

Comments of Heart of America Northwest and Heart of America Northwest Research Center to Washington Department of Ecology Regarding:

Rulemaking to Amend Chapter 173-321 WAC, Public Participation Grants, which establishes eligibility requirements and funding criteria for grants authorized by Chapter 70.105D RCW, MTCA.

The Model Toxics Control Act (MTCA) is the statute creating the Public Participation Grant (PPG) program. The statute was passed by the voters as a ballot initiative. It provides:

“The primary purpose of the PPG program is to facilitate the participation by persons or organizations in the investigation and remedying of releases or threatened releases of hazardous substances and to implement the state’s solid and hazardous waste management priorities.” RCW 70.105D.070.

The statute clearly provides that these funds shall be allocated:

“ONLY for public participation grants to persons who may be adversely affected by a release or threatened release of a hazardous substance and to not-for-profit public interest organizations.” (emphasis added) RCW 70.105D.070.

Heart of America Northwest (HOANW) appreciates the opportunity to participate in discussions regarding the rule making. Ecology explained that the revisit of the rules was prompted by two particular concerns: the outcome of a so-called audit¹, and a desire to incorporate environmental justice as a criterion for grant awards based on evidence that grant support was not achieving that goal under the rules as written.

Heart of America Northwest and our Executive Director, attorney Gerry Pollet, were deeply involved in the drafting of Initiative 97, which was adopted by the voters as the Model Toxics Control Act (MTCA). Public Participation Grants were a major component of the initiative reflecting the belief of the drafters that the communities and people impacted by the complex issues affecting health and the environment from toxic waste sites (hazardous substance release sites) required substantive support to enable the public to participate in the decisions which impact the public. The grants were deliberately called “public participation grants,” NOT called or designed as “technical assistance grants” (as EPA’s program was called) or “education grants”, because the drafters and voters wanted to prioritize assisting in enabling the public to participate in the decisions regarding investigation and cleanup of toxic waste sites.

Thus, a major concern reflected in our comments is the degree to which the proposed rules will ensure that applications are reviewed and awards are made based **on the degree to which public participation in decisions for hazardous waste sites or decisions for waste management priority implementation is “facilitated” or enhanced.**

The PPG program has suffered in recent years from a lack of focus on this primary statutory purpose of enhancing public participation in the decisions regarding hazardous waste sites and waste management priorities to avoid creation of new sites.

¹ This so-called audit did not follow any standard government audit procedures. For example, the entity hired failed to contact an organization which was a focus of the audit or to consider the extensive correspondence regarding the grant application process and prior grants discussed. At minimum, standard procedures require providing for a response to audit findings or comments. Concerns raised with externally provided documentation regarding potential violations of state ethics and other standards were not addressed.

We also spent several years participating in Ecology's MTCA Policy Advisory Committee and follow-up. In that process, the value of public participation was discussed and an agreement reached under which the rules were to be amended as sought by many business and toxic waste site owner / operator interests to allow for site specific risk assessments, industrial cleanup standards (utilizing site specific risk assessment), maximum reasonable exposure scenarios and other changes that greatly increase the burden on citizen groups seeking to effectively participate in cleanup decisions. The agreement was predicated on support for increasing the maximum PPG award, the amount of funding for PPG and creation of a risk assessment resource Ombud. The rules were changed to allow the site specific risk assessments, etc. – but, environmental, community and citizen groups never saw the concomitant increase in support for public participation.

The result is that site investigations and cleanup decisions should have greater participation, e.g., for the public (particularly highly impacted communities with language barriers or less access to resources) to provide early input on how communities utilize the impacted land and resources in order for a reasonable maximum exposure scenario and resultant cleanup decisions to properly protect individuals and communities with higher exposures from greater risk.

The proposed rule changes fall far short of enhancing or facilitating such public participation in the decisions regarding hazardous waste sites and plans that may significantly impact public health, safety and the environment for decades and centuries.

Some of the provisions of the proposed rule revision will be obstacles to facilitation of public participation in those decisions, rather than facilitating or enhancing them. Those proposed provisions need to be significantly changed because they are inconsistent with the statute and with the goals of the program.

HOANW understands the sense of urgency on the part of Ecology to finish the rule making process and apply the changes to grants awarded in the 2017-19 biennium. We do note that there is no particular obstruction to applying the "lessons learned" to the rules as they currently stand. However, other strongly motivating factors for Ecology are to provide more clarity to applicants and evaluators for 2017-2019, and achieve greater efficiencies in the administration of the program.

We do caution that these goals – particularly ease of administration or reducing evaluation of applications - should not outweigh due consideration of the fundamental purposes of the PPG program.

Regarding Prioritization of "New Applicants":

In the past, our organization has questioned the rule giving priority to "new" applicants on the grounds that it does not demonstrably improve achievement of the goals stated in the statute.

We have previously stated our position that the Department of Ecology can and should provide support in a consistent way to new applicants in order to help them to make successful and compliant grant applications, but that this does not rise to the level of statutory priorities.

Assisting new groups by providing training for the in the application process would be an example of facilitating involvement.

However, the statute does not allow Ecology to add a new prioritization, as is proposed in the proposed amendment to WAC 173-321-010, for applicants who:

“(c) Have not received funding in the last two biennia.”

The priorities of the PPG program are set in statute. If Ecology wants to change the priorities of the PPG program to add a new, third, priority, it must seek legislation to do so.

As noted above, there are two priorities set in statute. Further, as an initiative, the statute must be interpreted to meet its purpose, which is to “facilitate the participation by persons or organizations....”

Creating a priority for applicants who have not received funding in the past two biennia will actually be an obstacle to facilitating involvement, particularly for hazardous substance release sites:

- The statute (and the rules implementing MTCA in the WAC) recognizes that the most complex and potentially dangerous sites may take years to investigate, develop potential exposure scenarios (which depend on the facilitated public input from various stakeholders who eat, drink, breathe, use the land and other resources which may be impacted from releases), and many more years to develop and implement cleanup plans.
- The proposed rule amendment to prioritize grant awards to “new” applicants (which also includes increasing evaluation scores for groups that have not received grants for two biennia and penalizing those who have) diminishes the ability of those individuals and groups seeking to participate in the most complex and long-term hazardous substance release sites.²
- The proposed rule amendment directly penalizes the groups working to facilitate public participation in the most complex sites. It is not written as an encouragement for new applicants, but as a diminution of priority and grants for the groups working to involve the public in such extremely long-term site process such as for Hanford, the Duwamish and every other major Superfund / CERCLA site and other complex sites.
- Under the proposed rule amendment, a group which successfully assists the public and higher risk individuals to provide input to a site investigation, risk assessment and exposure scenario, would lose priority and have a diminished likelihood of receiving a grant when the liable parties, Ecology, EPA and others were developing a cleanup plan.

Or, after conducting processes to involve the public in an investigation and gathering input for the exposure scenario and risk assessment, which often take four years at complex sites³, a grant applicant would move into a lower priority and disfavored applicant status – just when the importance of providing that input and having an iterative public participation process to ensure that cleanup decisions reflect input was reaching its apex.

² We believe that waste management prioritization decisions may be different enough from hazardous substance release site grants if the decision processes do not take more than four years, so that Ecology could provide a small scoring benefit to “new” applicants for waste management grants.

³ Consider how long it is taking Ecology to produce an RI/FS for the US Ecology site, or the years between investigation and issuance for comment of an interim cleanup plan for scores of Hanford sites.

The groups that are likely to suffer the most from moving into a disfavored status after four years are groups working to provide environmental justice related considerations into the cleanup decision process.

Thus, this proposed set of amendments (010 and 050(8)(a)) would diminish, rather than facilitate, public participation.

A Better Approach is to Emphasize Environmental Justice Language and Assistance Rather Than Disfavoring Applicants Working to Involve the Public at the Most Complex, Long-Timeline Sites:

HOANW strongly supports the proposed environmental justice language to “facilitate public participation in highly impacted or low-income communities,” as a much improved approach to prioritizing new applicants in a way that goes directly to the purpose of the PPG program under the statute, while avoiding the potential mistake of supporting newness simply for the sake of newness.

Having made this revision, it makes no sense to also add language (priority consideration to applicants that “have not receive funding in the last two biennia” [010 and 050(8)(a)]) that essentially still calls for prioritization of new applicants simply because they are new.

It makes even less sense to substitute this language, not as a direct replacement of (2) “new applicants,” but rather as a replacement of an entirely different priority, (3) “Applicants that demonstrate the ability to provide accurate technical information on complex waste management issues.”

There is no rationale for making such a substitution. In fact, it is likely to negatively impact the achievement of the purpose of the PPG program, as many high priority waste management issues are indeed complex, and many applications meeting environmental justice criteria will also prove to be addressing complex management issues over a time frame extending beyond two biennia.

If there are difficulties with the old language in regard to other goals, such as a revised system of evaluation, then it may make sense to modify the language regarding complex waste management issues. HOANW challenges the assumption, however, that the prioritization of applicants with skill in dealing with complex waste should be replaced.

It is especially problematic to replace the evaluation criteria for the ability to communicate regarding technical waste management issues with the prioritization of new applicants

We urge that the current language for criteria regarding “the ability to provide accurate technical information” be modified to have specific evaluation criteria which reflects the goal of increasing public participation with the following:

“a) The ability to review complex procedural and technical information on cleanup and waste management, including such issues as risk assessments, and to effectively communicate how decisions may impact affected individuals, communities and environmental resources; and,

“b) The degree to which the applicant proposes to facilitate public participation through public input or comment in decision processes for hazardous substance release sites or pending waste management prioritization decisions; e.g., will the applicant increase the numbers of public offering to comment, or will the applicant enable the public to participate in additional geographic regions or from different segments of a community?”

Nowhere in the proposed amendments is there any proposal to have clear criteria to evaluate applicants based on the primary goal of the PPG program: to facilitate public participation in these decisions.

Instead, the proposed amendment adds several administrative evaluation criteria (050(c)(d) and (e)) without improving the criticized lack of clear public participation evaluation criteria. The repeated emphases on administration in 050 evaluation criteria – at the expense of involvement criteria - will penalize the smallest groups, particularly those with English Language barriers, lower income communities, who do not have the experience and resources to report perfectly.

The only element of evaluation criteria relating to facilitating public participation proposed in the revision to 050 is (b), the extent to which the applicant is impacted by the release site or decision.

But, the proposed 050(b) is not even truly evaluation criteria for public participation. Rather, it is really simply a restatement of the statutory limitation that awards of funding are limited to: “persons who may be adversely affected by a release or threatened release of a hazardous substance and to not-for-profit public interest organizations.” RCW 70.105D.070.

Thus, for the PPG program to address the questions raised about whether the evaluations consider the degree to which public participation is enhanced or facilitated, and the objectivity of the evaluation process, the rules truly need to add that there will be specific evaluation criteria regarding how many people, from which communities, will have participation facilitated in the decisions.

How the Rule Should Reflect Criteria Which Facilitates Public Participation:

The rule should specify that awards will be based primarily on how the proposal would facilitate public participation in specific decisions at sites or specific pending waste management prioritization decisions (e.g., not broad “education” about waste or the environment). There should be clear criteria for increasing the numbers of people participating in cleanup site or priorities decisions, e.g., *a group which proposes to increase participation by ten people should not receive the same funding award as a group effectively increasing participation by one thousand; and groups serving to increase participation for major sites over a broader area should receive a higher award than a group serving one single community.*

- Ecology made a commitment the last time that the MTCA rules were changed to provide increased support for public interest and community groups to have resources to review and comment on site specific risk assessments as part of complex cleanup plans. Ecology has never provided that increase in resources, even though Ecology changed the rules for increasing use of site specific risk assessments. Site specific risk assessments can only be valid if there is meaningful community input regarding future community use of resources impacted by the site in developing reasonable maximum exposure scenarios to be used in applying cleanup standards and setting cleanup levels.

- Ecology should be emphasizing in the rule that the evaluation criteria will ensure that groups or citizens seeking to review risk assessments and comment on cleanup plans with exposure scenarios based on public input are supported.
- The rules should provide for MORE awards of varied size based on level of increased public participation and considerations such as whether the increased participation facilitates environmental justice considerations by increasing participation by, and the inclusion of viewpoints from, impacted persons or communities who have traditionally had less of a voice while experiencing disproportionate impacts.
 - Groups increasing participation in multiple communities or areas; and, with a record of increasing participation in actual comments on decisions by dozens or hundreds of commenters; should receive higher awards based on the increased work to do so than a group serving one community or a small group, such as twenty or one hundred people.
 - Obviously, the cost of communicating and effectively involving larger numbers of people is higher and should be a factor in scaling awards as well as in initial scoring.
- **The rules should add to 050 that one evaluation criteria will reflect Ecology’s claimed commitment to support participation in major cleanup site advisory boards, including the Hanford Advisory Board.**
 - There should be clear criteria that for complex sites with advisory boards that Ecology will provide support for groups participating. Ecology has repeatedly stated that it understands the lack of PPG support for groups on the Hanford Advisory Board has severely diminished their participation and the overall work of the Board, e.g., ability to spend extensive time developing advice on complex issues relying on organizations’ expertise. This clearly fits within the legislative mandate for grants to facilitate public participation in decisions about hazardous release sites.
 - The language should be: “whether the applicant participates in an official advisory board convened by Ecology or another agency (agencies) for purposes of increasing public input to cleanup decisions or the waste management prioritization decision which is the subject of the application.”
- The Rule should specify that Ecology views the PPG program, as noted in other WAC sections, and in various MTCA and HWMA cleanup orders and agreements and their public participation plans, as part of the public participation plan process for hazardous substance release sites and a direct cost of investigation and remediation. Therefore, pursuant to the Federal Facilities Compliance Act, RCRA, RCW 70.105.280 and WAC 173-328-014(1)(e), **the rule should lay out a clear process under which Ecology will charge USDOE or other mixed waste site operators with releases for the cost of grants to qualified organizations applying for PPG grants to facilitate public participation in cleanup decisions for the site (and RCRA permitting), especially for the costs of effectively participating in the Hanford Advisory Board and increasing public comment and participation in upcoming decisions for the site in the biennia for which the grant is awarded.**

WAC 173-328-040(1) directs Ecology to collect fees for the “[d]irect and indirect cost of . . . [p]ublic involvement, education, and outreach” WAC 173-328-040(1)€ (implementing RCW 70.105.280).

- The rule should include a commitment by Ecology to support environmental justice goals by laying out a process through which Ecology will offer to assist groups from more highly impacted communities with language and financial barriers in being able to apply for grants. This would be a meaningful commitment and represents a proven approach to improving minority and limited English proficiency participation in state grants and business awards. This would not be in the evaluation criteria, but a new WAC section.
 - The WAC needs to be clear as to when, how and for whom Ecology staff will offer such assistance.
 - The proposed rule amendments fail to address the serious problem exposed when some Ecology staff assisted one applicant who had significant connections to Ecology officials and management of a release site with preparation of their application. The rules need to specify if – and when – any assistance is offered to an applicant in order to avoid the appearance of unfairness or favoritism.

Supplies and tools as reimbursable expenses must not include purchase of materials that will be used for purposes other than the grant and allowable grant purposes if over \$1,000. The current proposal (060(1)(g)) for allowing tools and supplies with costs up to \$5,000 opens Ecology to severe criticism and inability to prevent use of grant funds for non-allowable purposes. Equipment with a life of five years is major equipment. Depreciation of equipment is normally five years.

- a. During the discussion on the rule prior to the hearing, in response to a question about this Ecology said the agency won't allow reimbursement for things that are not reasonable. That is not a standard. Indeed, anyone submitting a reimbursement for such supplies and tools would be entitled to reimbursement under the proposed rule, even if the future uses of the supplies and tools over the ensuing years might be for entirely unallowable purposes, such as assisting in a ballot campaign.

Dispute resolution process is missing: There is no formal appeal process. This is not adequate. Sharing how grants are scored is not a replacement for an appeal process. The rules should have a clear process and timeline for appeals.

Our final proposal for enhancing the administration, credibility and goals of the PPG program is for Ecology to appoint a small group of 3 to 7 external advisors with expertise in public participation (and without any connection to applicants or liable parties) to assist in review of the applications.

- Ecology faces obstacles for timely review of applications with appropriate expertise in public participation. This proposal would greatly enhance credibility of the reviews and allow for independent individuals to provide a composite score (instead of one or two Ecology staffers). This proposal would allow Ecology to tap a wide range of volunteer public participation expertise to enhance the PPG program, speed up review and increase objectivity and credibility of the scoring process.

Submitted by
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