



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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December 16, 2020

Natalie Swan
Yakama Nation Fisheries
12421 Lateral A Road
Toppenish, WA 98948

Reference: Ecology/Army Draft Agreed Order No. DE 18125

Subject: **Response to Public Comments**

Dear Ms. Swan:

Thank you for submitting the Yakama Nation's comments to Ecology's draft Agreed Order No. DE 18125. Below, *in italics* are Ecology's responses to your comments.

Ecology's draft responses Yakama Nation comments to the YTC Agreed Order and Permit

General Comments

1. The Washington Legislature in 2020 re-codified MTCA as Chapter 70A.305 RCW. All citations to the prior Chapter 70.105D RCW should be corrected to reflect this change.

The citations to the Model Toxics Control Act (RCW 70A.305) and the Hazardous Waste Management Act (RCW 70A.300) will be updated in any future Agreed Order and Permit Lite.

2. There are no references to the Yakama Nation in the AO, despite its interest in the YTC lands through treaty reserved hunting and gathering rights, and an agreement with the Army in 1992 that committed to transfer of the property to the Department of the Interior for tribal use. Specific suggested changes to the AO address this omission (see below).

If the Army agrees to sign the Agreed Order, Ecology will include language in the Findings of Fact that describe the Yakama Nations' historic and future use of lands that are now cleanup sites.

3. References to CERCLA are needed in the AO because the Army's sovereign immunity is waived only by Section 120 of that statute, not through MTCA. The Army will only recognize Ecology's authority through that section and others addressing the elements of CERCLA liability. Also provisions in Section 6001 of RCRA regarding state enforcement and waiver of U.S. immunity will have to be cited and stressed. References to state court enforcement will also not be helpful, and state claims under MTCA can always be brought into federal court through pendent jurisdiction with CERCLA claims. These citations

may be the only persuasive way you can convince the Army to sign this AO given the agency's inability to recognize state (and tribal) authority for cleanups.

Thank you for raising issues of jurisdiction, authority, and sovereign immunity. At this time, the Army has indicated that it does not intend to sign the Order or Permit. Therefore, a detailed response to the issues raised here is unnecessary. However, if the Army should agree to sign the Order and Permit, Ecology will review whether such citations should be incorporated into the applicable sections of the Order and Permit.

4. The AO should specifically refer to the proposed Dangerous Waste Management Permit as an alternate source of state authority for enforcement of MTCA through the corrective action provisions of the HWMA Dangerous Waste regulations. This will bind the permit and the AO together under concurrent RCRA/CERCLA authority. Incorporate the permit by reference in the Ecology Determinations.

The Permit that would be issued with the Agreed Order already states:

Ecology is requiring that JBLM fulfill corrective action responsibilities for the facility, as defined by WAC 173-303-040, using the Model Toxics Control Act (MTCA), (Chapter 70.105D RCW), as amended, and its implementing regulations (Chapter 173-340 WAC), and the Dangerous Waste Regulations (Chapter 173-303 WAC – specifically, WAC 173-303-646).

The Permit Lite also states the Agreed Order and its attachments “are incorporated by reference as fully enforceable under this permit.” This language from the Permit addresses the concerns raised by the Yakama Nation in their last sentence to that comment.

Specified Suggested Changes/Comments

Part II. Jurisdiction

Insert at the end of first sentence: “and 42 U.S.C. § 9620(a).”

See Ecology response to General Comment No. 3.

Insert at the end of second sentence: “and 42 U.S.C. § 6961.”

See Ecology response to General Comment No. 3.

Part V. Findings of Fact

- B. Strike second sentence and insert as follows: “Before 1855, the land was used by the tribes and bands now comprising the Yakama Nation. In that year the Yakamas ceded the YTC area to the United States by treaty, and expressly reserved hunting and gathering rights thereon. In the late 19th and early 20th centuries, the land was used for ranching and mining operations.”

See Ecology response to General Comment No. 2.

- H. Insert new sentence as follows: “In December 1992 Fort Lewis executed a memorandum of agreement (MOA) with the Yakama Nation acknowledging its 1855 treaty hunting and gathering rights on the YTC,

permitting access to the area for such purposes, and committing to a future transfer of the land to the Department of the Interior (DOI) in trust for the Yakama Nation when the Army no longer needs the YTC for military training.”

See Ecology response to General Comment No. 2.

Part VI. Ecology Determinations

A. Insert at the end of the sentence: “and 42 U.S.C. § 9601(21).”

Ecology does not believe the inclusion of the proposed citation is necessary. The citation to RCW 70.105D.020(24) (which if the Army signs the Order, will be changed to RCW 70A.305.020(24)) provides a sufficient reference for the definition of “person.”

B. Second sentence should read: “The Army is also an ‘owner and operator’ as defined by RCW 70.105D.020(22) and 42 U.S.C. § 9601(20), of a ‘facility’ as defined by RCW 70.105D.020(8) and 42 U.S.C. § 9601(9).”

Ecology does not believe the inclusion of the proposed citations are necessary. The citations to RCW 70.105D.020(22) and .020(8) (which if the Army signs the Order, will be changed to RCW 70A.305.020(22) and 70A.305.020(8)) provide sufficient references for the definitions of “owner and operator” and “facility.”

C. Add the following sentence: “The corrective action provisions of Ecology’s Dangerous Waste Management Permit No. WA8214053995, issued to the Army on _____, 2020, are fully incorporated into this Order by reference.”

Ecology cannot agree to include this proposed language. The YTC Facility’s identification number (WA8214053995) is not a hazardous waste “permit.” This identification number, as required under WAC 173-303-060, is a simple notification of certain hazardous waste management activities. WAC 173-303-060 states:

Any person who generates, transports, offers for transport, or transfers a dangerous waste, or who owns or operates a dangerous waste TSD facility or a recycling facility must have a current EPA/state identification number (EPA/state ID#).

WAC 173-303-060(1). EPA/state identification numbers are generally issued automatically to any facility/company that completes a form to request one; it is a self-implementing and self-reporting process.

D. Insert at end of sentence: “and 42 U.S.C. § 9601(14).”

Ecology does not believe the inclusion of the proposed citation is necessary. The citation to RCW 70.105D.020(13) (which if the Army signs the Order, will be changed to RCW 70A.305.020(13)) provides a sufficient reference for the definition of “hazardous substance.”

Part VIII. Terms and Conditions

A. Payment of Remedial Action Costs

Insert at end of last sentence: “and 42 U.S.C. § 9607(a).”

Ecology does not believe the inclusion of the proposed citation is necessary or correct. The last sentence which includes the citation to RCW 70.105D.050 (which if the Army signs the Order, will be changed to RCW 70A.305.050) is sufficiently a reservation of rights by Ecology to bring an action against the Army for cost recovery pursuant to .050.

M. Transfer of Interest in Property

First sentence of second paragraph should read as follows: “Prior to the Army’s transfer of any interest in all or a portion of the Facility to the Department of the Interior pursuant to the 1992 MOA, and during the effective period of this Order, the Army shall provide a copy of this Order to DOI through the U.S. Bureau of Indian Affairs; and, at least thirty (30) days prior to any transfer to DOI, the Army shall notify Ecology of said transfer. Upon transfer of any interest, the Army shall notify the DOI of the restrictions on the activities and uses of the property under this Order and incorporate any such use restrictions into the transfer documents.”

As the Agreed Order is only between Ecology and the Army, Ecology does not believe the proposed language is appropriate.

Part X. Enforcement

- A. Sentence should read as follows: “The Attorney General may bring an action to enforce this Order in federal court pursuant to 42 U.S.C. § 6961, 42 U.S.C. § 9613, and/or RCW 70.105D.050.”

Ecology does not believe the inclusion of the proposed citation is necessary. The last sentence which includes the citation to RCW 70.105D.050 (which if the Army signs the Order, will be changed to RCW 70A.305.050) provides a sufficient a reservation of rights by Ecology to bring an action against the Army for cost recovery pursuant to .050.

Please feel free to call me at (509) 454-7893 if you have any questions.

Sincerely,



Greg Caron
Supervisor
Hazardous Waste and Toxics Reduction Program
Central Regional Office
Washington State Department of Ecology