate? If not, what other means would you suggest? See Section 340(1)(b) of the preliminary draft rule.**

Ecology should be expanding, not reducing, who they provide notice to when submitting reports to the Legislature. Only providing notice to the Site Register is not adequate. Ecology should continue providing notice to the site register and the media and provide a summary of the report to the public. We recommend Ecology coordinate with the Washington Department of Health to identify best practices and communication outlets for informing the public.

**Section 340: Questions about economic impacts**

We believe transparency in MTCA funding must be improved. The proposed language does not take enough steps to improve funding transparency. In particular, funding prioritization and allocation should be transparent for *both* operating and capital costs. Without identifying operating cost needs, there will be no documentation to support higher appropriation for operating funds, which is critical for Ecology to make progress towards cleanups.

**Questions re: Environmental Justice in Remedy Selection For STAG Review**

The term “public health impacts” is used throughout this chapter with no definition provided. “Public health impacts” should be defined in the rule for clarity. We recommend Ecology include health, social, cultural, and economic impacts to communities near MTCA sites in the definition given the ability of these factors to cumulatively affect a community’s health.

**1. Remedial investigations → Identify disproportionate impacts**

**i. Is it appropriate to require such an investigation?**

Yes, we believe it is appropriate to require such an investigation. It will be impossible to know how a community is being impacted and how to reduce the disparate impacts without doing an investigation to collect site specific information.

Information should be provided to the public and the legislature on how this investigation is being used to inform cleanup decisions and alternatives.

**ii. What type of effects should be investigated?**

We recommend Ecology consider the wide range of effects MTCA sites have on the community. This includes, but is not limited to, effects to health status and outcomes, food accessibility including fish consumption, drinking water, recreational activities, and social practices and activities. Ecology should look at all of the above effects for each of the exposure pathways assessed in SHARP.

**iii. What methods should be used to conduct the investigation?**

Ecology should develop a standardized system to conduct the investigation. A standardized system will help maintain consistency across investigations and staff.

Ecology must consult with the public in a meaningful way to understand how the community is interacting with the site and the surrounding environment. Different communities will be exposed to contaminants in different ways, so it is important to identify how each community might be exposed given their specific activities and interactions with the site. We recommend Ecology consult with the Washington Department of Health on best practices and methods for conducting investigations with the public.

Ecology should also incorporate the rankings and indicators defined in the WA Environmental Health Disparities Map<sup>3</sup> to identify cumulative impacts. Ecology should compare community interactions and cumulative impacts with the exposure pathways identified in SHARP to determine whether and how a community may be impacted by the site.

**iv. Ecology is proposing to specify in guidance, as opposed to rule, the type of effects that should be investigated and the type of methods that may be used to conduct the investigation. Is that appropriate?**

We recognize the need for flexibility in the rule, however we also believe this investigation needs to be transparent and consistent across Ecology staff. We encourage Ecology to specify minimum requirements in the rule to ensure that the broad range of effects to communities is consistently addressed across investigations. Additional details on the effects that should be investigated and the types of methods that may be used can be included in the guidance.

**2. Cleanup action requirements → Reduce or eliminate disparate impacts**

**i. Should Ecology require reductions in the disproportionate public health impacts of the site? If so, only “as appropriate”? And if so, based on what considerations?**

Yes, Ecology should require reductions in disproportionate impacts. Without specific requirements, progress will not be made towards reducing disproportionate impacts. However we believe the current language is too vague. The term “as appropriate” leaves too much room for interpretation. We recommend Ecology remove “as appropriate.”

In addition, Ecology should identify specific metrics to use for tracking progress on reducing disproportionate health impacts. Metrics should be clear and explicitly defined.

**ii. Should Ecology require that cleanup actions minimize disproportionate impacts (short or long-term) of the cleanup? For this requirement, should impacts other than public health impacts be considered? If so, how?**

Yes, Ecology should require cleanup actions that minimize disproportionate impacts of the cleanup. However, we recommend Ecology adds sideboards to these considerations to ensure that toxic sites are still cleaned up.

---

3

<https://www.doh.wa.gov/DataandStatisticalReports/WashingtonTrackingNetworkWTN/InformationbyLocation/WashingtonEnvironmentalHealthDisparitiesMap>

It is important to keep in mind that the communities located near MTCA sites are not the ones responsible for the contamination. Those communities also have the lowest contributions, but bear the worst impacts, of climate change. It's a false narrative to say that we should do a less protective cleanup because of the potential impacts to the community without consulting with the community first.

Ecology should engage with the community to determine their preferred alternatives. Equitable redevelopment and other projects that provide public benefits such as affordable housing should be prioritized.

Please also see our comments above on the definition of "public health impacts."

**iii. Should the provisions be included both as a general requirement and as a comparative factor in the disproportionate cost analysis?**

Yes, the provisions should be included as both a general requirement and as a comparative factor in the disproportionate cost analysis. If it is not included as a general requirement, there are no assurances that disparities will be addressed. There needs to be an explicit requirement for Ecology to work towards reducing disparities, especially as staff turnover or other circumstances change. However, we want to be careful about how this would be a factor in the disproportionate cost analysis and that it is weighted appropriately to ensure it has a meaningful sway in the outcome.

We also encourage Ecology to add a similar requirement to reduce the disproportionate number of MTCA sites in highly impacted communities. Please see our previous comments for more information.

**iv. Should the provisions be included as a stand-alone requirement and factor, as opposed to under an existing requirement or factor (such as under protectiveness)?**

We strongly encourage Ecology to include the provisions as stand-alone requirements and factors. If incorporated into an existing factor, the provision is more likely to be overlooked or disregarded. Ultimately, we want to ensure the environmental justice goals are met.

**v. In practice, what would you do differently to meet these requirements?**

Ensure consistency, transparency, and use more public input to determine how the cleanup remedies will impact the public.

Thank you for your consideration of this feedback.

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:

Justin Parker and Randy Lumper, Northwest Indian Fisheries Commission ([jparker@nwifc.org](mailto:jparker@nwifc.org);  
[rlumper@nwifc.org](mailto:rlumper@nwifc.org))

David Mendoza, Co-Chair Environmental Justice Task Force ([david@frontandcentered.org](mailto:david@frontandcentered.org))

Millie Piazza, Department of Ecology Environmental Justice Coordinator  
([mpia461@ECY.WA.GOV](mailto:mpia461@ECY.WA.GOV))