

Comment Memorandum

Date: April 16, 2023
To: Clint Stanovsky, Washington State Department of Ecology, Toxics Cleanup Program, Cleanup Rulemaking Lead (comments submitted online)
From: Ben Starr, Anne Fitzpatrick, Luke Smith, Geosyntec Consultants Inc.
Subject: Comments on MTCA Cleanup Regulations Chapter 173-340 WAC - Proposed Rule Amendments

Geosyntec Consultants Inc (Geosyntec) is providing the following general and specific comments to the Model Toxics Control Act (MTCA) Cleanup Regulations Chapter 173-340 WAC Proposed Rule Amendments (proposed rule) posted by the Washington State Department of Ecology (Ecology) on February 15, 2023. The proposed rule restructures several sections of WAC 173-340 in an effort to improve the site hazard ranking process, revitalize MTCA cleanup program planning and assessment, update and clarify remedial investigation and remedy selection requirements, improve response to underground storage tank (UST) releases, strengthen environmental justice, advance public and tribal participation, and make rules easier to follow.

We appreciate the opportunity to review the draft document and look forward to working with Ecology, stakeholders, and community members in a constructive dialogue for implementing changes to the MTCA Cleanup process.

OVERVIEW

Based on our review of the proposed rule, the changes in the proposed rule fall into the following general categories:

- Revisions that reflect Ecology’s need to consider environmental justice, in accordance with the Healthy Environment for All (HEAL) Act (Chapter 70A.02 RCW) and to:
 - Ensure equal protection from environmental and health hazards and equal access to decisions made about environmental protection.
 - Prioritize sites for cleanup or funding. Ecology would be required to prioritize vulnerable populations and overburdened communities impacted by contaminated sites and to track Ecology’s progress in reducing such impacts.
 - Conducting cleanup work. Ecology and regulated parties would be required to consider and document site and cleanup impacts on vulnerable populations and overburdened communities when making cleanup decisions.
 - More explicit requirements and process for Tribal consultation and engagement for Ecology-supervised cleanups.

- Changes to the site hazard assessment, ranking, and prioritization process.
- Updates and clarification of requirements for investigating sites and selecting cleanup actions.
- Updated responses to releases from regulated USTs.
- Clarification of requirements for independent site cleanups.
- Incorporation of a revised disproportionate cost analysis (DCA) into the feasibility study process to facilitate identification of a cleanup action alternative that uses permanent solutions to the maximum extent practicable.
- General revisions to improve clarity and understanding.

GENERAL COMMENT

Throughout the proposed rule, Ecology incorporates discussion and consideration of ‘*vulnerable populations and overburdened communities*.’ We appreciate that these changes are intended to promote more equitable consideration/engagement of these communities and prioritization of cleanup sites. The proposed rule indicates that during the initial investigation stage of a project, Ecology will identify vulnerable or overburdened communities using the environmental health disparities map or other readily available information. It is recommended that Ecology provide additional information regarding the process that will be used to identify vulnerable or overburdened communities (e.g., if available existing mapping tools¹ will be used) and how this designation may impact the overall MTCA cleanup process and schedule.

SPECIFIC COMMENTS BY SECTION

WAC 173-340-350 Remedial Investigation

The requirements under Section (6) Investigations use the term ‘*must*,’ which is too strong depending on the nature of the site and its conceptual site model. It is recommended that this term be replaced with ‘*should*’ to allow flexibility to tailor the scope of the investigation based on site characteristics.

WAC-173-340-360 Cleanup Action Requirements

Subsection 5 presents a revised procedure for utilizing the DCA in determining whether a cleanup action uses permanent solutions to the maximum extent practicable. The proposed rule describes an iterative process in which the baseline alternative (defined to be the most permanent per WAC 173-340-200) is compared to other cleanup action alternatives. If the incremental costs associated with the baseline alternative are determined to be disproportionate relative to the incremental degree of benefits, the alternative may be eliminated, and the next most permanent baseline alternative becomes the baseline for a subsequent round of analysis. It is understood that the iterative approach is intended to prevent misuse of the DCA and ensure that a cleanup action that uses permanent solutions to the maximum extent practicable is identified at the conclusion of the process. However, this stepwise process will be tedious to implement and evaluate and

¹ Examples of existing mapping tools to identify vulnerable populations are: the United States Environmental Protection Agency Environmental Justice Screening and Mapping Tool, available here: <https://www.epa.gov/ejscreen>, and the Washington Environmental Health Disparities Map, available here: <https://doh.wa.gov/data-and-statistical-reports/washington-tracking-network-wtn/washington-environmental-health-disparities-map>

create unnecessary steps. Also, by iteratively screening out alternatives this revised DCA process has the potential to amplify very minor differences between two or more alternatives that have very similar net benefits and/or costs. It is recommended that flexibility be maintained on a site-specific basis to minimize inefficiencies and the potential to artificially amplify differences between similar alternatives. One DCA screening may be sufficient for most projects.

Subsection (5)(c)(i)(C) states that Ecology may consider public concerns and tribal rights and interests when determining and weighting each of the five benefit criteria (protectiveness, permanence, long-term effectiveness, management of short-term risks, and implementability). The text indicates that this requirement is intended to replace the separate “public concerns” criterion of the DCA in former subsection (3)(f)(vii). It is recommended that this modification not be implemented, and that the prior category of public concerns be retained. It is understood that a particular criterion may be of greater or less interest and concern to an individual population or group; however, it is more transparent to develop a weighting/score that objectively assesses the magnitude of benefits with respect to a given criterion. It is also a place that could narratively describe public outreach efforts to collect and consider stakeholder priorities. Expressed public concerns may then be taken into consideration and used to adjust or modify the cleanup action selection, if needed.

WAC-173-340-370 Expectations

The change from “overall” to “long-term” prioritizes long-term over short-term impacts (e.g., greenhouse gas emissions, resource use). It is recommended that the prior term “overall threat” be maintained and consider all impacts.

WAC-173-340-620 Tribal Engagement

The proposed rule includes an added requirement for Ecology to develop a tribal engagement plan for each site that identifies affected Indian tribes and opportunities for engagement. The text further indicates that Ecology intends to develop a template that can be modified on a site-specific basis as needed based on tribal interest. Please confirm that identification of affected Indian tribes and development of a site-specific tribal engagement plan are activities that will be performed independently by Ecology, with input if appropriate from Potentially Liable Parties (PLP) and/or engagement specialists.

Table 1. Summary of Comments

Chapter	Section	Page Number ²	Geosyntec Comment
<i>Remedial Investigation</i>			
WAC 173-340-350	(6)	83	The requirements under <i>Section 6 - Investigations</i> incorporate the term ‘must,’ which is too strong, depending on the nature of the site and its conceptual site model. <u>It is recommended that this term be replaced with ‘should’ to allow flexibility to tailor the scope of the investigation based on site characteristics.</u>
<i>Cleanup Action Requirements</i>			

² Page numbers refer to the formatted version of the proposed rule with tracked and footnoted changes.

WAC-173-340-360	(5)	113	<p><i>Section 5 – Cleanup Action Requirements</i> presents a revised iterative and stepwise process for utilizing the disproportionate cost analysis (DCA) in determining whether a cleanup action uses permanent solutions to the maximum extent practicable. The baseline alternative may be eliminated if costs are disproportionate to the incremental benefit and the next most permanent baseline alternative becomes the baseline for a subsequent round of analysis. This stepwise process will be tedious to implement and evaluate, and by iteratively screening out alternatives it has the potential to amplify very minor differences associated between two or more alternatives that have very similar net benefits and/or costs. <u>It is recommended that flexibility be maintained to adapt this process on a site-specific basis to minimize inefficiencies and the potential to artificially amplify differences between similar alternatives.</u></p>
WAC-173-340-360	(5)(c)(i)(C)	114	<p><i>Subsection (5)(c)(i)(C)</i> states that Ecology may consider public concerns and tribal rights and interests when determining and weighting each of the five benefit criteria (protectiveness, permanence, long-term effectiveness, management of short-term risks and implementability). <u>It is recommended that the “public concerns” DCA criterion in former subsection (3)(f)(vii) be retained (no change). This criterion can be used to provide a transparent narrative discussion of stakeholder outreach efforts and documentation of priorities.</u></p>
<i>Cleanup Expectations</i>			
WAC-173-340-370	(8)	121	<p>The change from “overall” to “long-term” prioritizes long-term over short-term impacts. <u>It is recommended that the prior term “overall threat” be maintained.</u></p>
<i>Tribal Engagement</i>			
WAC 173-340-620	3(a)	212	<p>The proposed rule includes an added requirement for Ecology to develop a tribal engagement plan for each site that identifies affected Indian tribes and opportunities for engagement. The text further indicates that Ecology intends to develop a template that can be modified on a site-specific basis as needed based on tribal interest. <u>Please confirm that the identification of affected Indian tribes and development of a site-specific tribal engagement plan are activities that will be performed independently by Ecology, with input from others if appropriate.</u></p>

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