

To: Clint Stanovsky, Rulemaking Lead
Department of Ecology
P.O. Box 47600
Olympia, Washington 98504-7600

Date: April 13, 2023

Subject: Comments on the Proposed Revisions to MTCA Cleanup Rulemaking Chapter
173-340 Washington Administrative Code

Dear Mr. Stanovsky:

Thank you for the opportunity to review and comment on the Washington Department of Ecology's proposed revision to the state cleanup law, the Model Toxics Control Act (MTCA). The Port of Seattle appreciates the effort that has gone into these revisions and looks forward to the ongoing successful implementation of cleanups in Washington under this revised regulation. In general, the Port is in strong support of the changes. There are a few areas where we would like to provide feedback, with the intent of supporting Ecology's efforts to streamline and clarify the process for site cleanup, as well as to clarify some details regarding the state's expectations for investigation and cleanup. The Port provides the following comments for your consideration in finalization of the rule revision:

1. Inclusion of Environmental Justice considerations: The Port of Seattle fully supports revision of the rule to include the consideration of overburdened communities and vulnerable populations more clearly and directly in the cleanup process. We agree that this is a key consideration during the site prioritization by Ecology, and the initial determination of site ranking through the Site Hazard Assessment process. Related to Ecology's changes to include specific consideration of overburdened communities and vulnerable populations within specific site investigations and reports, we strongly encourage Ecology to consider including more specific detail on the following:
 - a. What specifically is expected during the Remedial Investigation and Feasibility Study process for consideration of these communities and populations, and how this consideration may vary from a standard assessment of human health impacts.
 - b. Clarity on whether sites located within overburdened communities are expected to modify assumptions used for the evaluation of human health exposure.

- c. Clarity on how the determination of the presence of a vulnerable population is determined for a site. For example, the current language in the Land and Resource Use section of Chapter 173-340-350 states *"Sufficient information must be collected on the present and proposed land and resource uses, comprehensive plan, and zoning for the site and potentially affected areas to determine the exposure or potential exposure of human and ecological receptors, including vulnerable populations and overburdened communities to hazardous substances at the site"*. Please consider providing further direction on what level of information may be considered sufficient, or how data on land use or comprehensive plans or zoning would provide information useful to the determination of the presence of vulnerable populations at a site – it is not clear how land use, zoning, or comprehensive plan information would provide sufficient information to assess exposure to vulnerable populations.
- d. Clarification on expectations for how data related to vulnerable populations is to be collected and included in site reports and documents – for example, is Ecology expecting that demographic information for the worker population at industrial sites would be collected to complete an industrial worker exposure scenario evaluation?
- e. Clarity on how quantitative risk assessments may be used in evaluation of vulnerable populations (WAC 173-340-357(1)). The current process for quantitative risk assessment already considers children and pregnant women as end-points/receptors, so additional information on what Ecology's expectations are regarding modifications to a risk assessment calculation for consideration of defined vulnerable populations would be very helpful to understand. Currently, there is no specific language regarding this in the discussion of Human Health Risk Assessment parameters detailed in 173-340-357(2).

The Port encourages careful consideration of these expectations, as collection and publication of demographic data in cleanup documents could produce information that entities and individuals may find sensitive. Relying on individuals in overburdened communities/vulnerable populations to self-report demographic information unjustly adds to their burden and may not accurately reflect demographics for the site vicinity as a whole (for example, native English speakers may be more likely to respond to demographics surveys).

2. Ecology Resource Concerns: The proposed rule revisions include multiple new or expanded efforts for Ecology staff. This includes the development and maintenance of a No Further Action Sites List, and re-analysis of all existing MTCA sites for Site Hazard Assessment as primary examples. The Port strongly encourages Ecology to consider the effort required both to initiate these new processes, as well as efforts to maintain

them, given Ecology staff are already supporting extensive workloads. Maintaining these types of registers or lists is critical to their use and relevance; if the lists are not updated and maintained in a timely manner, they may not provide the benefit intended and could inadvertently hinder transparency if they are not correct or up-to-date. Along these lines, we also strongly recommend that any site lists, such as the No Further Action Sites List be caveated that the list may not be an accurate representation of current site status. In instances where financing or business transactions depend on the No Further Action status of a site, having timely accurate listing, or noting that site status may not be accurately represented by the list may be critical to some sites undergoing activity in short timeframes. This comment also applies to the institutional control or periodic review status of sites on the No Further Action Sites List. There are many Ecology site webpages today that do not represent current status and condition. Ecology's ability to maintain accurate status on public-facing lists should be considered before committing to additional staff responsibilities.

3. Specific comment: Page 46 is missing from the redline document published for review.
4. Section 173-340-350 has been revised to focus on the purpose and process for completing a Remedial Investigation, however, sections (3) and (6)(j) of this chapter continue to discuss Feasibility Studies. Please consider removal of discussion of feasibility study-related topics in this remedial investigation chapter, as this can lead to confusion, as the Feasibility Study section is now separately detailed in Section 173-340-351.
5. Cleanup Action Requirements Text Revisions. The Port fully supports the revisions made for clarity and flow of Section 173-340-360 Cleanup action requirements. We strongly encourage Ecology to consider providing additional detail or explanation of the General Requirements included in subsection (3)(a), specifically:
 - a. Section (v) describing expectations for resilience to climate change impacts – please consider including clarification on what Ecology considers or would use to consider what would have a “high likelihood of occurring” and what would be defined as a “severely compromising long-term effectiveness.” It is unclear what the definitions of “high likelihood” and “severely compromising” are, and how this analysis can be done without a consistent understanding of how these terms are defined or determined.
 - b. Section (vii) notes that cleanups may not rely primarily on institutional controls or monitoring if it is technically possible to implement a more permanent cleanup action. We strongly recommend removal or revision of this requirement. The Disproportionate Cost Analysis (DCA) process is conducted in the feasibility study for the purpose of determining what remedial action is permanent to the maximum extent practicable. This evaluation considers many

factors in addition to technicality, and this subsection noting only technical possibility is inconsistent with the DCA and process for selection of a cleanup action. There are many cases, such as active industrial facilities, where institutional controls and monitoring may be the action that provides permanence to the maximum extent practicable. That scenario would be in conflict with this General requirement vii.

- c. Similarly, Section (viii) is also repetitive of the process conducted in the DCA. Consider revision or removal of this subsection, as it does not appear to provide a requirement that is not already included in other areas, and could lead to confusion or conflict in the same way as subsection vii noted above.
 - d. We applaud your work to clearly define the expected process for completion of a disproportionate cost analysis. In subsection (5)(c)(iv)(B)(I), the decision step of Step 4 of the process introduces the determination on if costs are "disproportionate." We request additional discussion or detail on what Ecology will consider to be disproportionate. The current footnotes do not provide any indication on how much of an incremental change would be considered "disproportionate." Without this, the work to revise and clarify this section will not provide the key piece of information needed to complete the DCA process – what threshold Ecology considers to be "disproportionate."
 - e. Subsection (5)(d)(iii)(B) of the same section provides detail on the criterion of Effectiveness over the long term, including a hierarchy of types of cleanup components. The highest-ranked cleanup component for Effectiveness over the long term is Reuse or Recycling, placing this higher than destruction or detoxification. The Port does not understand or agree with this hierarchy ranking in that, similar to disposal or containment, reuse or recycling does not provide for removal of the chemical from the site or environment/system. We understand Ecology's interest to encourage reuse/recycling, however, we do not agree that 'effectiveness over the long term' is the appropriate place to do this.
6. Inadvertent Discovery Plans. The Port agrees inclusion of Inadvertent Discovery Plans as part of site investigation and construction plans is critical to proper identification and protection of tribal and historical resources. Currently, the rule does not appear to have any exemptions to the requirement for development of IDPs. We encourage Ecology to consider whether in some situations, such as sites with a known and documented history of filling at extents greater than the proposed work, sites that are not located within an area of any known historical population activity or use, or sites with multiple previous investigations and activities that have not resulted in identification of resources may be exempted from the requirement to develop IDPs. Language added to section 173-340-815 Cultural resource protection indicates IDPs

will be required at sites 'capable of affecting a cultural resource,' but all earlier discussions of IDPs indicate all sites will be required to develop these plans. Please consider clarifying language around IDPs outside of Section 173-340-815 for clarity and consistency.

7. Written Opinions on Portions of Sites. Section 173-340-515 describing Independent remedial actions includes a deletion of existing rule text in subsection (5)(a)(ii) that says, *"Provide a written opinion regarding the remedial actions performed at the site and remove the site ~~or a portion of the site~~ from the contaminated sites list if the department has sufficient information..."* The Port strongly disagrees with this deletion. It is not uncommon for sites to include multiple parcels of land or extend over multiple different areas. By this simple deletion, Ecology is restricting the ability to close out individual areas of a site that have achieved cleanup goals to allow for redevelopment or property transfer to occur in those areas simply because they are identified as part of a larger site. We encourage you to rethink the large-scale impact this small deletion could have on the ability of owners to progressively cleanup and move forward on sufficiently cleaned parcels while contamination remains on others. This does not achieve the streamlined process and efficiency that Ecology intends, and it may discourage brownfields redevelopment efforts.
8. Part 7 Global Edits. Deletion of the word "potential" from "potential threats" is listed as a global change for Part 7 – Cleanup Standards. It seems that in some instances, when developing cleanup standards, use of "potential" would still be applicable, and that deletion of this term globally may not be appropriate. We support an effort by Ecology to ensure that deletion of potential is appropriate given the specific use of the term in each instance.

It is clear that tremendous effort to clarify, update and improve the cleanup rule has been conducted by Ecology over the past few years, and we appreciate and applaud your efforts. Please let us know if the Port can provide any support to this ongoing effort, or if there are any comments in this letter you would like to discuss in greater detail.

Thank you for your time and consideration of our comments. Please reach out to John Evered (evered.j@portseattle.org) on my staff with any questions or clarification needs on the comments provided above.

Sincerely,



Sandra Kilroy, Senior Director
Environment and Sustainability
Port of Seattle