



J.R. Simplot Company
Simplot Headquarters
1099 W. Front Street
Boise, Idaho 83702
P.O. Box 27
Boise, Idaho 83707

April 13, 2023

**SUBMITTED VIA: <https://tcp.ecology.commentinput.com/?id=uJVx2>
Chapter 173-340 WAC, Model Toxics Control Act (MTCA) Cleanup Regulations - Proposed Rule Amendments**

Sarah Wollwage
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

Dear Ms. Wollwage:

Washington Department of Ecology (Ecology) proposed a draft rule¹ on February 15, 2023, which will make changes including:

- Update the general provisions and defined terms in Parts 1 and 2 of the chapter.
- Update the requirements for release reporting, initial investigation, site hazard assessment and ranking, site listing, and program planning under Part 3 of the chapter.
- Update the requirements for conducting a remedial investigation and selecting a cleanup action for a site in Part 3 of the chapter.
- Update the requirements for public participation and tribal engagement in Part 6 of the chapter.
- Incorporate changes to the cleanup program specified in Chapter [70A.305](#) RCW, the Model Toxics Control Act.

The J.R. Simplot Company (Simplot) is a privately held agribusiness corporation based in Boise, Idaho. The corporation is engaged in a number of businesses including food processing, farming, fertilizer manufacturing, mining, ranching and other enterprises related to agriculture. Simplot has operations throughout the United States, including a number of operations in Washington state. These operations are or may be subject to many environmental regulatory requirements, including the Model Toxics Control Act (MTCA) Regulations in Chapter 173-340 of the Washington Administrative Code (WAC). Thus, this rulemaking is of direct interest to the company, and we offer the following comments.

¹ Washington Department of Ecology. 15 February 2022. *MTCA Cleanup Rulemaking, Chapter 173-340 WAC, Proposed Rule, Text with Tracked and Footnoted Changes*. <https://ecology.wa.gov/DOE/files/bf/bfc8fd5c-c009-43cf-a1ef-b695ef63e575.pdf>

J.R. Simplot Comments on MTCA Cleanup Rulemaking, Chapter 173-340 WAC

Specific Comments: Model Toxics Control Act (MTCA), Chapter 173-340 Washington Administrative Code (WAC) Proposed Rule (“the Rule”)

Part 1

WAC 173-430-110(1), Applicability

Proposed revision replaces “remedy” with “clean up”, as a verb. Simplot recommends that the term “remedy” be maintained throughout, as the results of evaluating alternatives within a Feasibility Study per *WAC-173-340-351* may not result in a “clean up” action, such as soil removal or active groundwater treatment. The same comment applies for *WAC-173-340-330.5(C)(v)*.

WAC 173-340-120, Overview of Cleanup Process

Proposed revision adds the new paragraph *173-340-120(9)(b), Construction*, with the allowance that, “During and upon completion of construction, ecology may inspect the site and provide construction oversight.” Simplot is concerned that undefined “construction oversight” both “during and upon completion of construction” has the potential to add significant costs to the Responsible Party. Per *WAC 173-340-550, Payment of Remedial Action Costs*, “The department shall charge an hourly rate based on direct staff costs plus support costs.” These proposed construction oversight fees should include a “not to exceed” amount, in line with accepted industry standards, such as “During and upon completion of construction, ecology may inspect the site and provide construction oversight, with cost recovery eligibility not to exceed five percent of total construction costs” (proposed addition emphasized).

WAC 173-340-130(5), Administrative Principles

Proposed revisions expand on including the interests of “vulnerable populations and overburdened communities”. Simplot understands that this language is included throughout the proposed revisions to MTCA per Revised Code of Washington (RCW), Title 70A, Chapter 02, Environmental Justice (Chapter 70A.02 RCW). As detailed below in the discussion of proposed *WAC 173-340-200*, considering “human health” throughout the MTCA process already includes the “vulnerable populations and overburdened communities” human population subset.

WAC 173-340-130(6), Administrative Principles

Proposed revisions also include clarification on engaging and collaborating with Indian tribes, including “continuous opportunities for collaboration”. Simplot recommends that the opportunities for collaboration (such as participation in the public comment period opportunities in *WAC 173-340-120*) be applied in a consistent manner across all public stakeholder groups, and that “continuous opportunities for collaboration” does not inadvertently result in substantially and/or unexpectedly changing course outside of the typical MTCA process or causing undue delay in remedy implementation (for example, receiving comments after a Cleanup Action Plan has gone through the public comment process and is finalized, resulting in significant change in selected remedy or substantial delays in implementation).

J.R. Simplot Comments on MTCA Cleanup Rulemaking, Chapter 173-340 WAC

Part 2

WAC 173-340-200, Definitions

Proposed revisions include a new definition for “Contaminated site”. The associated footnote states that the term “hazardous waste site” will be replaced with “contaminated site” in the updated Rule. The definition of “contaminated site” includes the detail that ecology needs to “confirm whether there is a threat to human health or the environment posed by a release or threatened release” (emphasis added). Additionally, a new definition for “Contaminated sites list” is included, and the footnote mentions that the current “Confirmed and suspected contaminated sites list” (emphasis added) will be replaced with “Contaminated sites list”. The word “suspected” could indicate a site is in an investigative phase and prevent unfounded assumptions by parties not involved in the details of the site. Simplot requests that the word “suspected” not be dropped in the updated list title. This comment applies to *WAC 173-340-330, Contaminated Site List* as well.

WAC 173-340-200, Definitions

Proposed revisions include an updated definition of “Reasonable maximum exposure”, which includes the addition of, “including a vulnerable population or an overburdened community.” Previously, the definition read as follows: “the highest exposure that can be reasonably expected to occur for a human or other living organisms, at a site under current and potential future site use.” By default, characterization of reasonable maximum exposure includes “human and other living organisms”, which would include all populations of all affected communities, including vulnerable and overburdened populations, within and around a project area.

Part 3

WAC 173-340-310, Initial Investigation

Proposed revisions include adding the purpose, “c. Whether the population that may be threatened may include a vulnerable population or an overburdened community”, in addition to “b. Whether the release or threatened release may pose a threat to human health or the environment”. The footnote in the proposed rule also notes that item c. is needed to complete an initial SHARP assessment under Section 320 and helps to prioritize sites for further action under Section 340. The purpose of the Initial Investigation is greatly expanded in the proposed rule, including this redundant language to human health risks.

WAC 173-340-340(1), Program Planning and Assessment – Strategic Plan

This section discusses Ecology’s newly proposed comprehensive and integrated strategic plan for cleaning up contaminated sites. As noted in the proposed rule, “The strategic plan must prioritize vulnerable populations and overburdened communities that may be impacted by a contaminated site, and consider the resource allocation factors in subsection (2) of this section.” The resource allocation factors are as follows:

2. Resource allocation. In fulfilling the objectives of this chapter, ecology will allocate staffing and capital funds based on the following factors:

a. The threats posed by a contaminated site to human health

and the environment;

b. Whether the population threatened by a contaminated site may include a vulnerable population or an overburdened community;

c. The land reuse potential and planning for a contaminated site; and

d. Other factors specific by the legislature or ecology.

As the section of the proposed rule reads, it appears that a subset of the population would be favored in prioritizing resources to contaminated sites. It is unclear the weight of each factor when deciding how resources should be allocated. It seems that item b. would inherently be included in item a., as item a. includes concerns of human health. Similarly, proposed *WAC 173-340-340(3) Program Planning and Assessment – Performance Assessment*, describes “including its progress in cleaning up sites that may impact vulnerable populations and overburdened communities...” as the only criteria emphasized in this section.

Similarly, in proposed *WAC 173-340-351(6)(f)(vii), Feasibility Study – Step 6: Report Results*, vulnerable populations and overburdened communities are the only criteria emphasized in this section: “Documentation of the detailed evaluation process in Step 4 of the feasibility study, including how impacts on vulnerable populations and overburdened communities were considered in the evaluation, and the basis for eliminating any alternative from further evaluation.”

WAC 173-340-360(3)(c)(iii)(C), Nonpermanent Groundwater Cleanup

Proposed revisions to action requirements include the requirement to “Provide an alternate water supply or treatment if the cleanup action does not protect an existing use of the groundwater. A cleanup action is not protective of an existing use if a hazardous substance concentration exceeds the protective groundwater concentration for that use.” Simplot does not agree that providing an alternate water supply or treatment in every instance that a cleanup action is not protective of an existing use of groundwater should be required or is even feasible for all instances. Proposed *173-340-120(10), Overview of Cleanup Process – Cleanup Completion*, describes an example of “nonpermanent cleanup actions” “such as those involving containment of contamination”. If a contaminated water source is successfully contained, and an alternative water supply is readily available and/or already utilized, such as a deeper aquifer, then providing an alternate water supply or treatment should not be a general requirement included within the proposed rule; this should be determined on a case-by-case basis.

WAC-173-340-360(5)(d)(iii)(A)(III) – Cleanup Action Requirements ... Factors

Proposed changes include adding, “The resilience of the alternative to climate change impacts” as a required consideration when evaluating long-term effectiveness of a cleanup alternative. Guidance in evaluating an alternative for

J.R. Simplot Comments on MTCA Cleanup Rulemaking, Chapter 173-340 WAC

resilience to climate change should be cited here to ensure a scientific and consistent process is used across projects.

Summary

In Summary, the proposed revisions to the WAC include a number of items that lack specificity or clarity on implementation, that could result in deviations from the MTCA process resulting in delays in implementing remedial activities, and include language changes that reduce Ecology's ability to tailor remediation activities to a specific site's need.

We appreciate the opportunity to submit these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read "Alan L. Prouty", is positioned above the typed name.

Alan L. Prouty
Vice President, Environmental & Regulatory Affairs