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IM 23 amounts to de facto rulemaking and Ecology has not gone through the appropriate evaluation required by MTCRA regulation [WAC 173-304-702(15) & (16)], which requires the department to consult with the science advisory board, the department of health, and the United States Environmental Protection Agency when considering new scientific information in the establishment of cleanup levels. Ecology is not authorized to promulgate cleanup levels in the manner it is attempting in IM 23.

Of particular concern is Ecology's intent to promulgate a surface water cleanup level for an extremely complex mixture of compounds based on a single study that tested only one mixture of each fuel when there are thousands of variations and mixtures that could produce different results. Additionally, while indicating that the study was done with "fresh-spiked" total petroleum hydrocarbons (TPH), IM 23 does not acknowledge the absence of weathered TPH testing. Ecology's means and methods in this case are ill-conceived and have not been scientifically vetted and validated.

Although the scientific literature using similar methods for testing toxicity of petroleum hydrocarbon mixtures is limited, it does exist. IM 23 does not acknowledge or discuss the results of other scientific studies on this subject, many of which are highly variable and determined NOEC and LOEC values for aquatic organisms that are considerably higher than the values being proposed by Ecology. At a minimum, Ecology should compile and provide an evaluation of related existing research.