



**Jim Verburg**

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April 15, 2023

Sent via upload to: <https://tcp.ecology.commentinput.com/?id=uJVx2>

Clint Stanovsky  
Department of Ecology  
Toxics Cleanup Program  
Cleanup Rulemaking Lead

Sarah Wollwage  
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Olympia, WA 98504-7600

Re: *Proposed amendments to Washington Administrative Code, Chapter 173-340, the Model Toxic Control Act (MTCA) Regulations*

Dear Mr. Stanovsky and Ms. Wollwage,

The Western States Petroleum Association (WSPA) appreciates this opportunity to comment on the proposed amendments to Chapter 173-340, WAC as provided in the Department of Ecology's (Ecology) February 15, 2023, CR-102. WSPA is a trade association that represents companies which provide diverse sources of transportation energy throughout the west, including Washington. This includes the transport and market petroleum, petroleum products, natural gas, and other energy supplies. WSPA provides the following comments for Ecology's review.

### **Process Concerns**

In December 2018, Ecology filed a CR-101 pre-proposal notice indicating potential amendments to Chapter 173-340 WAC. Following that CR-101 filing, Ecology engaged with stakeholders and developed several preliminary drafts of possible rule amendments over the course of the following four-plus years. For those impacted by these changes that were not part of the Stakeholder and Advisory Group (STAG), the issuance of the CR-102 in February 2023 was abrupt and surprising. WSPA recommends that in the future, after such a significant time period elapses between a CR-101 and CR-102, and where several drafts of possible amendments are developed, the agency should issue a new, updated CR-101 and invite broader input from affected stakeholders on the most current draft rule amendment before filing a CR-102. In addition, given the number and complexity of the proposed amendments, WSPA submits that a longer comment period was warranted here, particularly for those affected stakeholders that were not part of the STAG. WSPA observes that after spending over four years in developing the rule amendments, an additional 60 days for parties to review the proposed amendments in the CR-102 would have not meaningfully extended the rulemaking process.

### **Comments on the Proposed Amendments to WAC 173-340**

WSPA provides the following substantive comments on the proposed amendments to Chapter 173-340 WAC. Our comments are grouped by the draft rule Parts as designated by Ecology.

### **Part 1 Overall Cleanup Process**

#### **WAC 173-340-120(13)(b) Public notice and participation and tribal engagement**

This rule change summarizes both the public notice and participation requirements along with new requirements for tribal engagement for Ecology-conducted and Ecology-supervised cleanups. Specifically, the rule change includes: “ecology provides the public with notice and opportunity to comment and invites tribal engagement on most steps in the cleanup process.” However, it is unclear what is meant by the phrase “most steps in the cleanup process” and how this compares to the existing public engagement process within MTCA.

WSPA suggests adding a description of what is meant by “most steps” and if that includes major deliverables in the MTCA process, and how public comment and tribal engagement overlap, or not.

#### **WAC 173-340-130(4) Administrative Principles: Preparing Documents**

The new rule language and a footnote in the *Proposed Rule Text with Tracked and Footnoted Changes* clarifies that only Ecology can perform the initial investigations and site hazard assessment and ranking (which are to be performed using the site hazard assessment and ranking process (SHARP Tool). The SHARP Tool cannot be used by a potentially liable person(s) (PLP). This change will cause delays in ranking sites and ranking updates.

However, to facilitate site ranking and alleviate some of the burden on Ecology’s resources, WSPA suggests PLPs or consultants, with experience in the industry and often with additional site/property knowledge, could complete the ranking process to be submitted to Ecology for review and approval. This change will help to facilitate the process especially if there is immediate public concern for a given site. As Ecology is aware, cleanups under MTCA already take many years to complete and the agency should balance these proposed changes with further increasing the length and cost of the cleanup process.

### **Part 2: Definitions and Usage**

#### **WAC 173-340-200 “Model Remedy”**

The proposed rule adds a new definition for “model remedy” which “means a set of technologies, procedures, and monitoring protocols identified by ecology for use in routine types of cleanup projects at facilities that have common features and *lower risk* to human health and the environment.” (Emphasis added).

The proposed rule text with tracked and footnote changes clarifies that this change reflects Senate Bill 5296, passed 2013. WSPA understands that the addition of this definition was not intended as a change in policy or practice. The term “lower risk” is not explicitly defined in the rule or in Ecology-prepared model remedy documents. However, model remedy guidance defines eligibility criteria that must be met to qualify for a model remedy. This forms the set of conditions that ensure sites that qualify for model remedies are lower risk. As a result, WSPA suggests that “lower risk” should be deleted from the -200 definition section without creating an inconsistency among Ecology documents.

### **Part 3 Site Reports and Cleanup Decisions**

#### **WAC 173-340-300 Site Discovery and Reporting: Applicability and timing**

The proposed Section -300(2) requires site owners/operators to report releases to Ecology “within 90 days of discovery a release or threatened release of a hazardous substance to the environment that may pose a threat to human health or the environment.” Section -300(2)(b) then provides examples of releases and threatened releases that should be reported to Ecology. There is also

additional language throughout Section 300 that describes requirements for investigation of releases and threatened releases.

The proposed new rule language lacks clarity regarding what constitutes a reportable threatened release. “Threatened release” is not defined in Section -200; and Section -300(2)(b) only provides examples of releases that *have already occurred* and are observable in environmental media. The inclusion of “threatened releases” in reporting requirements unnecessarily expands the scope of the MTCA rule and will likely increase the scope and number of potential cleanup sites in Washington State and as a result will increase the administrative review burden on Ecology to review and rank sites. This is because whether a release is or is not “threatened” is often not clear and may lead to over-reporting for possible, “threatened” releases.

WSPA proposes that defining “threatened release” in Section -200 is necessary to clarify reporting requirements, which formerly only required reporting releases if impacts to environmental media were observable. WSPA also proposes to remove text in WAC 173-340-300(2) expanding reporting requirements to include reporting of threatened releases because threatened releases have not yet reached environmental media.

**WAC 173-340-310 Initial Investigation; WAC 173-340-340(1)-(2) Program Planning and Assessment: Strategic Plan and Resource Allocation; and WAC 173-340-360(3)(a)(i) Cleanup Action: Requirements**

Section -310(1)(c) includes a new provision as part of the purpose of an initial site investigation to determine “whether the population threatened may include a vulnerable population or an overburdened community.” A footnote in the proposed rule track changes document describes that “[t]his is needed to complete an initial SHARP assessment under Section 320 and help prioritize sites for further action under Section 340. This initial determination *will likely* be based on the site’s location and the environmental health disparities map or other readily available information” (emphasis added). This information is then considered in Ecology’s prioritization of sites and allocation of resources.

It is unclear whether the EPA EJScreen Tool is what is used within the initial site investigation to meet the objective of determining whether the population threatened may include a vulnerable population or an overburdened community. Is Ecology planning on providing further guidance regarding how the EJScreen Tool is being used by Ecology to determine how communities impacted and informing site ranking, and allocation of Ecology resources as referenced in WAC 173-340-340(2)? Further, if a site that is currently undergoing a cleanup does not affect vulnerable populations and overburdened communities, the proposed rule language suggests that further delays in Ecology opinions may be expected because the site would not be as high of a priority as other sites. There is concern that this could lead to further delays in Ecology review and approval for sites that are under an Agreed Order schedule but do not negatively impact vulnerable populations.

Clarifications within the proposed language are necessary regarding whether use of the EJScreen Tool referenced in SHARP guidance is intended to be the tool used to determine if a vulnerable population or an overburdened community will be affected by a site. And clarifications are necessary for the regulated community to understand how Ecology will evaluate information collated using the EJScreen (or analogous tool), particularly when socioeconomic indicator index percentiles are similar. In particular, a draft guidance, to be reviewed by the public, that is separate from the SHARP Tool Manual and EJScreen link would be beneficial, because the proposed rule

language implies that the SHARP Tool is for use by Ecology staff, rather than PLPs or their consultants.

Lastly, WSPA suggests Ecology provide additional clarification with respect to how consideration of impacts to vulnerable populations and overburdened communities will influence the allocation of Ecology resources for sites with currently assigned Ecology project managers and that are undergoing cleanup.

**WAC 173-340-350(5)(b)(i)(F) Remedial investigation: Steps; and WAC 173-340-400(4)(b)(x) and (c)(xii) Program planning and assessment: Notification**

The proposed rule adds a requirement to include an inadvertent discovery plan (IDP) to meet the requirements in the newly created Section -815 regarding cultural resources. An IDP is also now required throughout the MTCA reporting process from RI work plans through cleanup action implementation plans.

However, an IDP will not be necessary for all sites. From the new language, it is unclear if the IDP will be required based on the outcome of consultation, or if the IDP is required regardless of site circumstances. As a result, WSPA assumes that an IDP is necessary for sites where cultural resources are potentially present, but that an IDP is not needed for all sites. For example, an urban site with a low probability of the presence of cultural resources would not need an IDP. Therefore, WSPA suggests that Ecology add clarification to the proposed rule language to provide examples of what would trigger the IDP requirement. If Ecology intends a blanket requirement for an IDP for all sites, regardless of the potential for cultural resources, Ecology should reconsider that approach because such a blanket requirement will unnecessarily drive additional costs and further lengthen the cleanup process.

**WAC 173-340-350(5)(g)(ii) Remedial Investigation: Report Results**

Step 7 of the proposed rule language includes a requirement to include “maps, figures, or diagrams illustrating relevant existing and historic site features,” including utility lines, surface topography, and subsurface structures.

The proposed rule language generally captures the types of site features that are relevant to current and historical contaminant release and transport. However, at many sites, these features are neither well known nor relevant to the conceptual site model or preferential contaminant transport pathways.

As a result, WSPA suggests the following language be added to clarify that current and historical site features should be depicted on “maps, figures, or diagrams illustrating . . . features as relevant to the conceptual site model, including . . .” This clarification negates the need for site owners and operators to create figures that are not relevant to contaminant release and migration pathways at their site, or that yield diminishing returns towards advancing remedy selection and implementation.

**WAC 173-340-350(6)(a) Investigations**

The proposed text added to Section -350(6)(a), Hazardous Substance Sources, clarified that confirmed and suspected releases must be investigated to “define the location, quantity, areal and vertical extent, concentration within, and sources of hazardous substances.” This is a separate investigation requirement from soils investigation requirements in Section -350(6)(b).

However, Section -350 or -200 do not define what is considered a “hazardous substance source.”

Greater clarity is needed to reduce potential overlap between soil characterization requirements and requirements more appropriate for manmade structures that contain and may release hazardous materials, such as underground storage tanks. Additionally, it is inherently difficult to estimate the quantity of release for tanks that have been leaking for an indeterminate amount of time, and which may have been refilled more than once during that time. In such cases, it may not be appropriate to define the quantity of hazardous substances directly; instead, it would be more appropriate to characterize the nature of the release or estimate the quantity of releases based on data collected in other media (for example, as described in Section -350(6)(b)). This approach is preferable to performing modeling or quantitative analytical techniques, which can imply a false degree of certainty while unnecessarily increasing the cost to perform the remedial investigation.

WSPA proposes to add a definition of “Hazardous Substance Source” in Section -200. Additionally, WSPA suggests clarifying language to Section -350(6)(a) to state, “estimated quantity.”

### **WAC 173-340-350(6)(d)(iii) Remedial Investigation: Investigations**

The proposed rule adds language specifying that “[s]urface water, sediments, and hydrology must be investigated to adequately characterize . . . properties of surface and subsurface sediments that are likely to affect the type and rate of hazardous substance migration, *the potential for recontamination*, or the ability to implement cleanup action alternatives.” (emphasis added).

This new language expands the scope of upland cleanups at waterfront sites. Many waterfront sites are adjacent to surface waterbodies that include contaminated sediments as a result of activities and releases from multiple sites, which may or may not include the upland subject site. Currently, Ecology does not have an established guidance document or policy describing what factors should be considered in a recontamination analysis, or how to determine what concentrations in stormwater or surface water runoff may cause sediment recontamination. Typically for waterfront sites, the groundwater to surface water pathway is evaluated by demonstrating groundwater compliance with surface water standards at the point of discharge. The rule change does not provide sufficient detail to evaluate the analyses required to evaluate sediment recontamination potential. There is not a clear understanding of what concentrations must be achieved in stormwater and other site discharges at sites located along waterbodies undergoing CERLA and MTCA sediment cleanup. For example, it is unclear if the upland PLP would be required to start analyzing stormwater discharges for TSS and a broad suite of hazardous substances, which may differ from and be inconsistent with an entity’s stormwater NPDES permit sampling and analysis requirements. In addition, the upland PLP may not have any control over stormwater discharge. Thus, this new language may drive inconsistent regulatory requirements (as between Clean Water and MTCA requirements) that upland PLPs may not be able to achieve.

WSPA suggests removing the phrase “the potential for recontamination,” from the proposed changes. This phrase adds unnecessary ambiguity. The existing evaluation of the groundwater to surface water pathway under MTCA is sufficient to ensure protection of receptors associated with adjacent surface water. Further, the existing SMS regulation contains requirements for recontamination analysis that are more specific to sediments within the context of sediment cleanups.

### **WAC 173-340-350(6)(f) Investigations: Climate; WAC 173-340-360(3)(a)(v) Cleanup Action Requirements; and WAC 173-340-360(5)(d)(iii)(A)(III) DCA requirements**

Ecology added requirements to the remedial investigation process to determine “projected . . . climatological characteristics . . . which could affect the migration of hazardous



substances or the resilience of cleanup action alternatives.” Ecology also added language to the cleanup action plan process to ensure resilience against climate change impacts that have a high likelihood of occurring and could compromise the long-term effectiveness of the site’s remedy. Additionally, Ecology added similar language to the description of the DCA process within the rule change, which now includes consideration of climate change in the evaluation of protectiveness, effectiveness over the long-term, and management of implementation risks.

Ecology has issued *Guidance for Sustainable Remediation*, which was revised in January 2023. However, it is unknown if there will be opportunities for public review of future revisions of this guidance, particularly since components of the guidance are now included in the revised MTCA rule and because the guidance is a “living” document. There is a Green Remediation Guidance section in the document that recommends green remediation best management practices, which suggests that cleanup alternatives must consider the environmental impacts during a cleanup.

All of this is very unclear. Given the significance of these new draft requirements, Ecology needs to provide greater clarity regarding how climate change will be used in the DCA scoring and evaluation of alternatives, and whether climate change considerations are considered quantitatively or qualitatively.

#### **WAC 173-340-350(6)(i)(i) Remedial Investigation: Investigations**

The proposed rule language describes phasing of investigations such that “terrestrial ecological evaluations may be conducted so as to avoid duplicative studies of soil contamination that will be remediated to address other concerns, such as protection of human health or aquatic ecological receptors.” This may be accomplished “by evaluating residual threads to the environment after cleanup action alternatives for human health or aquatic ecological protection have been developed” except at some sites. The rule language states that this approach is not appropriate at sites “where the development of a human health based cleanup action is expected to be a lengthy process, and postponing the terrestrial ecological evaluation would cause further harm to the environment.”

The proposed rule language is similar to the current rule language but adds consideration of aquatic receptors that may be impacted by soil contamination. However, it does not provide additional clarity with respect to what concentrations or amounts would be considered a threat to aquatic receptors. It also does not clarify what is considered a “lengthy process,” or who determines when a process is expected to be lengthy enough that further harm would be caused to the environment.

Ecology should add clarity to its Terrestrial Ecological Evaluation guidance describing what factors are considered when determining whether it is appropriate to phase investigations for risk to ecological receptors, particularly when considering cross-media pathway impacts from soil to aquatic receptors. The public should be given an opportunity to comment on this change.

#### **WAC 173-340-351(6)(f)(v)(D)-(E) Feasibility study: Report results**

The proposed rule language requires the feasibility study to include the “estimate[d] amount of each hazardous substance to be removed or treated” and the “estimated amount of each hazardous substance remaining...after implementing the alternative.”

This language implies that Ecology expects feasibility studies to include quantitative estimates of the amount of mass or volume removed for each hazardous substance. However, it is standard practice to estimate the total volume of impacted media removed or treated, not the amount of each hazardous substance removed or treated. While, for example, it is typical to estimate the volume

of soil to be removed that is contaminated (i.e., soil with concentrations above applicable cleanup levels) it is not typical to estimate the amount of the hazardous substance(s) within that volume of excavated soil. Additionally, the value of conducting such an estimate is not clear.

WSPA suggests replacing the language specifying the “amount of each hazardous substance” with the following: “amount of impacted media removed or treated”.

**WAC 173-340-355(6)(c) Development of cleanup action alternatives that include remediation levels: Examples**

The proposed rule change uses an example of groundwater meeting cleanup levels (CULs) at a conditional point of compliance (CPOC). The CPOC is established at the property boundary and groundwater exceeding the CUL must be remediated.

The example used in the proposed rule assumes that CULs have not been met at the property boundary (e.g., “This means any groundwater exceeding 500 ug/L at the point of compliance must be treated”), but proposed implementation of a remedial action will help groundwater concentrations to decline to less than the CUL; therefore, a CPOC can be established at the property boundary. In recent experience and consistent with the proposed rule change, some Ecology site managers have agreed to establish the CPOC at the property boundary at sites with groundwater exceedances at the property boundary, in instances when remedy implementation using remediation levels within the property will achieve CULs in wells at the property boundary.

However, there is inconsistency in decisions made by Ecology site managers when establishing CPOCs. Other Ecology site managers have indicated that CPOCs can never be established at the property boundary if groundwater concentrations in wells at the property line do not meet CULs prior to the implementation of the proposed cleanup, even when proposed cleanup will treat all off-property groundwater and soil impacts. Additionally, the next example within the new rule language within 173-340-355 (6)(d) includes text that allows one to assume that a CPOC can be established at the property boundary as long as the CUL will be met at the CPOC after the remedial action is implemented.

Because of this, Ecology should clarify the proposed rule language to indicate that Ecology may allow establishment of a CPOC at the property boundary once the data show that CULs have been met and as long as implementation of the proposed remedial action will achieve CULs at the property boundary.

**WAC 173-340-360(d)(iii) Cleanup Action Requirements DCA Criteria for each cleanup action alternative**

This Section includes new text emphasizing that, when assessing the long-term effectiveness of a cleanup action, one must consider impacts on vulnerable populations and overburdened communities. However, this change does not provide any definitive statements regarding how these factors will be incorporated into the DCA process.

WSPA requests clarification with respect to how consideration of impacts to vulnerable populations and overburdened communities will be incorporated into the DCA process.

**WAC 173-340-830(4) Sampling and Analysis Procedures: Methods**

In the proposed rule, Ecology removed the list of Ecology-approved methods to make it easier to update the list based on technological changes. Under the new language, Ecology is required to

maintain and make available to the public a list of Ecology-approved methods. This allows Ecology to add or remove methods from the list without the required notice and comment rulemaking.

The removed language provided the regulated community with a consistent and reasonably stable understanding of the quantitation limits that would be expected to become cleanup levels for persistent bioaccumulative chemicals, which tend to have very low risk-based targets in all environmental media. Therefore, the cleanup levels are based on the greater of the practical quantitation limit, natural background, or area background. Ecology's definition of "natural background" in Section -200 recognizes that "PCBs can be found in surficial soils and sediment throughout much of the state due to global distribution of these hazardous substances" and its definition of "area background" recognizes that concentrations present in the environment may be elevated "as the result of human activities unrelated to releases from that site."

Frequent increases in the sensitivity of approved analytical methods is of particular concern for persistent bioaccumulative chemicals, like PCBs and dioxins/furans. For these chemicals, even slight changes in practical quantitation limit can have significant schedule and cost implications to site cleanup because the rule requires selection of a method capable of achieving risk-based targets when available (see WAC 173-340-350(5)(b)(i)(D)) and also requires the use of Ecology-approved methods (WAC 173-340-830(4)). Therefore, for persistent bioaccumulative chemicals, current and proposed rule language indicates the most sensitive Ecology-approved method must be used.

Maintaining a list of Ecology-approved methods on Ecology's website would allow Ecology to update the list of approved methods more frequently, which is expected to lead to more rapid increases in analytical sensitivity. However, this will also increase the uncertainty of the cleanup process. For example, because remedial investigations are often completed using data from multiple investigations and phases of data collection, data collected in an earlier investigation event may become irrelevant prior to completion and approval of the remedial investigation, simply as an artifact of changes to the list of Ecology-approved laboratory methods. The proposed rule language specifies that the public must be notified when methods are added or removed from the Ecology-approved list but does not indicate that the public will be given an opportunity to comment on the change. If Ecology approves a new method in the middle of a cleanup (or removes a method from its list of approved methods), it is unclear if results analyzed by then-current methods will still be considered acceptable for site characterization, or if additional data collection by a newer or more sensitive method will be required in the middle of the investigation process.

Ecology should retain the current rule language in WAC 173-340-830 regarding analytical method selection. If the proposed rule language is kept, Ecology must provide clear and timely guidance identifying what criteria will be used when considering whether to add or remove a method from the list and an expected frequency of when the list will be updated. Ecology must also give the public the opportunity to comment on the addition/removal of methods. Finally, Ecology should provide clarity regarding whether additional data collection will be required if a new method is added or a previously-approved method is removed during the middle of a site's investigation and cleanup. For sites with multi-year RI data collection efforts and long-term monitoring programs, that data collected with previously-approved methods should remain valid during the course of the cleanup action.

**WAC 173-340-350(5)(b)(i)(D) Remedial Investigations: Steps and WAC 173-340-830(4)(d) Sampling and Analysis Procedures: Methods**

The proposed rule language in Section -830(4)(d) states that "Ecology may require an analysis to



be conducted by more than one method in order to provide higher data quality,” and provides an example that “Ecology may require that different separation and detection techniques may be used to verify the presence of a hazardous substance (qualification) and determine the concentration of the hazardous substance (quantification).” Proposed rule language in Section -350(b)(i)(D) requires use of “methods that enable detection of the target concentrations [for each hazardous substance in each environmental medium].”

The proposed rule language does not include considerations for use of two methods in a phased approach to first verify that hazardous substances are or are not present, and to then delineate the extent of any hazardous substances that are present as necessary to inform remedy selection and design. It is currently common practice to analyze for some hazardous substances to verify their absence in site releases, only performing analysis with a more sensitive method to if there is a need to quantify the extent of site impacts more definitively.

Ecology should add flexibility in the proposed rule to allow for and describe the use of a phased analytical approach to perform site investigations with the appropriate analytical sensitivity to meet target concentrations in WAC 173-340-350(b)(i)(D) and WAC 173-340-830(4). Ecology should consider providing another example in the proposed rule language to clarify that the use of two methods can be appropriate to verify that a chemical is not present; in which case, sampling with more sensitive analytical methods is not required. This will help expedite cleanup decisions by allowing the collection of data to confirm media and areas of the site where hazardous substances *are* and *are not* present due to site releases.

#### **Part 4 Site Cleanup and Monitoring**

##### **WAC 173-340-450(5)(c)(i) Free product removal**

These provisions are reflective of the US EPA 40 CFR Part 280.64 regulations. As such, WSPA recommends that the maximum extent practical provision be implemented by Ecology and the Pollution Liability Insurance Agency (PLIA) consistent with the intent of the provision as clarified by the US EPA Office of Underground Storage Tanks (<https://www.epa.gov/ust/ust-technical-compendium-release-investigation-confirmation-and-corrective-action>), Question 6.

#### **Part 5 Administrative Procedures for Remedial Actions**

##### **WAC 173-340-450 Releases**

Ecology added new requirements, such as investigating vapor intrusion pathways as part of the initial investigation, quarterly monitoring, and light non-aqueous phase liquid (LNAPL) removal activities when LNAPL is present. The vapor intrusion assessment has been a practice in place with Ecology but not specifically defined in the rules. Quarterly sampling is standard, but there should be a mechanism to indicate quarterly sampling can be scaled back.

Ecology should provide an example of when less frequent reporting and LNAPL removal may be appropriate later in the process, such as LNAPL thickness trends and transmissivity data.

#### **Part 6 Public Participation and Tribal Engagement General Provisions**

##### **WAC 173-340-600(5) Site specific information on website**

The proposed rule language includes new, required methods of providing notice about each site, including posting site information on Ecology’s website. The information required includes initial

investigation reports and cleanup action plans, and, for independent remedial actions, “any independent investigation, interim action, or cleanup action report.”

Posting and ensuring this information is complete will require significant Ecology resources if performed for all current sites and sites that have already received no further action letters. Additionally, rule language is not clear with respect to how this change could impact electronic document accessibility requirements. In recent months, Ecology has required documents be compliant with Americans with Disabilities (ADA) standards and Section 508 of the Rehabilitation Act (which provides accessibility requirements for electronic and information technology provided by the federal government) for addition to government websites; however, this requirement is often not communicated until the deadline for final document submittal is approaching.

Ecology should clarify that this requirement will be met for future cleanup sites only, as resources allow. Additionally, it would be helpful to have Ecology guidance specifying any ADA or Section 508 accessibility compliance requirements.

### **WAC 173-340-620 Tribal Engagement**

This new Section states that engagement with Indian tribes “must be in addition to and independent of any public participation process.” Under this completely new Section, tribal rights and interests would be defined and documented early in the MTCA process through a tribal engagement plan, rather than under the public participation process. This proposed rule change also calls for “continuous opportunities for collaboration” and states that “Ecology encourages early planning and engagement. Ecology will seek to engage affected Indian tribes before initiating a remedial investigation or an interim action at a site.” The new rule requires Ecology to develop a site tribal engagement plan that “identifies Indian tribes that may be adversely affected by the site, opportunities for government-to-government collaboration and consultation, and protocols for communication.” It is unclear whether this engagement plan will be similar to existing public participation plans.

This new Section provides insufficient detail regarding when and to what extent Indian tribes will be engaged throughout the process. Due to this ambiguity, it is unclear if Indian tribes’ focused review periods for major MTCA deliverables, such as the remedial investigation/feasibility study (RI/FS) and Cleanup Action Plan (CAP), are separate and in addition to the existing, required Ecology and public review periods. If so, this would result in additional revision rounds to cleanup documents, further extending the already long timeframes to clean up sites. It is also unclear if Ecology will lead all early planning and engagement, in addition to government-to-government consultation, or if PLPs will be responsible for some portion of tribal outreach planning and engagement (see WAC 173-340-620(3)(b) wherein “Ecology encourages early planning and engagement”). It is also unclear the extent to which PLPs will engage with Tribal nations in this process.

Additional clarity is needed regarding whether the new Indian tribe engagement and review periods, which are stated to be “in addition to and independent of any public participation process,” are concurrent with the Ecology deliverable review periods and what major MTCA deliverables they will apply to (e.g., RI/FS and CAP). Additional clarity is needed regarding the time frames for this tribal engagement. This clarification is necessary for project planning. Additional clarification is also needed regarding the Indian tribe outreach and planning responsibility and whether that falls to Ecology or to the PLPs. Lastly, it is not clear how this new rule will apply at existing MTCA sites with a tribal Memorandum of Understanding.

## **Part 8 General Provisions**

### **WAC 173-340-815 Cultural Resource Protection**

The proposed rule change includes an additional section to address cultural resource protection and actions to avoid, minimize, or mitigate adverse effects from remedial actions on archaeological and historic archaeological sites, historic buildings and structures, traditional cultural places, sacred sites, and other cultural resources. The new rule section mandates consultation with the Department of Archaeology and Historical Preservation, as well as affected Indian tribes, prior to any field activity that may impact cultural resources. This consultation aligns with the Washington State Governor's 2021 Executive Order 22-02, Archaeological and Cultural Resources.

Depending on the consultation outcome, Ecology may require a cultural resources survey or monitoring work plan, which may result in minor cost implications for the project. The requirement also includes the preparation of Inadvertent Discovery Plans (IDPs) for the site. While IDPs are already standard practice on most cleanup sites and consistent with current agency policy, this requirement is now being formalized.

WSPA assumes that an IDP is necessary for sites where cultural resources are potentially present, an IDP is not needed for all sites. For example, an urban site with a low probability of the presence of cultural resources will not require an IDP. WSPA suggests clarification in the proposed rule language to provide examples of what would trigger the requirement of an IDP.

WSPA appreciates the opportunity to comment on the proposed amendments to WAC 173-340. If you have any questions about the information presented in this letter, please contact me at (360) 296-0692 or via email at [jverborg@wspa.org](mailto:jverborg@wspa.org). I would be happy to discuss our comments with you.

Sincerely,



James Verburg  
Senior Director, NW and SW Climate and Fuels

