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Rulemaking Lead – Cleanup Rule Update AO# 18-09  
Policy and Technical Support Unit, Toxics Cleanup Program  
Department of Ecology  
*Submitted electronically*

RE: Model Toxics Control Act (MTCA) Cleanup Rulemaking Chapter 173-340 WAC Proposed Rule

Dear Clint,

Thank you again for providing the opportunity to comment on the proposed MTCA rule update. Duwamish River Community Coalition, RE Sources, Communities for a Healthy Bay, Washington Conservation Action, and Twin Harbors Waterkeeper offer these comments as members of the Stakeholder and Tribal Advisory Group and as interested parties. We have invested significant time in this effort since 2019 because MTCA is such a critical element for clean and healthy communities. We urge Ecology to continue ensuring that the public's interests are protected, and that historical inequities are addressed directly and transparently. Our members and communities care deeply about cleaning up toxic pollution expediently and fairly.

We know that a tremendous amount of work has gone into this important rulemaking update. We are pleased to see that some opportunities for improvement were taken; however, we believe there is more room for improvement to help close the gap for communities that are disproportionately impacted. Please see below for our feedback.

**ENVIRONMENTAL JUSTICE:**

Throughout the updated rule language, we noticed a few themes worth noting before we address specific sections. We appreciate the general inclusion of "vulnerable populations or an overburdened community" throughout this rulemaking update. This inclusion and acknowledgement is a good start towards incorporating environmental justice and closing the gap for communities that are disproportionately impacted, particularly when it comes to legacy contaminated sites. At the same time, there is a lack of clarity in the language on how vulnerable populations and overburdened communities will actually be incorporated or considered beyond just noting whether or not they exist in relation to a MTCA site. *We ask for clarity on how Ecology is making environmental justice actionable, rather than something that is simply noted in the MTCA process.*

Toxic waste sites in Washington are often clustered in low-income communities of color. In

addition to the health impacts that stem from living close to these sites, these communities also suffer from the consequences of living near other forms of pollution, including airports, freeways, and Superfund sites. When prioritizing cleanup sites and determining how they are cleaned, the cumulative impacts of living in areas where pollution is heavily concentrated must be considered.

*We recommend Ecology consult with the Washington Department of Health on best practices and methods to assess cumulative impacts using the Washington Environmental Health Disparities Mapping tool.* Using existing data, Ecology will be able to utilize the tool to analyze environmental exposures, environmental effects, sensitive populations, and socioeconomic factors. Using this tool is especially important during the MTCA process, including, but not limited to, in the site ranking process, cumulative impacts analysis, and remedial investigation into the effects on highly impacted communities.

In order to strengthen environmental justice principles, which is an identified purpose of the proposal, *we recommend that the rule include an environmental justice analysis that explicitly requires the use of the Environmental Health Disparities Mapping tool to identify cumulative impacts and incorporate these findings into the MTCA process.* We would be happy to have follow up conversations about resources if Ecology staff is interested.

### **310 INITIAL INVESTIGATION**

While we are pleased to see some improvements, such as the inclusion of vulnerable populations and overburdened communities, we reiterate our previous comments. *In addition to owners and operators, employees, renters, and other people who may be impacted by the contaminated site need to be informed under Section 310(6) and provided with information detailing the nature of the contaminants at the site and any potential health and environmental risks and exposures associated with the site.*

Section 310 no longer requires Ecology to perform site visits. *We recommend the implementation of a policy that identifies the procedures Ecology staff will utilize in order to determine if a site visit is necessary.* The steps outlined in the policy should be repeatable and consistent across sites. Additionally, we are concerned that codifying the removal of initial site visits could be deemed as a decrease in workload by the Washington State Legislature, and could justify a budget cut, further impacting an already tight budget.

*Finally, we recommend ensuring that Tribal governments are afforded the opportunity to opt in to receiving any communications related to initial investigations and assessments within their Usual and Accustomed Areas.* This could be included in section 620 on Tribal engagement as well as referenced in this section to ensure proper Tribal engagement.

### **320 SITE HAZARD ASSESSMENT AND RANKING**

We appreciate Ecology releasing the SHARP tool for public comment in parallel with this rulemaking update so that we can see a side-by-side comparison and to have a more transparent process. We have separately submitted a comment letter for the SHARP tool. We additionally appreciate the inclusion in this rulemaking of section 320(2)(d) on public

participation, ensuring that when establishing the site hazardous assessment and ranking process or making any change to the process that could affect hazard ranking, Ecology will provide a public notice and opportunity to comment. This too is important to maintain a transparent process that the public will have an opportunity to review.

We also appreciate that this section allows for new information to be considered and for consideration of vulnerable and overburdened populations. It appears that the performance standards and quality assurance added, while somewhat vague, do allow for easier and more regular updates to technical standards. In implementation, the notification requirements have been updated to include “potential exposure of human and environmental receptors,” severity of exposure to human health and environment, and whether community is overburdened, which we hope will also create more transparency.

This section, however, still lacks clarity on how vulnerable populations and overburdened communities are to be considered in site assessment and ranking. *We still do not see in the assessment and ranking any considerations for cumulative impacts or how long a site has been on the hazardous site list without any cleanup. We would still like to see performance standards for evaluating cumulative impacts of multiple environmental exposures. Consideration for potential of future releases of hazardous substances associated with historical and current land use, as well as consideration for chronic exposures should be taken into account. The rule is also still unclear how Ecology will ensure communities know about their notification options.*

### **340 PROGRAM PLANNING AND ASSESSMENT**

We are in support of some of the edits made in section 340 regarding program planning and assessments. We believe that broadening the language in subsection 1 and 2 to include prioritization for overburdened populations that *may* be impacted by contaminated sites is consistent with environmental justice principles. We also support a similar edit made in subsection 3 that broadens the language of the rule to include progress assessment for cleaning up sites that may impact vulnerable communities. These changes will allow for potential harm to overburdened and vulnerable communities to be considered when making decisions about program planning.

However, we still have several concerns with the section. *There should be an explicitly stated prioritization of BIPOC communities, as race is one of the strongest indicators of environmental injustice. We are also concerned that some of our previous comments on this section have not been addressed. We do not see anything in this section that would allow for ways to ensure the disparity in the number and severity of contaminated sites in frontline communities not only disappears, but also drives cleanup priorities.*

We are also concerned that there are no included metrics to measure how certain communities are disproportionately impacted by toxic pollution, how current and future MTCA sites will be analyzed, and how Ecology will report to the legislature regarding its progress towards eliminating disproportionate impacts on vulnerable, overburdened, and BIPOC communities. *These metrics need to be fully realized in the Toxic Cleanup Program’s (TCP) Strategic Plan, to include assurance mechanisms that reduce the disparity of toxic sites in low-income and*

*communities of color on a near-term timeline. A timeline is crucial to ensure accountability for the TCP, and to allow community advocates to track TCP's progress. Because public review and comment is not required for Strategic Plan updates, any communications about these updates should be explicitly clear that public review and comment are welcome, and those comments will be reviewed and considered by TCP staff.*

### **350 REMEDIAL INVESTIGATION**

We appreciated some clarifications and additions to this section, including:

- Clarification that the requirement to conduct a remedial investigation (RI) applies to all contaminated sites, regardless of which administrative option in Section 510 is used to conduct remedial action at the site (Ecology-conducted, Ecology-supervised, or independent). Performing an RI is a substantive requirement, applicable to all sites.
- The added requirement that independent investigations of a site must be reported to Ecology within 90 days of completion.
- The additional requirement that Ecology must notify the public of independent investigation reports submitted to Ecology.
- The added requirement to include an inadvertent discovery plan (IDP) to meet the requirements in new Section 815 regarding cultural resources. An IDP will also be required as part of interim action plans and cleanup action implementation plans, which is important in protecting cultural resources.
- The requirement added that reports must include documentation of the proper management and disposal of any waste materials generated.
- The added requirement that investigation must include, as applicable, an assessment of the geologic and hydrogeologic features of the site that are likely to affect the ability to implement cleanup action alternatives.
- For investigations of air and soil vapor, the addition of more specific requirements in reflection of better understandings of vapor pathways.
- The added specific characteristics relevant to climate change, such as sea level rise and potential for wildfires which are important to ensure permanence of cleanup actions and better reflects our current understanding.
- This section emphasized that investigations of land and resource uses must include the uses of vulnerable populations and overburdened communities, which is a step in the right direction.
- It also emphasized that investigations of affected human populations must include vulnerable populations and overburdened communities, though what this means is still left unclear.

We disagree with a few things in this section. *We do not agree with the elimination of the requirements for conducting a cumulative impact analysis of existing burdens on a vulnerable population or overburdened community for the purposes of selecting a remedy for a contaminated site.* It is not clear to us that cumulative impacts of existing burdens are analyzed at any step in the cleanup process. *We reiterate from our previous comment letters that cumulative impacts need to be considered early and often to ensure that the communities impacted most by environmental harms receive the benefits of this rule.* We know that “multiple

factors, including both environmental and socio-economic stressors, may act cumulatively to affect health and the environment and contribute to persistent environmental health disparities.” (EPA 2020). If Ecology is to truly advance environmental justice principles and reduce harmful disparities, a cumulative impacts analysis will need to be performed, especially for sites located in or adjacent to highly impacted communities.

*Further, this version of this section does not utilize our previous recommendation to include immigrant and refugee populations in the definition of highly impacted communities, which is important in making progress towards closing the gap on disproportionately impacted populations.*

### **351 FEASIBILITY STUDY**

We agree that the following additional requirements in this section improve this rule:

- the inclusion of the location and estimated amount of hazardous substances removed or treated by the alternative and the restoration time frame for the alternative;
- the inclusion of the location, estimated amount, and projected concentration distribution of each hazardous substance remaining above proposed cleanup levels after implementing the alternative;
- the inclusion of documentation of how impacts on vulnerable populations and overburdened communities were considered in the evaluation required in Step 4; and
- the inclusion of documentation of the proper management and disposal of any waste materials generated by study.

### **360 CLEANUP ACTION REQUIREMENTS**

We again appreciate that this section emphasized that cleanup actions must protect vulnerable populations and overburdened communities, and that one must consider the potential risks posed by the site to the health and environment of vulnerable populations and overburdened communities when evaluating the reasonableness of a time frame as well as when assessing the long-term effectiveness of a cleanup action. We also appreciate taking our recommendation to include language that considers the impacts on vulnerable populations and overburdened communities when assessing the short-term risks of a cleanup action during construction and *implementation; however, we believe more guidance is necessary to ensure cleanup occurs. Ecology needs a clear method for measuring the degree to which the benefits and burdens of the preferred cleanup action alternative are equitably distributed must be outlined in guidance. As currently written, it is unclear how Ecology plans to determine if these expectations are met.*

We support the separation of the climate resilience requirement from the existing protectiveness requirement in the former subsection (2)(a)(i). Specifying that a cleanup action must be resilient to climate change impacts that have a high likelihood of occurring and severely compromising the action’s long-term effectiveness is critical in ensuring the permanence of cleanup actions. We foresee a higher likelihood of extreme events occurring that could compromise cleanup actions and appreciate this addition. Under subsection (5), climate resilience has also been separated out as an explicit factor when evaluating the relative long-term effectiveness of a cleanup action alternative in the disproportionate cost analysis, which we also support.

We also agree with the added requirement in Section 360(3)(d), that for Ecology-conducted or Ecology-supervised remedial actions, one must consider both public concerns and tribal rights and interests both when determining and when weighting each of the five benefit criteria (protectiveness, permanence, long-term effectiveness, management of short-term risks, and implementation potential).

We have some concerns with the removal of “volume” replaced by “exposure” as a factor that must be considered when assessing the permanence of a cleanup action alternative. While this appears to prioritize exposure over volume, which could be protective of human health and the environment in the short term, we are concerned that this could lead to higher risks after sites are considered cleaned up if the volume of a contaminant is not considered. While capping contaminants is often used and can be an appropriate cleanup remedy, left behind contaminants may pose risk to human health and the environment in the long run should an exposure pathway be introduced at a later point in time. *What is Ecology’s justification for this change?*

We have concerns over the eliminated guidance in former subsection (2)(e)(ii) about using quantitative, scientific analysis to evaluate whether institutional controls demonstrably reduce risks. The original text that was removed stated: “Institutional controls should demonstrably reduce risks to ensure a protective remedy. This demonstration should be based on a quantitative scientific analysis where appropriate.” We are concerned that removing this language means there is no requirement for ensuring risks are reduced. We also are concerned that there is no explicit requirement to show how an analysis was done to create protective remedies. *What was Ecology’s intention with this change?*

We are concerned about the elimination of the separate equitability requirement for cleanup actions, including consideration of any cumulative environmental or health impacts on vulnerable populations and overburdened communities from sources additional to the contaminated site. The subtext indicates that this removal will be subsidized by provisions of the HEAL Act, but it is unclear to us how that will happen. *We request clarification and justification of this change.*

We are still very concerned about the process of performing the Disproportionate Cost Analysis (DCA). Given the amount of time and effort spent on discussing benefits while participating in the STAG, we are very disappointed to see that the proposed rule only lists specific costs to be included in the DCA, but not benefits. This will grossly underestimate the ecosystem and public health benefits of a thorough, more protective cleanup. And, because Ecology has no method to monetize ecosystem services and public health, but can easily tally the costs to the PLP for cleanup - finite costs like labor, construction equipment, and mileage, for example - costs will always be overrepresented in a DCA. As it currently stands, the DCA process is biased for permanence, meaning when the most permanent cleanup alternative is found, the DCA stops. This method then neglects to even consider more protective cleanup alternatives if a more permanent solution is found earlier in the process. *What is Ecology’s justification for prioritizing permanence over protectiveness?*

We understand that the exercise of monetizing ecosystem services and improvements in public health is time consuming and costly. These barriers should not however, be used as a reason to not perform the most accurate DCA possible. *Can Ecology complete this task using something similar to a model remedy? – use known factors and costs to plug in values to come up with a more complete picture of the benefits provided by a properly functioning, healthy ecosystem that the public can safely access?*

### **370 CLEANUP ACTION EXPECTATIONS**

We support the edit specifying that cleanup actions in compliance with the rule is not a substitute for conducting a feasibility study. *However, we are concerned that there are no details on what circumstances would make non-conformance acceptable. To increase transparency and accountability, there should be clear standards that specify when non-conformance will be allowed. We are also concerned that there is no specific language around equity related considerations as a cleanup action expectation. Expectations for the equitable distribution of costs and benefits from MTCA work, and for the expectation that cleanup remedies will be resilient to climate change should be added back into the proposed rule, as seen in previous drafts.*

### **380 CLEANUP ACTION PLAN**

We support the inclusion of the statement that independent remedial actions must also include the same information required in a cleanup action plan. Yet we have concerns about the removal of the subsection requiring notice when cleanup action cannot be achieved. *This should be included so that impacted communities can stay informed on the status of cleanups. We also believe that a summary of considerations related to cumulative impacts and overburdened community needs should be included.*

### **390 MODEL REMEDIES**

We appreciate Ecology's desire to accelerate the selection of cleanup actions. However, streamlining the process should not reduce the quality of cleanup actions. *We find the following sections in need of clarification to reduce ambiguity in the model remedy selection process:*

*(1) Purpose.* This section lacks an explanation of what constitutes “routine types of cleanup projects at sites with common features and lower risk to human health and the environment.” While this wording aligns with the definition of a model remedy in RCW 70A.305.020(20), the language does not provide enough information about the characteristics of projects that qualify for a model remedy. *We recommend adding language to clearly define these elements.*

*(2) Development of model remedies.* This section lacks a description of what constitutes common categories of sites or types of hazardous substances. *We recommend adding language to clearly define these elements.*

*(4) Selection.* We agree that in certain situations under certain circumstances, it makes sense to forgo a feasibility study. *However, the rule should be made clear to emphasize that this should only be done when a remedial investigation justifies the absence of a feasibility study, i.e. the*

*remedial investigation proves that the situation meets the conditions or standards to select a model remedy.*

## **600 PUBLIC NOTIFICATION AND PARTICIPATION**

All members of the public have a right to know about toxic waste sites and cleanups happening in their communities. The current methods Ecology uses for public notification do not make this information sufficiently accessible, especially for those without easy access to the internet or technology. *To ensure that the most effective communication strategies are being used, Ecology must gather information about the affected communities to determine the best modes of communication to reach them. Additionally, Ecology must provide more effective outreach to the general public about how to find information and receive notifications beyond the current obscure website registry.*

## **620 TRIBAL ENGAGEMENT**

In section (2) *Applicability*, we appreciate Ecology incorporating feedback from the STAG into this section. As stated in our October 2022 comment letter, this section previously too narrowly defined “Indian tribes’ rights or interests in their tribal lands.” This wording relied on the definition of “tribal lands” in RCW 70A.02.010(13) and “Indian country” in 18 U.S.C. Sec 1151. Conscripted by these definitions, this language introduces a limited geographic extent not encompassing broader geographic areas that are within Tribal lands and waters defined by Executive Order or within Usual and Accustomed Areas. Since Tribal rights and interests extend well beyond reservation boundaries, we appreciate the change of wording to reflect this in section 620 as well as sections 360 and 380. However, we defer to Tribal representatives for final wording.

We are however disappointed that the applicability of section 620 is limited to Ecology-conducted and Ecology-supervised remedial actions and does not include independent actions. This is an example of weaker policy in the independent cleanup program. *Tribal engagement must be a component of all cleanup actions that may affect Tribes’ rights or interest, including independent actions.*

In section (3) *Tribal engagement*, we appreciate Ecology’s commitment to developing a site Tribal engagement plan identifying Indian Tribes that may be adversely affected by the site and opportunities for government-to-government collaboration and consultation, and protocols for engagement. *However, we request clarity regarding how Tribes will be engaged and how input received from Tribes will be incorporated into decision making.*

Footnote 650 describes Ecology’s intent to develop a template that will be modified on a site-specific basis as needed based on Tribal interest. We defer to Tribal leaders on whether a template is the appropriate approach to engagement. *We would however like to see this section modified to outline how specifically Ecology plans to approach engaging with Tribes and what resources will be used to identify Tribes affected by a site.* Meaningful engagement requires careful planning by Ecology early in the process and the language in the rule should demonstrate Ecology’s proposed approach.



We are encouraged to see that Ecology will engage affected Indian Tribes before the initiation of a remedial investigation or an interim action at a site, but would like this language to more clearly reflect pathways that will emerge from engagement. *We would like the rule to clearly state how Ecology plans to consult Tribes and how input received by Ecology will be incorporated into final decision making about remedial investigations or interim actions.* We urge Ecology to consult with Tribal representatives to finalize this language.

In section (4) *Relationship with public*, we are encouraged to see language adapted from the HEAL Act, RCW 70A.02.100(3), requiring that engagement with federally recognized Indian Tribes must be independent from any public participation process.

We are disappointed that the Department's proposed Strategic Plan described in section 340(1) does not include Tribal engagement. As stated in our October 2022 letter:

"In addition to the engagement elements listed in the pre-proposal rule, we also urge Ecology to include tribal engagement in the Department's proposed Strategic Plan described in 173-340-340(1). One option would be to include a new Part (5) that describes tribal engagement, and cross reference that in 173-340-620. Engaging with tribal representatives during strategic plan development and assessment would be an effective opportunity to plan more broadly than the individual sites that are referenced in Part (4) of this section, where cumulative impacts to natural resources could be identified and addressed strategically."

## **815 CULTURAL RESOURCE PROTECTION**

In section (1) Purpose, we appreciate that the added statement of purpose aligns with Executive Order 21-02 which states that, "State agencies shall take all reasonable action to avoid, minimize or mitigate adverse effects to archeological and historic archaeological sites, historic buildings/structures, traditional cultural places, sacred sites or other cultural resources." This Executive Order recognizes the need to protect the state's numerous archaeological and historical sites and Native American sacred places and landscapes.

In section (3) Consultations and inadvertent discovery plans, *the applicability of consultations and inadvertent discovery plans should be expanded to include independent remedial actions.* This is an example of a weaker policy in the independent cleanup program that may have a direct, negative impact on Tribes.

Additionally, the language in section (B)(i), "Based on the consultations, Ecology may require the development and implementation of a cultural resources work plan," needs clarification. *The rule should state what types of consultation outcomes would trigger the development and implementation of a cultural resources work plan. The steps to determine the need for such a plan should be consistent and repeatable across sites.*

## **830 SAMPLING AND ANALYSIS PROCEDURES**

We appreciate the proposal to shift the list of Ecology-approved analytical methods outside of the rule as it will allow for adaptation to evolving scientific methodology and technological changes.

*As stated in our October 2022 comment letter, all data used for regulatory decision making must be subject to stringent quality assurance and quality controls using standard and acceptable methodologies. Because changes to the list are proposed to occur outside of formal rulemaking, we expect the addition or removal of methods from the list to strictly align with these standards.*

We thank Ecology for this opportunity to comment. Many years and much hard work has been put into updating these sections of the Model Toxics Control Act rule. We deeply appreciate the focus on environmental justice and engagement with Tribes. While we agree with some of the directions that have been taken, we still have serious concerns about the implementation of the changes, especially regarding reducing disparities across the many communities we serve. We look forward to continuing efforts with MTCA STAG in the future for an improved rule and inclusion of environmental justice.

Sincerely,

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