

# Washington Public Ports Association

March 20, 2018

Mr. Kyle Dorsey  
Rules and Policy Specialist  
Waste 2 Resources Program  
Washington State Department of Ecology  
PO Box 47600  
Olympia, WA 98504-7600  
Dear Mr. Dorsey:

I am writing on behalf of the members of the Washington Public Ports Association (WPPA) to comment on the CR-102 proposed revisions to the Chapter 173-350. Our goal is to provide useful comments, helping to shape an effective rule that minimizes unnecessary costs and administrative requirements while protecting public health and the environment. We appreciate the considerable effort that has been made to draft the proposed regulation and to accommodate our interests. Staff at the Washington State Department of Ecology (Ecology) has consistently worked in good faith to address the concerns ports have raised during the rule development process.

As you know, WPPA represents 75 port districts in our state. The size and complexity of these ports varies greatly; from the large-scale international trade facilities operated by the ports of Seattle and Tacoma, to the targeted, job-creating economic development engines that characterize ports in communities across the state. Regardless of their size, the economic development mission of ports invariably involves property management, construction projects, and moving soil and dredged material. As a result, our members are knowledgeable about their environmental responsibilities when handling these materials. Our comments reflect the views of seasoned, well-informed environmental managers with a well-established commitment to complying with state regulations.

WPPA representatives participated in discussions with Ecology and others on August 22 and September 19, 2017 regarding concerns that the draft rule appeared to impose solid waste facility permitting requirements on Port construction project material stockpiles. We understood based on these discussions that Ecology would not require infrastructure and earthwork construction projects implemented by municipalities, Ports, other governmental jurisdictions, or the private sector to obtain solid waste permits for temporary construction material stockpiles. We further understood that Ecology would include exemptions from regulation for stockpiles managed under appropriate National Pollution Discharge Elimination System (NPDES) permits.

Unfortunately, we are now deeply concerned that these understandings are not reflected in the current proposed regulation. We believe problems with the proposed regulation center on Sections 100 (definitions) and 320 (piles) as they apply to construction project duration and temporary stockpiles of materials including broken paving material, contaminated soil, and contaminated dredged material which WPPA members often use to construct projects at seaports, airports, rail, commercial, and industrial facilities.

The following specific comments reflect our most pressing concerns with the proposed regulation:

Section 100 – Definitions. The new definitions for contaminated soil and contaminated dredged material require that Chapter 173-340 WAC Model Toxics Control Act (MTCA) cleanup levels be "...established for the location that the soil is placed." Specific comments include:

- One of Ecology's stated goals for the soil handling revisions in WAC 173-350 was to provide a consistent and dependable statewide approach to assess soil quality. The proposed approach to develop MTCA cleanup levels applicable to the "placement location" introduces complexity and corresponding uncertainty. This is due in part to the number of environmental factors and engineering measures considered in MTCA site cleanup level development. To ease the implementation burden that will be placed on Jurisdictional Health Authority (JHA) representatives, improve consistency and improve statewide compliance, we request that Ecology default to simpler tabulated cleanup levels such as MTCA Table 740-1 Method A Soil Cleanup Levels for general soil acceptability screening.
- If Ecology requires that the evaluation of soil and dredged material quality include consideration of MTCA Method B criteria, such as the protection of groundwater, we request that Ecology explicitly provide for the consideration of engineering controls, such as paved surfaces, in determining which migration pathways must be considered in developing cleanup levels. Otherwise, most evaluations of soil and dredged material in Western Washington will require the application of MTCA criteria for protection of groundwater and surface water that will largely preclude the reuse of soil and dredged material originating from many, if not most, ports.
- Administrative burdens and implementation costs are created by the requirement to determine if soil or dredged material meets the definition of "contaminated" as determined by MTCA cleanup levels. The provision will result in greatly expanded material sampling and chemical laboratory testing, cleanup level development and evaluation, record keeping, real estate transaction due diligence changes, and JHA communications without providing a clear environmental benefit. Of particular concern, these new requirements and costs are not considered or assessed in the Preliminary Regulatory Analysis (Ecology January 2018) which states that "No additional costs over baseline..." are associated with the Section 100 definitions. At a minimum, Ecology must evaluate and share the likely costs to comply with these provisions. Furthermore, the agency should consider that these provisions were at the core of concerns raised by the regulated community in 2017.
- JHA representatives will be responsible for responding to inquiries that result from implementing the proposed regulations in Chapter 173-350 WAC. Ecology should be aware that JHAs will be facing highly complex of the questions from the public regarding the permitting of projects. In addition, the responses provided by these local government agencies may create new legal liabilities for project proponents. Most JHAs are understaffed to meet their current regulatory responsibilities and are typically not staffed with individuals that have a high level of expertise in developing or applying MTCA cleanup levels. With the likely complexity of questions the JHAs are likely to receive and the potential liability at stake, the timeliness and dependability of the responses will be critical to property development for ports and other parties. Additionally if JHA staff cannot respond to inquiries in a timely manner, project schedules will extend and costs will increase on public and private projects. As a result these agencies will be under tremendous pressure and scrutiny from the regulated community to ensure that their responses are grounded in fact. This regulatory complexity is likely to result in lengthened project schedules and associated costs that, related to port districts, will be borne by taxpayers. WPPA recommends that Ecology ensure the rule provides a mechanism to minimize implementation costs on the JHAs as well as project

proponents.

Section 320 and Table 320-A – Piles. WPPA is concerned that Piles Section (WAC 173-350-320) requires solid waste facility permitting for stockpiles of materials used during construction projects. Port construction projects often involve many phases, including: planning; preparation; material staging; and, in some cases, phased implementation. The duration of the activities that include maintaining material stockpiles may be years, exceeding the 90-day exemption included in Table 320-A Item 5. Based upon our meetings in August and September 2017, we understood that an exemption from permitting would be included in the regulation for construction project stockpiles of contaminated soil, contaminated dredged material, and paving rubble managed under an appropriate NPDES permit such as a Construction Stormwater NPDES or other NPDES permits applicable to the facility. We request that Ecology clarify the rule to include an exemption for temporary stockpiles of contaminated soil and contaminated material that are managed under applicable NPDES permits. The clarification could be included in Table 320-A Item 5, such as that used in Table 320-A Item 4, or in other sections (e.g., WAC 173-350-020[2][y]).

Thank you for your consideration of our comments. Our members have been pleased by Ecology's constructive approach to writing these regulations. As a result, we are surprised to say the least when issues we considered resolved then re-emerge in the CR-102. We stand ready to work with agency staff to ensure that previous commitments can be incorporated in this rule.

Sincerely,

Gerry O'Keefe  
Senior Director of Environmental Affairs  
Washington Public Ports Association