STATE OF WASHINGTON

DEPARTMENT OF ECOLOGY

Mail Stop PV-11 • Olympia, Washington 98504-8711 • (206) 459-6000

January 23, 1990

TO: Interested Persons

FROM: Susan Campbell SC

SUBJECT: Responsiveness Summary

Enclosed is the Responsiveness Summary, including comments, for the Model Toxics Control Act Cleanup Regulation, Chapter 173-340 WAC, published in the Washington State Register, No. 89-20, on October 18, 1989.

Due to a procedural problem in the publication of the regulation, we had to re-file. Consequently we revised the regulation and re-filed and it was published in the Washington State Register, No. 90-02, on January 17, 1990. The public comment period on this draft ends on February 16, 1990 and a final Responsiveness Summary will be made available to the public after receipt of public comment. A public hearing will be held on the regulation on February 7, 1990 at 7 p.m. at the EFSEC Meeting Room, Rowe 6, 4224 Sixth Avenue, Building 1 in Lacey, Washington.

If you have any questions, call me at (206) 438-7351.

SC:sc

Pub. No. 90-09-902

RESPONSIVENESS SUMMARY

for THE MODEL TOXICS CONTROL ACT

CHAPTER 173-340 WAC

Prepared by
Hazardous Waste Investigations and Cleanup Program
Policy Section
January 1990

COMMENTS AND RESPONSES

Introduction

This Responsiveness Summary addresses written and oral comments on the Model Toxics Control Act Cleanup Regulation (Chapter 173-340 WAC) received by the department between October 18, 1989 and November 22, 1989. Comments were received by mail and at the public hearings in Spokane and Seattle. Comments are summarized or paraphrased, with the department's response following each group of comments. Comments and responses are grouped under topics.

ORAL COMMENT

COMMENT 1

Loren Dunn of the Citizens' Toxics Coalition commented that the proposed regulations are well balanced and the department should be careful not to upset that balance in response to comments. They commended the department for doing a fine job under difficult circumstances.

RESPONSE

The department will work to retain the integrity and balance of the regulation as it responds to comments it receives.

COMMENT 2

The Citizens' Toxics Coalition had concerns about possible abuse of the agreed order process.

RESPONSE

The department and the Attorney General's Office are aware of the possibility of abuses of the agreed order process, and both agencies are committed to keeping agreed orders to the limited situations outlined in the regulation.

COMMENT 3

The Citizens' Toxics Coalition commented that they had reservations about whether the Regional Citizens' Advisory Committees will be given a meaningful role.

RESPONSE

The department is committed to giving the Regional Citizens' Advisory Committees a meaningful role in giving input to the Hazardous Waste Investigations and Cleanup Program on its implementation of the Model Toxics Control Act.

COMMENT 4

Lon Freeman of Olympia commented that lay citizens should have access to the department's computer data base in order to facilitate independent data analysis.

RESPONSE

The department does not have the computer capability at this time for the public to down-load its data base. This may be a possibility in the future.

COMMENT 5

Lon Freeman asked if there are documents available on the hazard ranking system mentioned in the regulation.

RESPONSE

There are two documents available to the public on the Washington Ranking Method. They are: 1) Washington Ranking Method Scoring Manual and 2) Final Report - Washington Ranking Method Development and Field Testing. These documents are available from the department by calling 438-3000.

COMMENT 6

Lon Freeman asked if recombinant DNA organisms, when there has been an accidental or intentional release, will be covered by the hazardous waste tax and cleanup regulations.

RESPONSE

Recombinant DNA releases are not covered by the hazardous tax. At this point, the department is not involved with the regulation of recombinant DNA research or experimentation. The federal government, through both the National Institute of Health and the Department of Agriculture, regulates research, as well as the introduction of genetically altered organisms into the environment. If it were necessary, the department may be able to use its authority under the Initiative to clean up problems caused by such releases; however, this has not been the focus of the regulations to date.

COMMENT 7

Alice Ralston Johnson of PREVAIL asked how this regulation applies to the Urban Bay cleanup site. She asked how we will know when a site has been effectively cleaned up.

RESPONSE

Though this regulation is not yet effective, the department has been following the Initiative as closely as possible since March 1989. All sites that are currently in the process of cleanup will be affected by this regulation. The regulation addresses the issue of monitoring cleanups in Section 410, Compliance Monitoring, and Section 420, Periodic Review. The yet-to-be-finished cleanup standards section will address the question "How clean is clean?."

WRITTEN COMMENTS

GENERAL COMMENTS

Comment 1

The Association of Washington Business (AWB) and The Boeing Company commended the department for its commitment to negotiated rule-making. They would also like to see a continued use of negotiated rule-making with respect to the cleanup standards.

RESPONSE

The Department is committed to negotiated rule-making. It is meeting regularly with a 20 member external work group to get input on the development of the cleanup standards. This work group is composed of a diverse group of people representing environmental groups, industry, agriculture, and local government. Because of the diverse nature of this group, "consensus" may not be possible; however, the department is committed to an open review and evaluation of any proposed regulation on cleanup standards.

COMMENT 2

Mr. Ken Weiner of Preston, Thorgrimson et al for the Public Private Cleanup Coalition expressed concern that the cleanup standards rule be a workable and realistic companion to the cleanup process rule.

RESPONSE

The department is cognizant of the relationship that the cleanup process rule has to the cleanup standards and is making every effort to make both of the rules workable and realistic.

COMMENT 3

The Boeing Company commented that they concur with the changes suggested by the Association of Washington Business.

COMMENT 4

AWB commented that it is concerned with the respective roles of the Attorney General's office and Ecology. It believes that the regulated community should be informed of those instances where the Attorney General is acting pursuant to some perceived independent authority and when it is acting as counsel for the department. AWB believes there is potential for turf battles.

RESPONSE

The department acknowledges the comment and will endeavor to work with the Attorney General's office to minimize any turf battles.

COMMENT 5

Bonnie Orme is concerned about the contamination of the Magnolia area of Seattle by toxic chemicals. She suggests that there be a commission of elected health directors from each county of the state to oversee the enforcement of the Model Toxics Control Act.

RESPONSE

The department welcomes outside oversight of the enforcement of the Initiative. Regional citizens' advisory committees will be set up in four locations around the state to give input to the department on how the Initiative is being implemented.

COMMENT 6

Mr. Ken Weiner would like the department to consider writing a preamble to the regulation to further clarify any ambiguities which may be found and set the regulatory intent.

RESPONSE

The department is not required to prepare a preamble to our republished rules and to do so would entail significant unanticipated workload and significantly further delay rule promulgation. Any ambiguities not addressed in the Overview or Administrative Principles sections will be addressed in the policies to be drafted following the rule-making process.

COMMENT 7

Ms. Leslie Nellermoe of Heller, Ehrman for Kaiser Aluminum and Chemical Corporations, Intalco Aluminum Corp., Valanco, Inc., Reynolds Metals, and Aluminum Company of America recommended that the regulation address how the department will determine de minimis contributions and how the Attorney General will determine whether the de minimis settlement is practicable and in the public interest.

RESPONSE

The department plans to address these issues in policy, rather than in the regulation.

COMMENT 8

Ms. Leslie Nellermoe commented that the number of separate reports required under the regulation will be cumbersome, even with the allowance in the regulation that some reports can be combined. She suggested that the regulation should state that in general reports should be combined and, in some cases, separate reports will be required.

RESPONSE

The department believes the flexibility within the regulation will allow reports to be combined when it is appropriate. There will be complex cases when reports will need to be separate, and the regulation is clear about the requirements for these reports. The department thinks the regulation is clear as it is drafted on this issue.

COMMENT 9

Ms. Leslie Nellermoe recommended that the regulation include a thirty day review period for the department to review documents.

RESPONSE

The department will attempt to review documents in a timely manner, but because each site varies in complexity, the schedule will frequently be determined as part of the consent decree or order negotiations or discussions.

COMMENT 10

Mr. Steven Merritt of the Western States Petroleum Association commented that the proposed regulation will not allow a simplified approach for the majority of LUST cases. He mentioned that the uncertainty brought on by the regulation may cause financial institutions to hesitate to finance property sales of service stations. He commented a service station with a pulled tank cannot wait 90 days for the department to conduct an initial investigation or for the 30 day public comment period. He suggested that LUST sites be explicitly excluded from the regulation or the department develop a separate section within the regulation covering LUST sites.

RESPONSE

The Department is aware that the LUST sites do not always fit easily into the process laid out by this regulation. However, the Initiative clearly includes petroleum as a hazardous substance. The regulation allows independent cleanups to occur, and the department will make every effort to accommodate the particular needs of a petroleum cleanup. We also believe part of the answer is for tank owners to do some preliminary investigations when it appears the tank has leaked before a tank is pulled and the station out of business. These preliminary investigations could then be used as a basis for entering the process under Initiative 97 in a more systematic fashion as envisioned in the regulations. The department has dedicated considerable resources to address LUST cases.

SECTION 110 - APPLICABILITY

COMMENT 11

Chemical Processors, Inc. (Chempro) commented that it is difficult to tell how the department intends to handle sites that are currently involved in cleanups under RCRA and CERCLA. They asked if federal cleanup standards apply to sites on the state hazardous sites list.

RESPONSE

Once effective, the cleanup standards will be considered applicable for all sites, both federal and state, within Washington State. Until it is effective, sites currently involved in cleanups will be considered on a case-by-case basis, with federal standards as one possible standard to be applied.

COMMENT 12

Chempro asked how the department's ground water cleanup standards will be incorporated into the cleanup program.

RESPONSE

The cleanup standards are not yet final and are not part of the current public comment period. The ground water standards, once effective, will be considered an appropriate requirement in the cleanup standard's amendment.

COMMENT 13

Mr. Steven Merritt suggested that subsection (3) be reworded to exclude those sites which have been previously adequately cleaned up.

RESPONSE

The department cannot "sign off" on the adequacy of a previous cleanup without evaluating the site. While the department does not intend to perform a detailed assessment of all sites that have already conducted cleanups under other applicable laws or regulations, we must keep the option open of revisiting sites which may still pose a significant risk. This section gives the department the authority it needs to protect human health and the environment and is consistent with the intent of the initiative.

SECTION 120 - OVERVIEW

COMMENT 14

Ms. Leslie Nellermoe suggested the regulation is unclear about both the role of the department in oversight of independent cleanups, and which reports should be submitted for independent cleanups.

RESPONSE

The department does not intend to oversee independent cleanups. Independent cleanups must be reported to the department after a cleanup has occurred (See Section 300(4)). The department will then have to complete an initial investigation of these sites within 90 days. The department will not review or approve reports sent in on independent cleanups unless it is in the context of an order or decree as provided for by the Initiative. We have added additional language to the rule to better clarify this issue.

COMMENT 15

Golder Associates commented that the department should allocate resources to the review of independent actions, so the hazardous sites list will not contain so many remediated sites.

RESPONSE

The department does not have the resources to review all independent actions and still fulfill our other obligations under the Initiative. The department has a duty to assure that we focus most of our resources on the worst sites and that these sites are handled under the process provided for under the Initiative.

COMMENT 16

The Association of General Contractors (AGC) expressed concerns that in the description of independent remedial actions the agency makes no reference to remedial action contractors and offers no indemnification to contractors performing those actions.

RESPONSE

It is not the intention of the department to encourage a person to perform independent remedial actions. The rule addresses the use of independent actions because it is not precluded by Initiative 97 and the department wants responsible persons to know that there are risks associated with that method of action. Furthermore, the Initiative authorizes the department to indemnify contractors performing work for the agency. The department has provided for this in its contracts. Independent actions are, by definition, done without agency involvement and therefore excluded from contractor indemnification.

COMMENT 17

AGC suggested that if the department's intention is to encourage independent cleanup activities through the availability of independent action, then the agency should provide more incentive for performance of such actions.

RESPONSE

It is not the intention of the department to encourage a person to perform independent remedial actions. The rule addresses the use of independent actions because it is not precluded by Initiative 97 and the department wants responsible persons to know that there are risks associated with that method of action.

COMMENT 18

AWB was very pleased to see built-in flexibility and expressed hope that the department management will communicate the intent to utilize the flexibility to staff in implementing the act.

RESPONSE

The department acknowledges and will address the issue at the policy level.

COMMENT 19

The AWB expressed concern that the rules have the potential for requiring undue study and documentation and should not be allowed to thwart the express intent that when enough information has been gathered to make a decision, action should proceed.

RESPONSE

The department agrees that decisions should be made as soon as enough information is obtained and the regulation has been modified to reflect this. However, it is not our intention to make "cleanup" decisions before we know the extent of the problem. The department intends to make decisions at each phase of the process when there is enough information. The department intends through guidance and staff training to minimize undue study of sites.

COMMENT 20

The AWB commented that the language regarding the consolidation and incorporation by reference should be strengthened.

RESPONSE

The department will clarify any ambiguities or redundancies during the policy making process.

COMMENT 21

AWB suggested that alternatives should be used to reduce the need for formal documents whenever possible.

RESPONSE

The department understands the concern; however, we have a duty to assure that the public has equal access to decisions and documents throughout the process.

COMMENT 22

Bruce Jones for Seattle Solid Waste Utility recommended that the overview section be amended to include examples or scenarios of what could be investigated and to what extent. He also thought the section should be further clarified to state whether the initial investigation is to be completed (or only started) within 90 days.

RESPONSE

The department refrained from using examples because, with the range of sites that will be investigated, the lists would be either too long or incomplete, both of which would be confusing. The rule requires the initial investigation to be completed within ninety days, and the department to make its determination within thirty days of the completion of the initial investigation.

COMMENT 23

Bruce Jones commented that the last sentence of subsection(4)(a) should be revised to say: "The state remedial investigation/feasibility study 'determines what problems exist' and..." rather than" defines the extent of the problems..."

RESPONSE

The department intends the state remedial investigation/feasibility study to both determine what problems exist and to define the extent of those problems. Section 350 further clarifies the scope of the remedial investigation/feasibility study.

COMMENT 24

Golder Associates recommended that the department streamline the permitting and SEPA process for remedial actions conducted under the rule. They suggested that if such streamlining cannot occur in the regulation, then the department should act to amend Chapter 197-11 WAC to provide for a categorical exemption of remedial actions performed under this regulation.

RESPONSE

The department recognizes that permits and SEPA can delay some cleanups. However, because the Initiative is silent on the issue, it is not clear a categorical exemption could be made. If long delays become a problem, the department may seek judicial or legislative help in obtaining exemptions for cleanups. In the meantime, the department will work with potentially liable persons and local governments to keep delays to a minimum.

COMMENT 25

Ms. Leslie Nellermoe commented that she understood section 130(9) to mean that the department can intervene in the local permitting process, though this is not clear from the regulation.

RESPONSE

The ability of the department to intervene in a local permitting issue depends on the local rules and site-specific situation. This section does not alter this. Should a permitting problem arise, the department is committed to working with local government to facilitate site cleanup.

COMMENT 26

Ms. Leslie Nellermoe commented that SEPA provides categorical exemptions for enforcement actions, waste discharge permits, etc. She suggested that the department should make clear whether or not it is relying on these categorical exemptions for decisions under the Initiative, and whether there are other actions the department is not including under these exemptions.

RESPONSE

In the future the department will provide a policy addressing how SEPA will be implemented in relationship to the cleanup process.

SECTION 130 - ADMINISTRATIVE PRINCIPLES

COMMENT 27

Golder Associates recommended that the criteria for routine actions be less restrictive.

RESPONSE

The department worked with an external work group to come up with a workable definition of routine actions. The department is satisfied that the criteria for routine actions are necessary and workable.

COMMENT 28

Mr. Steven Merritt recommended that the "ground water exclusion" should be removed from the routine cleanup criteria, and the definition of ground water should be amended. He also stated that the requirement that cleanup standards be "obvious and undisputed" was too restrictive.

RESPONSE

The definition of ground water in this regulation is purposefully broad. This definition will allow the department to take action in situations where ground water is impacted. The issue of what ground water will require remediation is being addressed in the cleanup standards. The criteria of routine actions was discussed with an external work group and the department is satisfied that these criteria are necessary and workable. If a cleanup standard is agreed to by the department and the potentially liable person in a routine action, and public comment is consistent with this approach, it is then "obvious and undisputed." This criterion is not meant to be so restrictive as to eliminate all sites from the routine action category.

COMMENT 29

Chempro commented that the term "threatened releases" needs to be clarified in subsection (2). They stated that it is unclear if this applies to situations where a threat of a release may exist or a suspected release is under investigation.

RESPONSE

The term "threatened release" is statutory language and the department believes it is intended to mean a threat of a release may exist.

COMMENT 30

Chempro commented that technical assistance from the department should be limited to regulatory advice and review/approval of cleanup proposals.

RESPONSE

Due to agency constraints, the department would prefer this role, but often is asked to provide more specific technical assistance on site-specific issues. As a public agency, the department is committed to providing limited technical assistance to those potentially liable persons who request assistance. However, the department's assistance to potentially liable persons who have not entered into a formal agreement with the department will necessarily be limited to general advice, in order to remain consistent with the initiative theme of "no backroom deals."

COMMENT 31

Chempro commented that the ability to combine steps is important, as is the simplified process for routine sites. They suggested, however, that the definition of routine actions needs to be clarified.

RESPONSE

The department worked with an external work group to come up with a workable definition of routine actions. The department believes this definition is clear.

COMMENT 32

Ken Weiner recommended an addition to Section 130 subsection (5). He stated that the subsection does not convey a strong enough policy position that cleanup decisions will be made as soon as adequate information is obtained.

RESPONSE

The department agrees that decisions should be made as soon as enough information is obtained. However, it is not our intention to make "cleanup" decisions before we know the extent of the problem. The department is concerned that the phrasing Mr Weiner proposed might be interpreted in a manner such that cleanup decisions could be made before the problem is clearly defined. It is the department's intention that decisions at each phase of the process will be made as soon as there is enough information, and the regulation has been revised to reflect that clarification.

COMMENT 33

Mr. Ken Weiner suggested that in Section 130, subsection (6) that "can" should be replaced with "should".

RESPONSE

The department appreciates Mr Weiner's concern; however, the department believes "can" should be changed to "may" rather than changed to "should". Because of the high cost involved in the cleanup process, the department would like to retain flexibility to combine or not combine steps depending on the situation at the site. If, for example, one potentially liable person among many requested to do a discrete step in the cleanup process when it was appropriate to combine steps, the department would not want to deny that volunteer the opportunity.

COMMENT 34

Mr. Ken Weiner commented that subparagraph (3)(a) should be (b) and that "small" should be deleted on subsection (5).

RESPONSE

The term "small" is an important modifier in the context it is used because a large site, even with minimal groundwater impacts, could require a fairly detailed groundwater analysis depending on the area and number of wells potentially impacted.

COMMENT 35

Mr. Ken Weiner would like the third sentence in Section 130 (3)(a) to be preceded by "Unless the department is providing guidance for the implementation of an order or decree..."

RESPONSE

The department has included this suggestion in the text of the regulation.

COMMENT 36

Mr. Ken Weiner believes that subparagraph (3)(a) needs an explanatory statement clarifying that it is not a bar on approvals for certain kinds of preliminary planning activities.

RESPONSE

Subparagraph (3)(a) is intended to bar approvals for activities done outside an order or decree. It does, however, allow discussions to take place without any assurance given by the department. If the potentially liable person wants assurance or approvals the method is through an order or decree. This is consistent with the theme of the initiative drafters of "no backroom deals."

COMMENT 37

AWB expressed concerns regarding interagency coordination. AWB would like an express commitment to coordinate cleanups under the Initiative and the federal "Superfund", and be assured that studies done under the federal program will satisfy requirements under the Initiative and, lastly, defer action under the Initiative, if a site is being remediated under the federal program.

RESPONSE

The department and the Environmental Protection Agency have a memorandum of agreement which identifies roles of the respective agencies and determines which agency will be in the lead at each site. This agreement facilitates mutual understanding regarding how each site will be handled and what each agency's role will be. The federal Superfund statute and the Initiative are not exactly alike and each agency must be aware of the overlapping and autonomous authorities. Neither agency is interested in duplicative work; however, the unique authorities under the individual statutes require careful attention by both agencies. When there is overlapping authority the lead agency's requirements will be pre-eminent, but neither agency relinquishes its ultimate authority.

COMMENT 38

Mr. Ken Weiner commented that the interagency coordination provisions were inadequate and that a new paragraph should be added. This new paragraph would "authorize" state and local agencies to combine notices, meetings, hearings and other documents.

RESPONSE

The department does not believe it has the authority to "authorize" state and local agencies to combine notices, meetings, hearings and other documents. We have, however, added a statement "encouraging" this to happen.

SECTION 140 - DEADLINES

COMMENT 39

Ms. Leslie Nellermoe commented that the need to obtain permits and comply with SEPA will cause sites to not meet proposed deadlines.

RESPONSE

The department understands the potential timing problems associated with either compliance with SEPA or permits or the proposed deadlines, but will address that if the need arises.

COMMENT 40

Golder Associates commented that 18 months is not enough time to complete a remedial investigation/feasibility study at a complex, high priority site.

RESPONSE

The department understands the potential timing problems associated with the proposed deadlines. The regulation does allow the deadline to be extended up to 12 additional months and it is anticipated that a complex site would warrant such an extension. Furthermore, the deadlines in the regulation are not meant to apply at all sites, only certain high priority sites.

COMMENT 41

Golder Associates recommended that a sampling and analysis plan and schedule be incorporated into each consent decree or agreed order.

RESPONSE

A sampling and analysis plan is a required part of a remedial investigation/feasibility study. The schedule for site work is part of each consent decree or order.

COMMENT 42

Golder Associates suggested that the regulation include deadlines for departmental review for each stage of the remedial action process.

RESPONSE

The department will attempt to review documents in a timely manner, but because each site varies in complexity, the schedule is determined as part of the consent decree or order during negotiations or discussions.

SECTION 200 - DEFINITIONS

COMMENT 43

Ms. Leslie Nellermoe, Golder and AWB all commented that the definition of "environment" should be revised.

RESPONSE

The department revised the definition.

COMMENT 44

Ms. Leslie Nellermoe suggested that the definition of facility should be clarified. She suggested that this would also clarify the definition of site.

RESPONSE

The definition duplicates the Initiative and the department does not believe it is appropriate to alter statutory wording.

COMMENT 45

AWB, AGC, and Ms. Leslie Nellermoe suggested that the definition of "ground water" needed modification.

RESPONSE

The department modified the definition for clarity. The issue of what ground water will be subject to remediation is part of the cleanup standards.

COMMENT 46

Ms. Leslie Nellermoe suggested that the definition of owner/operator include the exemption from liability for the so-called innocent landowner.

RESPONSE

The definition of owner/operator duplicates the definition in the Initiative and the department does not believe it is appropriate to

alter statutory wording. The innocent purchaser is addressed in the Initiative and the department does not believe it needs to be repeated in the regulation.

COMMENT 47

Ms. Leslie Nellermoe commented that the definition of surface water is overly broad, and would appear to include pipelines.

RESPONSE

This definition is based on that used in the state's water quality law. In the context it is used in this regulation it can include stormdrains, but it is not intended to include other pipelines.

COMMENT 48

Ms. Leslie Nellermoe recommended that the term "high priority site" should be defined.

RESPONSE

Section 340 of the regulation explains that the department will use the results of hazard ranking, as well as other factors, in setting site priorities. Therefore, there is no succinct definition of a high priority site. Sites that are high priority for the site hazard assessment will not necessarily be high priority for remedial investigation/feasibility study.

COMMENT 49

Chempro and Mr. Ken Weiner suggested that the definition of "potentially affected vicinity" needs to be clearer.

RESPONSE

The definition of "potentially affected area" is provided for in the public participation section of the regulation [Section 600 (3)(c)] as: "all property adjoining the site and any other area that the department determines to be directly affected by the proposed action." Based on experience to date, the department believes that the public notice provisions are adequately defined.

COMMENT 50

Golder Associates commented that the terms "Model Toxics Control Act" and "chapter 2, Laws of 1989" are used interchangeably throughout the regulation. They suggested that "Model Toxics Control Act" be the term used.

RESPONSE

The department will be referring to both as Chapter 70.105D RCW.

COMMENT 51

Golder Associates commented that the terms "cleanup" and "remedy" are used synonymously in the regulation and that one of them should be deleted.

RESPONSE

These two terms are not synonymous in the regulation. "Remedy" includes study phases, while "cleanup" does not.

COMMENT 52

Mr. Ken Weiner recommended adding "agency" as a definition. His definition would read: "Agency" means any governmental body including federal, state, regional, local governments and the official governing body of an Indian tribe. He believes that although the term is used throughout the regulation there may be some who do not understand the meaning.

RESPONSE

The department does not see a reason for including this definition, the term agency is straight-forward and not ambiguous.

COMMENT 53

Mr. Ken Weiner believes the definition of "cleanup action" should be revised.

RESPONSE

The department evaluated the revised definition and believes the original definition better reflects the intent of the department.

COMMENT 54

Mr. Ken Weiner recommended a revision to the definition of "interim action".

RESPONSE

The department revised to clarify the meaning.

COMMENT 55

Mr. Ken Weiner suggested we define "potential hazardous release" to mean a release or threatened release of a hazardous substance that may pose a threat or potential threat to human health or the environment.

RESPONSE

The department believes that the term "potential hazardous release" distorts or minimizes the true meaning intended by the phrase "release or potential release of a hazardous substance that may pose a threat to human health or the environment."

COMMENT 56

Mr. Ken Weiner recommends a change in the definition of "potential liable person".

RESPONSE

The definition reflects the statute identically and the department believes it is inappropriate to alter statutory language.

COMMENT 57

AGC and Mr. Ken Weiner commented regarding "sensitive environments" and requested a clarification of the term "wetlands."

RESPONSE

The department agreed in the need for revision to this definition and revised accordingly. The department also added a definition of "wetlands".

SECTION 210 - USAGE

COMMENT 58

Mr. Ken Weiner would like three additions to the usage section, they include: "laws", "prepare or preparation" and "submit".

RESPONSE

The department sees no reason for making the proposed changes as their meaning is clear from the dictionary and the context in which they are used.

SECTION 300 - SITE DISCOVERY AND REPORTING

COMMENT 59

The AGC commented that there was a need for providing a de minimis provision that would allow contractors to not report certain quantities of a release, and Ms. Leslie Nellermoe suggested requirements for reporting should be tied to significant threats or potential threats to human health and the environment. Golder Associates recommended the use of reportable threshold quantities for releases of hazardous substances.

RESPONSE

The department considered establishing a threshold quantity for reporting but this was rejected as impractical for several reasons:

1) In most cleanup sites, the quantity of hazardous substance released is unknown because the release typically is discovered long after it has occurred or is a result of a series of smaller unquantified releases over an extended period of time.

2) At the time of initial discovery of a release, insufficient test data is available to calculate or estimate the quantity of a release.

3) The use of the EPA reportable quantities, as some have suggested, could result in very large quantities of soil or ground water having to be contaminated before the reporting threshold would be exceeded.

For these reasons, the current standard will be retained. Owners and operators must report any release that "may be a threat or potential threat to human health or the environment." The department is preparing guidance to help clarify this reporting requirement.

COMMENT 60

Ms. Leslie Nellermoe commented that the regulation implies that there must be a review of historical practices of past and present employees in order to comply with the reporting requirement. She suggested that the regulation should state that this is not required.

RESPONSE

The site discovery section was changed to clarify this point.

COMMENT 61

Ms. Leslie Nellermoe suggested that the regulation should state that only releases that actually pose a threat to human health or the environment must be reported.

RESPONSE

In evaluating reports, the department will determine if the release actually poses a threat to human health or the environment. The responsibility of the reporter is to assess if the release may pose a threat and the department will make the final determination of risk.

COMMENT 62

Ms. Leslie Nellermoe commented that the regulation should make clear that owner/operators only have to report releases on their own facility.

RESPONSE

The department agreed and made this change.

COMMENT 63

Mr. Ken Weiner suggested that the department, in a preamble, discuss the reporting requirements in the site discovery section and invite comment on it.

RESPONSE

The department is not anticipating preparing a preamble to the rules. The revisions to the site discovery section will be subject to additional public comment.

SECTION 310 - INITIAL INVESTIGATION

COMMENT 64

Mr. Ken Weiner recommends a more specific outline of the contents of the early notice letter.

RESPONSE

The department understands the concerns expressed by Mr Weiner but is concerned with the additional burden it puts on the department at this time. Several of the statements suggested to be added are not appropriate for all sites. The early notice letter is intended to provide early notification of potential problem and is not intended to

start the administrative process for cleaning up the site. The department has partially modified this provision.

COMMENT 65

Mr. Ken Weiner requested that subparagraph (iii) be added to paragraph (4)(d) which reads "(iii) One of the reasons stated in WAC 173-340-310(1)(b)."

RESPONSE

The department added (4)(d)(iii) which states "Action under another authority is appropriate", and we believe this addresses the concern.

COMMENT 66

Bruce Jones commented that subsection(4)(d) of this section should be revised to allow the department to determine, as part of the initial investigation, whether an independent cleanup conducted at a site would meet all applicable standards or requirements. If the site did, then the department should be able to require no further action at that time.

RESPONSE

The regulation, although not explicitly stated, does allow the department to do what Mr. Jones recommended. Those determinations must be published in the site register.

COMMENT 67

Bruce Jones requested that the early notice letter be sent by certified mail, return receipt requested, or by personal service.

RESPONSE

The department did not require this because there is no response required by the receiver and therefore no need to prove receipt.

COMMENT 68

Bruce Jones commented that the department should always contact the owner/operator or any potentially liable person before any remedial action is taken by the department.

RESPONSE

The Initiative grants the department authority to conduct remedial actions at a site without any procedural restrictions. Although the regulation expresses the department's policy decision to generally

provide the potentially liable persons the opportunity to conduct remedial actions for sites on the hazardous sites list, it does not want to limit its statutory authority.

SECTION 320 - SITE HAZARD ASSESSMENT

COMMENT 69

Bruce Jones suggested that the department should be required to make the results of the site hazard assessment available to the site owner, operator and any potentially liable person within thirty days of the completion of the assessment.

RESPONSE

The department is prepared to notify the owner, operator, etc. of the results prior to publishing them in the site register, although that notification may not be within thirty days of the assessment. Agency timeframes will be discussed as part of the policy making process.

COMMENT 70

Mr. Ken Weiner commented that the subsection (4) fails to describe what a site hazard assessment is and how it differs from a state remedial investigation/feasibility study. He has proposed new language.

RESPONSE

The purpose of a site hazard assessment is identified in this section and the department has further clarified the definition within the section.

COMMENT 71

Chempro commented that 180 days is not enough time to complete the site hazard assessment, and the regulation should provide for an extension.

RESPONSE

The department does not expect that all site hazard assessments will be completed within 180 days. Only a limited number of high priority sites will have the 180 day deadline. We admit it is a tight deadline, but believe it is necessary so that at the high priority sites the public can be assured that sites will be moved through the process in a timely manner.

SECTION 330 - HAZARDOUS SITES LIST

COMMENT 72

Golder Associates commented that there are too many loopholes that allow for subjectivity in the department's proposed process for ranking sites. Their greatest concern is that priorities will be driven by cash receipts from potentially liable persons rather than objectively determined environmental and human health risks. They suggested that the department finalize the "Washington Ranking Method Scoring Manual" to make it more objective and apply objective determinations to the ranking of sites.

RESPONSE

The "Washington Ranking Method Scoring Manual" is now being finalized. While sites with the highest environmental and human health impacts will typically be worked, due to a variety of factors, other sites may be allocated resources. The regulation contains flexibility intentionally.

COMMENT 73

Chempro commented that if sites with threatened releases are included on the hazardous sites list, then there should be separate requirements for rankings and investigations for these sites.

RESPONSE

Although sites with threatened releases may be included in the list, sites will not be put on the list until enough information has been collected to determine its relative risk through the "Washington Ranking Method". The method involved would take into consideration threatened releases, and the scoring would reflect this appropriately.

COMMENT 74

Chempro commented that there should not be a charge for petitioning the department to remove a site from the hazardous sites list. They also asked that there be a schedule of petition review in the regulations.

RESPONSE

The department must always balance its need to provide resources to those sites that present the greatest risk with those lower priority sites which, for a variety of reasons, are being remediated. The department has limited time and resources available to accomplish the many tasks associated with the Initiative. In order to ensure that petitions are reviewed, it may be necessary for the department to charge for its time in these reviews. A schedule for review will have to depend on agency priorities and cannot be included in the regulation.

COMMENT 75

Bruce Jones recommended that the hazard ranking assessment include sensitive environments and critical habitats.

RESPONSE

The hazard ranking model does consider sensitive environments and critical habitats.

COMMENT 76

Bruce Jones commented that potentially liable persons should be notified within 30 days of having been placed on the hazardous sites list.

RESPONSE

The rule has been modified to provide for the department to contact the potentially liable persons before publishing in the site register.

COMMENT 77

Bruce Jones requested that the department must respond to a petition for delisting from the hazardous sites list within 60 days.

RESPONSE

The department understands the interest that potentially liable persons have in getting off our list, but the department must maximize its resources in a way which provides the most protection of human health and the environment. Setting a deadline of 60 days for response to a petition could drain resources away from high priority site work. Agency timeframes will be discussed as part of the policy making process.

Section 340 - BIENNIAL PROGRAM PLAN

COMMENT 78

Chempro asked if the biennial program plan will be available to the public, as well as to the legislature.

RESPONSE

As stated in Section 340(2), the department will provide public notice and a hearing on the proposed biennial program plan. This public notice will include a mailing to all persons who have made a timely request and to news media, and publication in the state register and site register. The public comment period will run for at least thirty days from the date of the publication in the site register.

SECTION 350 - STATE REMEDIAL INVESTIGATION/FEASIBILITY STUDY

COMMENT 79

Golder Associates recommended that in subsection (1), the word "necessary" should be inserted before "sufficient" and that the phrase "necessary and sufficient" be used throughout the regulation.

RESPONSE

This concept is addressed in the overview section of the regulation, and the department believes that is sufficient.

COMMENT 80

Mr. Ken Weiner recommended an additional sentence be added to subsection (5) to clarify that the scope of state remedial investigation/feasibility study typically will not need to have the scope and complexity of a federal remedial investigation/feasibility study.

RESPONSE

The department believes the regulation already contains considerable flexibility in tailoring the scope of the remedial investigation/feasibility study to the scope of the problem. Based on our experience to date, there is no such thing as a "typical" remedial investigation/feasibility study. Therefore it seems unnecessary and unadvisable to prejudge the scope of future state remedial investigations/feasibility studies.

COMMENT 81

Mr. Ken Weiner commented on the packaging of the state remedial investigation/feasibility study, draft cleanup action plan, and SEPA documents - followed by the final cleanup plan, SEPA documents and proposed consent decree. He suggested it needs to be more explicit.

RESPONSE

While packaging of these documents may often be done, it will not necessarily, or always, be done this way. The regulation is written to retain flexibility.

COMMENT 82

Ms. Leslie Nellermoe commented that the regulation is not clear about the application of SEPA to local government actions. She suggested that since a remedial investigation/feasibility study is not usually a government action, the reference to SEPA is "out of place." In addition, she recommended that the required information may be more appropriately submitted to local governments and permit writers than to the department.

RESPONSE

The wording referring to SEPA will be clarified in the regulation to reflect this concern.

COMMENT 83

Bruce Jones commented that the first sentence should be reworded as follows: "The purpose of a ... is to collect, develop and evaluate information regarding a site sufficiently to enable the ...

RESPONSE

The modifier "sufficient" applies to the term "information" as it is used in this sentence and the proposed change would appear to be confusing. For this reason, it has not been adopted.

COMMENT 84

Bruce Jones requested a clarification of what "unnecessary information" is in relationship to the remedial investigation/ feasibility study.

RESPONSE

The remedial investigation/feasibility study is so specific to the circumstances at each individual site it would be impossible to adequately generalize about which information would not be necessary to collect. We drafted the language in the regulation to provide the flexibility to require only that information which is necessary based on site-specific circumstances.

COMMENT 85

Bruce Jones commented that subsection (6)(h) is inaccurate in that sufficient information should be provided for only the appropriate parts of the SEPA process, not for the entire process.

RESPONSE

The department concurs and made the changes as appropriate.

SECTION 400 - CLEANUP ACTIONS

COMMENT 86

Ms. Leslie Nellermoe commented that subsections (4) and (6) of section 400 contain unclear references to required administrative actions and local planning issues. She suggested that if the department is referring to permits and SEPA, this should be made clear. She also suggested that if the department is willing to help potentially liable parties in obtaining permits, then this should also be made clear.

RESPONSE

The department clarified.

COMMENT 87

AGC stated concerns regarding the wording in Section 400(4)(a)(viii) which outlines the requirements for justification of design engineering reports. They believed that the use of the words "assured and assurances" places a de facto warranty on the work performed by contractors.

RESPONSE

The legal responsibility of remedial action contractors, including any warranties, will primarily be articulated in their contractual agreements. It is not the intention of the department to add additional legal requirements. We have revised the language accordingly.

COMMENT 88

The AGC commented that Section 400(6) which discusses administrative actions, was unclear in meaning.

RESPONSE

The department agrees and has clarified.

COMMENT 89

Mr. Ken Weiner would like paragraphs (1)(b) through (d) deleted.

RESPONSE

While the purposes of this section are somewhat duplicative of earlier sections, the department believes its inclusion is important in order to emphasize the standards with which the cleanup action design and implementation must comply. This is especially true in light of the flexibility provided in this section.

COMMENT 90

Mr. Ken Weiner commented that the level of detail and number of different plans is duplicative and too detailed for the rules.

RESPONSE

The rule is detailed but does provide the necessary qualifiers to provide flexibility in what will be required at any given site.

COMMENT 91

Bruce Jones suggested that the conceptual plan of the proposed cleanup action should be in the remedial investigation/feasibility study process, not the cleanup action section.

RESPONSE

While a conceptual plan of the proposed cleanup action is frequently provided in the feasibility study, it is often altered somewhat or filled out in greater detail during the process of refining the detailed design. Also, a conceptual plan is usually needed to follow the calculations and discussions provided in the design report. The section references that other reports can be used to avoid duplication when appropriate and thus this will be kept as is.

SECTION 410 - COMPLIANCE MONITORING REQUIREMENTS

COMMENT 92

Bruce Jones questioned the use of statistical methods as presented in this section.

RESPONSE

Because of data variability, statistics are commonly used to determine if compliance has been achieved. This section provides for identifying the statistical method to be used.

SECTION 420 - PERIODIC REVIEW

COMMENT 93

Mr. Ken Weiner suggested that this section be clarified or deleted. He believes that the relationship of this section with compliance monitoring, delisting and other sections is not clear and that its purpose has at no time been stated.

RESPONSE

The purpose of this section is to provide a mechanism to assure that human health and the environment continues to be protected after the completion of the remedial action if hazardous substances have been left on site. Costs could be recoverable costs and could mean we do monitor some of the site every five years or more often to facilitate this review. CERCLA has a similar provision to assure the protection of human health and the environment.

SECTION 430 - INTERIM ACTIONS

COMMENT 94

Bruce Jones commented in subsection (3)(b) of this section that the cleanup action should comply with applicable laws as well as cleanup standards.

RESPONSE

Whenever remedial work is being done at a site it must comply with applicable laws and, therefore, it can be inferred that interim actions too will comply with applicable laws.

COMMENT 95

The AGC expressed two concerns with the interim action section. The first related to the use of the word "shall" in reference to the reports necessary in order to start the interim action. They thought the requirement might defeat the purpose of the section, especially in relationship to interim actions that might be done in response to an emergency situation. The second concern relates to the lack of definition for emergency actions.

RESPONSE

While an emergency action could be an interim action, it is not the intent of the department to require a report be submitted prior to proceeding with an emergency action. This was clarified. The department does not foresee a need for a definition of emergency actions.

SECTION 500 - DETERMINATION OF STATUS AS A POTENTIALLY LIABLE PERSON

COMMENT 96

Bruce Jones commented that potentially liable person status letters should be issued when the department has credible evidence and not wait until it is ready to proceed.

RESPONSE

The department will be sending early notice letters as soon as it has information regarding the potential problems at the site. The potentially liable person status letters are in essence a formal reminder that we are ready to proceed at that site and that we have identified certain persons to be potentially liable at the site. Sending a potentially liable person status letter before we are ready to proceed might result in taking away resources from sites already under remediation. The department believes the status letter will best serve the agency and the potentially liable persons when in context of impending action, rather than just as a pro forma administrative requirement.

COMMENT 97

Bruce Jones commented that the thirty day response time to the status letter is not long enough for potentially liable persons with limited resources to respond.

RESPONSE

Although the department is sympathetic to the needs of potentially liable persons with limited resources, extending the comment period to 60 days would undermine the ability of the department to take action quickly.

COMMENT 98

Bruce Jones questioned why accepting status as a potentially liable person means a waiver of their right to notice and comment.

RESPONSE

This subsection was drafted in response to external concerns regarding timing of actions. Except in emergency, the department must provide the (30 day) time for an opportunity to comment and that time might cause a delay that the potentially liable person wanted to avoid. In order to avoid that delay, a potentially liable person can voluntarily waive their right for notice and comment and proceed directly to the remedial action.

COMMENT 99

Mr. Ken Weiner commented that subsection (4) should be revised to insert "potential" between "finding of" and "liability".

RESPONSE

The department revised the regulation accordingly.

SECTION 510 - ADMINISTRATIVE OPTIONS FOR REMEDIAL ACTIONS

COMMENT 100

Mr. Ken Weiner states that the first sentence of subsection (1) is not in the statute and creates a new requirement that exceeds the department statutory authority, and therefore should be deleted or revised.

RESPONSE

Although the department does not think the language creates any new requirements, we have revised the language to more closely follow the statutory wording, along the lines suggested.

COMMENT 101

Mr. Ken Weiner requested that we add a new subsection (5) which sets forth an informal review process.

RESPONSE

An informal review process is always available to potentially liable persons who are unhappy with an agency decision, but because of the specific review process outlined in the Initiative, the department and Attorney General's office believe it would be unadvisable to set up a separate process. The legal implications to this process are unclear and the department does not want to undermine its clear "no pre-enforcement" review authority.

SECTION 520 - CONSENT DECREES

COMMENT 102

Bruce Jones had various comments that the requirements for the consent decree process are too cumbersome and require information which may or may not be known at the time. It was recommended that it duplicate the federal remedial investigation/feasibility study guidance.

RESPONSE

The requirements delineated in the regulation are intended to be general and based on available information. The department is not asking for complex or detailed information but a background review of the problems at the site. There is a need for the department to have sufficient information in order to evaluate the individual requests for resources as they come in.

COMMENT 103

Bruce Jones had a question regarding subparagraph (1)(e) and whether we can proceed without fully completing this step.

RESPONSE

The department will determine whether it has enough information, or it will request the additional information necessary to be able to negotiate.

COMMENT 104

Bruce Jones commented that it is inappropriate to have the potentially liable persons set the schedule when the department will probably control the length and timing.

RESPONSE

Mr. Jones may be misunderstanding the reason for the request that the potentially liable person propose a schedule. The department needs to know what schedule the potentially liable person is willing to commit to in order to evaluate whether the department can and should make the resources available, and whether the schedule the potentially liable person is proposing is reasonable for the site.

COMMENT 105

Bruce Jones questioned whether the negotiations will be with individuals or as a group.

RESPONSE

Except in rare circumstances, the department intends negotiations to include as many potentially liable persons as interested. It does not intend negotiating with different potentially liable persons sequentially.

COMMENT 106

Bruce Jones commented that the letter in subsection (2)(c) should request the potentially liable person to respond.

RESPONSE

The department has built in discretion in this provision because of external comments suggesting there may not be a need in every case to request a response.

COMMENT 107

Chempro commented that the information requested by the department in the letter initiating a consent decree is too complex and detailed. They felt that this information should be presented during, or even after, negotiations.

RESPONSE

The regulation states that the information in the letter initiating a consent decree should be based on available information. The

department is not asking for complex or detailed information, but a background review of the problems at the site.

SECTION 530 - AGREED ORDERS

COMMENT 108

Bruce Jones asked for clarification of the first sentence in this section. He also suggested that we define which interim actions that can be covered or provide examples.

RESPONSE

The department clarified the first sentence. Examples of interim actions are provided in the Interim Action section.

COMMENT 109

Bruce Jones suggested that mixed funding should be available under an agreed order.

RESPONSE

The Initiative is specific in only allowing mixed funding through a consent decree.

COMMENT 110

Bruce Jones had a question regarding subparagraph (3) and whether we can proceed without fully completing this step.

RESPONSE

The department will determine whether it has enough information or it will request the additional information necessary to be able to negotiate.

COMMENT 111

Mr. Ken Weiner proposed adding a new provision to the agreed order section to allow agreed orders to be called memoranda of agreement when between the department and another governmental entity.

RESPONSE

The department encourages cooperative interaction with other governmental agencies but the Initiative does not allow the department to treat separate categories of potentially liable persons differently. This kind of change would allow governmental agencies to be handled in a manner unlike any other potentially liable person. An agreed order is a type of order, not a memorandum of understanding, and to name it such would be inappropriate. The legal ramifications of this are not easily discernible. The department does not agree to such a change.

COMMENT 112

Bruce Jones asserted that more than a reasonable effort should be made to notify potentially liable persons before the department takes action.

RESPONSE

Even though the Initiative does not require it, the department agrees that potentially liable persons should be contacted before committing public resources. The wording in the other sections does clearly state the department's preference for potentially liable person-conducted remedial action. We believe the language in the regulation provides a sufficient standard for prior notification to potentially liable persons.

COMMENT 113

The AWB commented that the agreed order process is essential to the success of the Initiative. They would like the rules to more fully recognize agreed orders as one of the administrative options and recommended that the department should be able to initiate an agreed order.

RESPONSE

During the mediated rule-making process the use of the agreed order was discussed at length. The Attorneys General have clearly stated that because the differences between an agreed order and a settlement are subtle, and in order to most closely stay within the bounds of the Initiative, that the department should initiate consent decrees, not agreed orders. The use of agreed orders have been made available to those potentially liable persons who, for whatever reason, find it preferable; however, the department is not intending to use them as a replacement for consent decrees.

COMMENT 114

AWB suggested that a revision be made to subsection (6) of this section to allow the department to determine if there was a basis for judicial review.

RESPONSE

This issue was also discussed at length during the rule-making process and the environmental representatives felt strongly that this conversion process should be available. One difference between an agreed order and a consent decree is the judicial review. The intent was to allow the public to determine whether judicial review was more appropriate or not. To allow the department to make that determination would defeat the purpose of the subsection.

SECTION 550 - PAYMENT OF REMEDIAL ACTION COSTS

COMMENT 115

AWB, Leslie Nellermoe and Golder questioned whether the department has the authority to recover costs, or does that authority solely reside with the Attorney General?

RESPONSE

The department believes that it can request the remedial action costs be paid and, if needed, ask the Attorney General to seek, by filing an action, to recover the amounts spent by the department.

COMMENT 116

AWB recommended that the department remove the last sentence of subsection (1) because the Initiative says costs may be recovered, which they assert connotes a retrospective perspective. Ms. Leslie Nellermoe commented that the department does not have the authority to recover costs in advance or charge interest or overhead costs.

RESPONSE

Under this section, the department will seek payment of costs only after they have been expended, and therefore it does meet the retrospective nature of "recover". However, the department is, in advance, letting potentially liable persons know that it may demand the remedial actions costs on a routine basis rather than when all actions are completed.

COMMENT 117

Ms. Leslie Nellermoe suggested that subsection (5) should be deleted, since there is no provision in the Act for contribution action.

RESPONSE

The department included this subsection because of external requests and believes it is a clarification of rights expressed in the Initiative.

COMMENT 118

Golder Associates requested that the advance payment provision be deleted from the regulation.

RESPONSE

This was requested by representatives of potentially liable persons in our work group discussions as a vehicle for getting agency resources allocated when the site was not on the agency's program plan.

COMMENT 119

AWB recommended that the department change the name of the section to "Recovery of Remedial Action Costs" because they assert "payment" implies that such costs are clearly due, and that there is not a strong basis for a pay-as-you-go scheme.

RESPONSE

The department intends to receive payment for its remedial action costs on a pay-as-you-go basis whenever possible.

COMMENT 120

AWB and Golder asserted that interest charges are not remedial actions costs and can't be recovered.

RESPONSE

The department believes it is justified in recovering interest payment on those costs that are requested but not paid in a timely manner. The monies spent from the State Toxic Control Account for remedial action obviously do not collect interest and therefore represent an additional loss of revenue to the fund. The loss of revenue is a cost attributed to the remedial action.

COMMENT 121

Mr. Ken Weiner suggested a change in the wording of subsection (1) to delete everything after "basis" or revise so that it reads: " .. the department generally will periodically notify parties of the amount of costs being incurred."

RESPONSE

The department revised this subsection.

COMMENT 122

Bruce Jones commented that all backup documentation should be submitted to support costs in the itemized statement.

RESPONSE

The department is willing to submit an itemized account of costs and, upon request, will provide any other available information necessary.

SECTION 560 - MIXED FUNDING

COMMENT 123

AWB commented that the rule overstates the role of the director in making mixed funding decisions.

RESPONSE

The department is responsible for the state toxics account from which the mixed funding dollars come, and the director is expressly given the authority to determine that the settlement meets the criteria for mixed funding as outlined in the Initiative. Therefore the department believes the authority does rest with the director.

COMMENT 124

Pam Leister suggested a revision of Section 560(3)(b)(ii) which would require potentially liable persons to demonstrate they are not contributors to the releases for which mixed funding is being proposed.

RESPONSE

The department understands Ms. Leister's concern; however, the Initiative in Section 7(xi) expressly provides for public funding to assist potentially liable persons, and the regulation articulates under what circumstances that assistance can take place.

COMMENT 125

AGC commented that the mixed funding section should make specific reference to the application of mixed funding to contractor payments.

RESPONSE

The department recognizes that most remedial work is done by contractors, not the potentially liable person. Although there is no specific reference that monies allocated for mixed funding could be spent for payment of contractors, the department understands that the money will be spent in that manner.

COMMENT 126

Bruce Jones suggested that mixed funding should be available whether or not the persons are under a consent decree or agreed order.

RESPONSE

The Initiative is specific in only allowing mixed funding through a consent decree.

COMMENT 127

Bruce Jones commented that the potentially liable person should be allowed to explain and defend funding determinations during a review process.

RESPONSE

All funding decisions are at the discretion of the director.

COMMENT 128

Mr. Ken Weiner requested that the department include a commitment to set aside an amount for mixed funding either on an annual or biennial basis, in the mixed funding section or preamble.

RESPONSE

Due to the uncertainties in revenue and the inability to foresee which sites could qualify for mixed funding, the department has no framework from which to estimate and commit a fixed amount for mixed funding. The department is committed to evaluating mixed funding needs on a case-by-case basis and, in the future, considering allocating mixed funding monies as part of the biennial budget process.

COMMENT 129

Mr. Ken Weiner commented that the rule, definitions, or preamble or policies should clarify that governmental agencies may qualify for mixed funding.

RESPONSE

The department will clarify in future policies.

SECTION 600 - PUBLIC PARTICIPATION

COMMENT 130

Ms. Leslie Nellermoe suggested that the regulation include a thirty day deadline for the publishing in the register or communicating to the interested parties the department decision of "no further action" at a site.

RESPONSE

The department intends to respond in a timely fashion but due to workload priorities may not be able to meet a thirty day deadline.

COMMENT 131

Golder Associates recommended that requirements for the specificity of public comment, such as those included in WAC 197-11-550 and 40 CFR Part 1503.3, be incorporated into the regulation.

RESPONSE

The department feels that the public participation section is detailed enough and does not need specific requirements for public or agency comments.

COMMENT 132

Ms. Leslie Nellermoe recommended that the regulation give more detail about the site register, including where it will be kept and published, and how it will be distributed.

RESPONSE

The regulation does not give the details suggested by Ms. Leslie Nellermoe because the site register is a new project for the department and the maintenance of the register may change over time. At this point, it is anticipated that the register will be coordinated and mailed with the SEPA register, but this may end up as a temporary arrangement. The department does not want the regulation to lock us into a method that may not be the best in the long run.

COMMENT 133

Ms. Leslie Nellermoe suggested that high priority sites should be included on the hazardous sites list and notice of their inclusion should be part of the site register.

RESPONSE

Section 600(6)(h) states that the site register will include: "changes in site status or placing or removing sites from the hazardous sites list."

COMMENT 134

Ms. Leslie Nellermoe suggested that owner/operators be notified when their facility is listed on the register, as well as given the opportunity to comment, with the comments and agency response included in the register.

RESPONSE

The department agrees that owner/operators should be notified when their facility is put on the register. There is no formal comment period of the hazard ranking. Furthermore, the register is not intended for comments on actions. The information in the register will be to notify or announce to the public of changes or impending actions. The location of specific information will be given but not the information itself.

COMMENT 135

Ms. Leslie Nellermoe commented that the definition of "potentially affected area" is imprecise. She suggested that there is no reason for the potentially affected area to include more than those who live adjacent to the site or who are directly affected by the site.

RESPONSE

The regulation defines the "potentially affected area" as including "all property adjoining the site and any other area that the department determines to be directly affected by the proposed action." This definition gives the department some flexibility and is consistent with the comment of Ms. Leslie Nellermoe.

COMMENT 136

Ms. Leslie Nellermoe commented that a public participation plan will not be needed at each site and will be expensive. She suggested that this requirement be deleted and replaced with one that requires appropriate public notice and comment opportunities.

RESPONSE

The department is aware that some sites will not need an elaborate and expensive public participation plan. The department feels, however, the public participation needs for all sites should be evaluated. The department is working on a simple plan format for sites that do not need a extensive plan.

COMMENT 137

Ms. Leslie Nellermoe suggested that the regional citizens' advisory committees should allow potentially liable persons and their agents to be members because of their expertise with the cleanup process. She suggested that potentially liable persons be allowed to be members of the committees as long as they do not participate in recommendations that pertain to their site within the region.

RESPONSE

The role of the regional citizens' advisory committees is to solicit citizen input on the implementation of the Act. It is not intended to be a panel of experts. Potentially liable persons have other avenues to give input to the department.

SECTION 800 - PROPERTY ACCESS

COMMENT 138

AGC suggested that the regulation does not define "reasonable notice" nor does it define what "reasonable precautions" are.

RESPONSE

The regulation does define "reasonable notice" in section 800(1) in terms of time but does not define "reasonable precautions." The department thought it was advisable to simply set the standard but not try to describe it in detail. "Reasonable precautions" will vary depending on the circumstances at the particular site.

COMMENT 139

AWB suggested that subsection (1) be revised by adding a new subparagraph (c) which would require the department to provide the site owner/operator with information regarding the reason for the proposed access.

RESPONSE

The department clarified the contents of the notice which will address AWB's concerns.

COMMENT 140

AWB suggested that the regulation should include a provision for the department to designate a potentially liable person acting under an order or decree as an agent of the department.

RESPONSE

The department discussed this issue during the rule-making process. Although the department is sympathetic to the concerns of the potentially liable persons, it was thought to be unadvisable, from a legal point of view, to designate such persons as agents of the department because the state could be assuming liability for action taken by those designated agents (potentially liable persons). The department has made a firm commitment in the regulation to facilitate access whenever it is a problem.

COMMENT 141

AWB proposed that there be a procedure for designating documents as confidential and to protect such documents from disclosure.

RESPONSE

Procedures and standards to protect business confidences already exist in established state law. The specific legal authorities suggested by the AWB already apply to the proposed regulation.

SECTION 810 - WORKER SAFETY AND HEALTH

COMMENT 142

Ms. Leslie Nellermoe, Bruce Jones and Golder suggested that there not be a requirement for a submittal of safety and health plan because of various reasons.

RESPONSE

The department recognizes that the Department of Labor and Industries has the final authority for review of safety and health plans. It is important, however, for the department to have these plans on file for sites over which we have oversight and to be aware of the contents of these plans, so we can work more effectively on these sites and inform the Department of Labor and Industries when inappropriate safety procedures are being followed.

SECTION 820 - SAMPLING AND ANALYSIS PLAN

COMMENT 143

Bruce Jones commented that the second sentence in subsection (1) is ambiguous and should be deleted.

RESPONSE

The level of detail is commensurate with the scope and purpose of the sampling activity. Although subsection (2) outlines the contents, it does not specify the level of detail necessary to fulfill the requirements. A previous sentence specifies the level of detail.

COMMENT 144

Bruce Jones commented that the first and second sentence in subsection (2) are ambiguous and should be deleted.

RESPONSE

These are the general overriding standards the plans must meet and are meant to be general.

COMMENT 145

Ms. Leslie Nellermoe commented that the sampling and analysis plans appear to duplicate aspects of the lab certification regulations. She suggested that the regulation should exempt a potentially liable person from some of the parts of Section 820 if a certified lab is used.

RESPONSE

Certification of a lab does not necessarily address the requirements for a sampling and analysis plan. However, if a lab has been certified and if that certification addresses the sampling and analysis plan informational needs, the plan may reference the certification information to fulfill these needs.

SECTION 840 - GENERAL SUBMITTAL REQUIREMENTS

COMMENT 146

Mr. Ken Weiner commented that the "General Provisions" plans be made consistent with the requirements in preceding parts of the rules, especially Section 400-420.

RESPONSE

Without further information the department is unable to understand the concern expressed.

SECTION 850 - RECORDKEEPING REQUIREMENTS

COMMENT 147

The AGC believes that a ten year recordkeeping requirement is too lengthy and an alternative provision should be made for allowing records to be transferred to the state.

RESPONSE

The department sees a need for responsible parties to maintain information long enough for the department to be assured the remedy did indeed work and, if it hasn't, the department can readily retrieve the information necessary to evaluate what went wrong. The department does not have the facilities to store records and make them readily retrievable for the hundreds of potentially liable persons and their contractors in the state.

cc: Pete

Pam Liester
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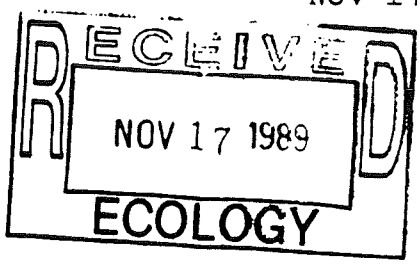
Nov 14, 1989



Hazardous Waste Investigations
and Cleanup Program
Department of Ecology
MS: PV-11
Woodland Square Building
Olympia, WA 98504

Ecology staff,

Although I'm generally impressed and comfortable with the rules to implement the MTCA, I do have reservations, particularly with regard to mixed funding. I think the following provision, or something comparable, should be added to Section 340-560·(3)(b)(ii) so that the department shall consider the extent to which mixed funding will

> "Achieve greater fairness with respect to the payment of remedial action costs between the potentially liable person entering into a consent decree with the department and any nonsettling potentially liable persons. In these circumstances, potentially liable persons must provide clear evidence they did not contribute to releases for which remedial costs are found to be eligible for mixed funding."

By adding this provision, the burden of proof will be on the PLP's to demonstrate they are not contributors to releases for which the total culpability is unclear, if remedial costs are to qualify for mixed funding.

The issue of joint liability is central to the Act. "The deep pocket pays" - even though it is often difficult or impossible to identify all responsible parties and assign specific shares of remedial costs. Many delays and avoidance of cleanup have resulted, in the past, from this confusion. Where more than one party are suspected contributors to a particular release, it must be clear that Ecology need not show that a confirmed PLP did contribute to the release, in order to immediately recover remedial costs; rather the PLP should demonstrate that they were not contributors, in order to qualify for mixed funding. Without some such qualifying provision, the sites that are found to be eligible for mixed funding will almost certainly far outdistance limited available public funds.

As the rule is currently drafted, cleanups may be delayed because the issue of cost allocation is brought into question with a determination by Ecology that the site qualifies for mixed

funding, even though public funds may not be available immediately or in the near future to provide the remedy. Clearly, cleanup postponements that may unnecessarily result from confusion over liability would not be consistent with the language or intent of the Act.

Even with the addition of the recommended provision, the principle of joint liability, which is so clearly established by the Act, is apt to be compromised by allowing public funds to be used at sites where a responsible party has been identified and is able to pay remedial costs. However in the interest of promoting voluntary settlements, the current rule may expedite cleanups if it's accompanied by firm controls such as the recommended stipulation.

Thank you.

Sincerely,

Pam Lester

ASSOCIATED GENERAL CONTRACTORS OF WASHINGTON

November 15, 1989

Ms. Phyllis Baas
Department of Ecology
MS: PV-11
Olympia, WA 98504-8711

Dear Ms. Baas:

Recently, the Associated General Contractors of Washington formulated a Task Force to review the Model Toxics Control Act regulations currently under consideration by the Department of Ecology. Apparently, the public hearing deadline has been extended until January 19, 1990. However, we wish to submit our comments prior to November 17, 1989 to ensure that our comments are considered before any revisions to the rules occur.

Therefore, the AGC submits the following comments for Ecology's consideration prior to promulgation of the proposed Model Toxics Control Act regulations.

PART I: OVERALL CLEANUP PROCESS

AGC Concerns: The AGC notes that the regulations require reporting of all quantities of hazardous waste releases. Unlike federal CERCLA there are no de minimis reporting provisions. That is to say, there are no provisions for non-reporting of small quantity releases.

The AGC further notes that these regulations allow for "independent actions" (WAC 173-340-120(6)(b)). However, the operative language of the regulations requires that such independent actions which may be taken without departmental approval are taken at the risk of the person or persons taking such independent action.

AGC Comment: The AGC supports the position that the regulations need to include a de minimis provision that would excuse contractors from reporting releases under a certain quantity. The requirement of reporting any release no matter how small has the potential of placing an onerous burden on the contracting industry. The independent action provisions will be discussed later in this letter at Part III: Site Reports and Cleanup Decisions.

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PART II: DEFINITIONS AND USAGE

AGC Concerns: The AGC takes specific note of the definition of "groundwater" per WAC 173-340-200(17) and also the definition of "sensitive environment" per WAC 173-340-200(40).

The AGC has concern for ambiguities that can arise in defining groundwater. Groundwater is defined as "subsurface water that occurs in soils in geologic formations that are fully saturated." As currently written, it would appear that the definition does not include geologic systems that are not fully saturated, such as perch systems, or systems with full saturation of a portion of a system. The phrase is too ambiguous. DOE may wish to look at its regulations relating to what constitutes an aquifer for guidance on this matter.

Another issue involves decerning when a formation may be considered to be fully saturated, since many systems on the west side of the Cascade Mountains are fully saturated all winter and totally dry all summer. This definition is important because WAC 173-3490-130(7)(c) provides that cleanup of groundwater will not normally be considered a routine cleanup action. Accordingly, a more precise definition is important for utilization by contractors since precision will avoid disputes in litigation.

The definition of "sensitive environment" includes wetlands; critical habitat for endangered or threatened species; national or State wildlife refuge; critical habitat, breeding or feeding area for fish or shellfish; wild or scenic river; rookery; riparian area; big game winter range; or other area of special environmental concern. There is no specific definition within the regulations for what constitutes a "wetland." Wetland terminology should be further defined in the regulations as "wetlands" may be construed as a legal term of art. In addition, the regulations place the burden upon those taking action at a site, including contractors, to determine whether or not they are in fact dealing with a "sensitive environment."

AGC Comment: The AGC supports the position that groundwater should be further defined so as to eliminate any ambiguity. This will avoid disputes and litigation as a result of imprecision and definition. Further, the AGC supports the position that the burden should be on the State to designate "sensitive environments." This would shift what would otherwise be a potential contractor's liability to State regulatory agencies to designate "sensitive environments."

PART III: SITE REPORTS AND CLEANUP DECISIONS

AGC Concerns: This section of the proposed regulations mentions the ability to take "independent action." The AGC has identified the right of independent action as an attempt by the State to encourage cleanup activity. However, the language of independent action provisions within the regulations tends to be perceived as threatening in that the language identifies that those taking independent actions do so at their own risk.

AGC Comment: The AGC supports the position that if it is the State's intention to encourage independent action regarding cleanup activities, the language that accompanies the independent action option should be less threatening and offer more incentive for contractor performance of independent actions.

PART IV: SITE CLEANUP AND MONITORING

AGC Concerns: WAC 173-340-400(4)(a)(viii) states that cleanup actions must include a design engineering report that includes:

> "engineering justification for design and operation parameters including: design criteria, assumptions and calculations for all components of the cleanup actions; expected treatment, destruction, immobilization, or containment efficiencies and documentation on how that degree of effectiveness is assured; assurance that the cleanup action will achieve compliance with cleanup requirements by citing pilot or treatability test date results from similar operations, or scientific evidence from the literature;"

(Emphasis added). The express concern of the AGC is that the use of the word assured and assurance places a de facto warranty on the work performed by contractors and may be legally actionable in the event that cleanup requirements are deemed not to be met. This is simply unartfully drafted language in the regulation and should be changed.

WAC 173-340-3400(6) discusses administrative actions but does not define what administrative actions are. This is once again unartful drafting which needs to be corrected.

WAC 173-340-430 discusses interim actions. Two concerns are identified with regard to this particular regulation. WAC 173-340-430(4) regarding submittal requirements states that,

> **"Prior to conducting an interim action a report shall be prepared. Reports prepared under an order or decree shall be submitted to the Department for review and approval. Reports shall be of a scope and detail commensurate with the work performed and site specific characteristics shall include as appropriate. . ."**

(Emphasis added). The AGC is concerned with the use of the word "shall" in this subsection in that it may be inconsistent with the definition of "shall" in the usage section of Part II of the regulations. Interim actions are generally considered to be actions performed on an expedited basis as exemplified within the regulation itself. If this is the case, then making it an absolute requirement for reports to be submitted prior to carrying out an interim action may in fact defeat the purpose of the section.

Further concern regarding this section relates to separating interim actions from emergency actions. As it is currently written, no interim action may be taken without a report, and there is no section referencing emergency action. Earlier sections of the regulations (WAC 173-340-310) distinguish between emergency and remedial actions. Therefore, it seems appropriate for a regulation to specifically deal with emergency actions.

AGC Comment: The AGC supports the position that using unartful drafted language that would create contractor warranties is inappropriate and should be changed. The AGC also supports the position that administrative actions need further definition. Further, Section 430(4) should be modified to make reporting requirements non-mandatory in certain situations. Regulations need to be developed regarding emergency actions.

PART V: ADMINISTRATIVE PROCEDURES FOR REMEDIAL ACTIONS

AGC Concerns: This section discusses the performance of independent remedial actions at the potentially liable person's own risk without Departmental approval. (WAC 173-340-510). Although this part makes no specific reference to remedial action contractors, the AGC takes note that the independent actions contain "at risk" provisions and do not offer any indemnification for contractors performing those actions. In fact, the only reference in the entire regulatory scheme to contractor indemnification may be found in I-97, Section 3(C), indicating that contractors retained by Ecology for carrying out investigations in remedial actions may be indemnified and such indemnification is a discretionary function of Ecology.

Of further concern is the mixed funding provision. WAC 173-340-56 refers to mixed funding and under what circumstances the State may offer to partially fund the cost of cleanups at hazardous waste sites. There is no specific reference to contractors in this section. Therefore, there is no specification as to whether mixed funding may be applied to contractor payments.

AGC Comment: The AGC supports the position that remedial action contractors be indemnified for work performed at sites and also supports the position that any mixed funding provisions in the regulations specifically allow for the use of mixed funding in contractor payments.

PART VI: PUBLIC PARTICIPATION

AGC Concerns: The AGC has no specific concerns with this section.

PART VII: CLEANUP STANDARDS

AGC Concerns: WAC 173-340-800 refers to property access and allows for a contractor after "reasonable notice" to enter upon any real property, public or private, to conduct investigations or remedial actions. The regulation, however, does not discuss what constitutes reasonable notice and places the burden and risk

arguably on the contractor to make that determination. The same section also discusses ongoing operations and specifically indicates that persons gaining access under the section shall take "reasonable precaution" to avoid disrupting the ongoing operations on a site. Once again, the section does not define what "reasonable precautions" are and leaves it up to the contractor, arguably, to make such determinations. Similarly, the section provides for emergency entrance and indicates that notice is not required for contractors to enter in an "emergency." However, as previously noted, there is no discussion of what constitutes an emergency, leaving it once again for the contractor at his or her own risk to determine whether there is or is not an emergency.

WAC 173-340-850 addresses recordkeeping requirements and requires that records shall be retained for at least ten years from the date of completion of compliance monitoring. The records are to be retained by the person taking the remedial action unless Ecology requires that the person submits the records to Ecology. This section would potentially require contractors to plan for maintaining voluminous records in storage at contractor facilities for the requisite period of time. This is an onerous burden to place on contractors. This burden can be ameliorated by either reducing the time required for maintaining records or allowing for records to be tendered to the State at contractor request.

AGC Comment: The AGC requests that the regulations either require the State to determine what is "reasonable" in all situations of property access or, in the alternative, indemnify contractors who are required to make those determinations. Further, the AGC believes that a ten year recordkeeping requirement is too lengthy and in the alternative a provision should be made for allowing records to be transferred to the State.

GENERAL CONCERN

The major issue of indemnification, which has been almost entirely overlooked, must be addressed in these regulations and in the statute. There is no response action contractor indemnification specific provision to be found in either I-97 or the regulations that have been developed. With the exception of I-97, Section 3(c), which allows for discretionary indemnification with Ecology, there is no reference to contractor indemnification or a requirement for same.

Contractor indemnification is critical to the success of the act. Response action contractors have traditionally relied on commercial liability insurance or indemnification to sufficiently offset their potential liability risks from participation in cleanup programs. Historically, during the federal Superfund reauthorization debate, the response action contractor community identified several factors which the response action contractors contended impaired their ability to adequately offset risk. These factors included (1) subjection to strict joint and several liability under Superfund and some State laws, and (2) the inability of the commercial liability insurance market to provide liability insurance coverage to response action contractors

involved in hazardous waste programs. The United States Congress, recognizing that lack of indemnification was delaying Superfund cleanup processes, amended CERCLA in 1986 to include Section 119, which specifically addresses contractor indemnification provisions.

The AGC strongly supports the position that indemnification for response action contractors is imperative. By making statutory reference to indemnification, the State has broad latitude to include a regulatory scheme which would address the indemnification issues. At the very least, the State of Washington should be required in its regulatory scheme to address the needs of response action contractors in a like or better fashion than federal law.

Thank you for the opportunity to be heard. Should you have any questions regarding these comments, please contact me at the below-noted Seattle address and telephone number.

Very truly yours,

Jennifer Sheldon

Jennifer B. Sheldon
Director of Regulatory Services
Associate Counsel

cc: Duke Schaub, AGC Director of Governmental Affairs
Richard Bristow, AGC Executive Director
Dennis Dickert, AGC President
John Abbott, Co-Chair AGC Government Affairs Committee
Mary Lee Mueller, Co-Chair AGC Government Affairs Committee

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November 17, 1989

Carol Fleskes
Department of Ecology
MS PV-11
Olympia, WA 98504

Re: Proposed Regulations Implementing Model Toxics Control Act, ch. 173-340 WAC

Dear Ms. Fleskes:

In response to regulations recently proposed by the Department of Ecology ("Ecology") to implement the Model Toxics Control Act ("the MTCA" or "the Act"), Heller, Ehrman, White & McAuliffe provides the following comments on behalf of Kaiser Aluminum and Chemical Corporations, Intalco Aluminum Corp., Vanalco, Inc., Reynolds Metals, and Aluminum Company of America.

The comments cover the following general areas of concern: certain definitions and usage of terms delineated by the regulations; the reporting regulations; permits for remedial actions; the number and scope of plans required by these regulations, especially when considered with the time lines for completion of various sorts of activities; regulation of independent cleanups; the contents and use of the site register; public participation, including the citizen's advisory groups; the provisions regarding the recovery of costs and contribution actions; and the omission of regulations pertaining to a de minimis contributor to the site. Each of these general areas will be addressed.

I. DEFINITIONS.

As proposed, WAC 173-340-200 includes several definitions that present difficulties. In addition, the chapter does not include definitions of certain terms that are used throughout. A discussion of the definitions included and the definitions omitted follows.

A. Definitions. The definitions of concern are several. They include the definitions of "environment," "facility," "ground water," "owner or operator," "site," and "surface water." The bases for the concerns vary as the discussion illustrates.

1. "Environment," Section 200(13). As defined, "environment" includes the built environment. This poses significant problems. The first is that releases to the "built environment" would include unintentional spills and other releases inside buildings that occur on a fairly regular basis around the state. Most such spills are immediately cleaned up and therefore not likely to create or add to contamination at the site. The operational impact of the proposed requirement that releases inside a building must be reported to Ecology is potentially enormous. Not only will this have significant impacts on the day-to-day operations of many businesses, it will also hamper Ecology's ability to respond to reports and investigate all such releases within ninety days as required by Section 3(2)(c) of the Act.

In addition, a second problem is posed by this definition. It appears to be borrowed from the State Environmental Policy Act, ch. 43.21C RCW, ("SEPA") and the implementing regulations, ch. 197-11 WAC, both of which use the term "built environment." As used in that context, the term has acquired a very specific meaning which does not match that assigned by the proposed section 200(13). See, RCW 43.21C.110(f) which, for example, defines the "built environment" to include such things as public utilities, transportation, and land use. If Ecology intends to regulate releases inside buildings, a better approach would be to state its intention, rather than to borrow a definition that is not well-suited for application in this context. For example, the SEPA definition includes public utilities and excludes private utilities. That distinction, although meaningful in the SEPA context, is not meaningful in this context. We recommend that the reference to "built environment" be excluded from the proposed definition of "environment."

2. "Facility," Section 200(15). The definition in the proposed regulation comes from the Act, Section 2(3). The statutory definition is imperfectly punctuated. Under the Act, "facility" means:

> (a) any building, structure, installation, equipment . . ., or
>
> (b) any site or area where a hazardous substance, . . ., been deposited, stored, disposed of, or placed or otherwise come to be located.

Section 2(3) of the Act.

The apparent drafting error was in not making the last clause of subsection (b) applicable to both the buildings, structures, etc. and sites or areas at which hazardous substances are found. As written, every well and every ditch in the state are facilities.

Ecology should take the opportunity presented by the promulgation of these regulations to clarify this definition. Clarification would be provided by defining "facility" as:

> (a) any building, structure, installation, equipment . . ., or
>
> (b) any site or area,
>
> where a hazardous substance, other than a consumer product in consumer use, has been deposited, stored, disposed of, or placed, or otherwise come to be located.

Revising the definition of "facility" in this way would also clarify the definition of "site" in proposed Section 200(41). The current definition is circular. Changing the punctuation in the "facility" definition would eliminate the circular nature of the definition of site as well. "Site" would become a shorthand way of describing both structures and geographic areas in which hazardous substances have, by some mechanism, come to be located.

3. "Ground water," Section 200(17). The proposed definition is over broad. As defined in the proposed regulations, ground water would include any water in the soils in Western Washington during a good part of the year. A better definition would be:

> Waters found in a subsurface geologic formation or group of formations capable of yielding a significant quantity of water to wells or springs.

4. "Owner or operator," Section 200(29). This definition also tracks the definition given this term by the Act. It does not, however, include the provisions of the Act that exempt the so-called innocent landowner from liability. Section 4(3)(b). Although the exemption from liability is not, under the statutory scheme, a part of the definition of "owner or operator," the addition of a reference to the exemptions from liability would assist the reader of the regulations.

5. "Surface water," Section 200(45). The definition appears to be overly broad. It includes public and privately owned natural or constructed lakes, water courses, etc. As drafted, it would appear to include water conveyance structures, like pipelines, which properly should be regulated through another part of the proposed regulations.

B. Undefined Term. In several places throughout the proposed regulations, the term "high priority site" is used. See, e.g., Section 140(5), and (6). It is nowhere defined. Without a definition, or some mechanism for ascertaining whether a site is a "high priority site," those persons involved with such a site are hampered in their ability to plan and to respond to the problems at their site.

II. RELEASE REPORTING REQUIREMENTS.

The Act states in Section 3(5) that Ecology is to establish a program to: "identify potential hazardous waste sites and . . . encourage persons to provide information about hazardous waste sites." The Act does not mandate reporting of a release or spill under any circumstance -- a marked departure from federal and previous state law. Further, the Act does not distinguish between classes of persons, "owners or operators" and "others" in the manner proposed in these regulations.

Despite the absence of statutory authority to mandate reporting, the agency has apparently made the policy decision that a reporting requirement is necessary to its ability to identify "potential hazardous waste sites." As drafted, the proposed regulation requires that the owner or operator of a

facility must report releases discovered before and after the effective date of the regulations. WAC 173-340-300. In addition, "other persons are encouraged to report such information." Id.

Given the problem created by the absence of statutory authority to require reporting of releases, it is very important that the proposed reporting scheme be realistic and workable. First, in the proposed regulations, there is at least an implication that a review of historical practices or interviews of past and present employees must be undertaken to meet the requirement that releases of hazardous substances discovered before the effective date of the regulation be reported. Section 300(1). The regulation should clearly state that no such review is required. Subject to the conditions discussed in the following paragraphs, reports would be required only at the time a release is discovered, whether the release occurred in the past or is a current release.

Second, the regulation should clearly state that only releases of hazardous substances that actually present a threat or potential threat to human health must be reported. Section 300(2). The threat or potential threat condition should apply to both past releases reported upon the effective date of the regulations and to releases identified in the future. This is consistent with the agency's view of the information necessary to institute action at a site. When a determination is made that a party is a potentially liable party, for example, Ecology's notice letter to that effect will describe the basis:

> for the department's belief . . . that the release or threatened release poses a threat or potential threat to human health or the environment.

Section 500(2)(d).

Furthermore, a level of significance should be assigned to the threat posed by those releases that must be reported. Without a requirement that the threat posed by the release be significant, no release of a carcinogen would ever escape the reporting requirement. An illustration of the problems this would pose is found at the neighborhood gas station. Every spill of gasoline, which contains carcinogens, of whatever size, would fall within the reporting net. Gas station operators would spend virtually all of their time reporting overfills of car and truck gasoline tanks as well as other releases. This problem can be

remedied by adding the word "significant" as a modifier before the phrase, "threat or potential threat" in the proposed definition.

Another mechanism to measure the significance of a release is the use of the reportable quantities for hazardous substances. The Environmental Protection Agency ("EPA") has recognized the importance of requiring only significant releases to be reported. EPA has developed a series of reportable quantities for various substances. This system is already in place and the required reports are made now.

Third, Section 300(2) should be revised to state that a facility owner or operator is required to report only releases that occur at his or her facility. Without that clarification, the operator of a facility in an industrial park, for example, would have the obligation to "tattle" on the neighboring facility if a release of some sort were observed across the property boundary.

These revisions are consistent with the "main purpose" of the MTCA which is to "cleanup all hazardous waste sites and to prevent the creation of future hazards . . . . ." (Emphasis added.) Section 1(2). Additional discussion of reporting requirements as they apply to independent cleanups is found in Section V of these comments.

III. PERMITS REQUIRED FOR REMEDIAL ACTIONS.

Chapter 70.105B RCW specifically exempted remedial actions from the permitting requirements of state and local governments. Included within this exemption were such things as grading permits, waste water discharge permits, and shoreline permits. The Act includes no such exemption. The regulations attempt to address the problems created by the absence of the waiver in the Act. In so doing, however, Ecology avoids taking a position on the critical issue: Are state and local permits required for remedial actions undertaken pursuant to the Act? A second question, tied to the permitting question is whether compliance with SEPA by both Ecology and local permitting agencies will be required or excused by these regulations or other regulations already in place. The applicability of local permitting requirements to remedial actions under the Act and the operation of SEPA in this arena will be discussed below.

A. Local Permits. There are several sections in which the regulations appear to address the permit question. The first, Section 130(9) is titled "Inter-agency coordination." On its face, it purports to impose a duty on Ecology to keep other governmental agencies and tribal organizations apprised of the status of remedial actions in which they may be interested. It further specifies Ecology's role in obtaining participation from other agencies. It is our understanding that this section addresses the local permitting issue and allows Ecology to intervene in that process. That understanding is not gleaned from the proposed regulation, however. As written, this section is very difficult to understand and its meaning is, at best, unclear.

Other oblique references to local permits are found elsewhere in the proposed regulations. In Section 400(4)(a)(xii), the proposed regulations require the cleanup plan to describe the relationship of the proposed cleanup to "local planning and development issues." A second reference is found in Section 400(6) in which the proponent of a cleanup action is directed to identify "administrative actions required for construction or to otherwise implement the cleanup action." Again, one interpretation of this proposed provision is that the cleanup action proponent is to identify the permits, both local and state, necessary for construction of the remedial action.

There are several problems with these sections. First, their meaning is not clear. If the topic of these sections is local permits, that should clearly be stated. Second, if the regulations are an attempt to somehow avoid local and state permits, that too should be clearly stated. The Act does not specifically exempt remedial actions from state and local permit requirements. If Ecology is attempting, in these regulations, to provide an exemption from permitting requirements, the exemption should not be hidden in impenetrable language. Finally, if Ecology intends to provide assistance to liable parties or potentially liable parties in their pursuit of permits, that too should be stated and the type of assistance to be provided described in definite terms.

In addition to our concern about the basis for an exemption from state and local permitting requirements, these sections create apprehension about the ability to complete a remedial action in a timely manner. The practical implication of the permitting requirement is the time compliance takes. The permitting processes involved are complicated, in many cases

cumbersome, and lengthy. As a result, the timelines of the proposed regulations are in serious jeopardy.

For example, the proposed regulation contemplates the completion of all Remedial Investigations/Feasibility Studies within eighteen months. Section 140(6). A Feasibility Study may include a ground water treatability study. The treated water must be discharged which discharge may require a state waste discharge or NPDES permit. The minimum time within which a discharge permit can be processed, according to some Ecology staff, is six months. Much of the allotted eighteen months may have elapsed before the permit is obtained.

A second example is excavation of a test pit within two hundred feet of a shoreline. A local shoreline development permit may be required for that activity. Under some circumstances, the issuance of the shoreline permit will also trigger the preparation of a mitigated Declaration of Nonsignificance or an Environmental Impact Statement under SEPA. The time necessary to complete the permitting process may exceed the eighteen months allowed by the proposed regulations for the completion of an RI/FS. (Additional discussion of the SEPA implications of actions taken pursuant to the Act follows in subsection B of this section.)

Although Ecology may be able, in some circumstances, to expedite permit processing where it is the permitting agency, other state or local agencies may not be as motivated to expedite their processes to facilitate a remedial action. The proposed regulations should clearly state that state and local permits otherwise applicable to remedial actions are required. Further, the proposed deadlines for completion of various actions found in Section 140 should be carefully reviewed with this practical consideration in mind. The goals for completion of various actions should be flexible enough to account for the vagaries of the permitting process.

B. SEPA Compliance. SEPA is designed to ensure that government decision makers are made aware of the potential significant adverse environmental impacts of a proposed governmental action. It applies to state agencies as well as local government. There are, therefore two different situations in which the question of SEPA compliance will arise. The first is the situation in which Ecology is making a decision, issuing a permit or enforcement order, which could trigger review of its

environmental impacts. The second situation in which SEPA may be an issue is at the local government level when a city, county, or other agency is contemplating issuing a permit for some aspect of a remedial action. The first situation, Ecology's application of the SEPA process to its decisions does not appear in the proposed regulations. The second situation, local government compliance with SEPA is incompletely discussed in the regulations.

As proposed, the regulations do not clearly address the application of SEPA to local government actions. There are two puzzling references to information necessary to meet the requirements of SEPA. The proposed regulations state in at least two places that reports must include enough information to "fulfill the requirements of the State Environmental Policy Act." Section 350(6)(h), (pertaining to Remedial Investigation/ Feasibility Study ("RI/FS") Reports); Section 400(4)a)(xvi), (pertaining to plans for cleanup actions.) As noted above, SEPA requires consideration of the probable significant adverse environmental impacts of governmental action. Usually, the submission of an RI/FS report or a cleanup plan is not a governmental action, so the reference to SEPA seems out of place. Further, if the regulation is attempting to ensure that the necessary information is supplied to the local governmental officials and permit writers, the proposed regulations should direct the submission of the information to local government, not to Ecology.

The second situation, Ecology action selecting a remedial action, approving a plan, or issuing an order, for example, should also be addressed. The SEPA guidelines categorically exempt enforcement actions and inspections from threshold determination and EIS requirements. WAC 197-11-800(13). In addition, the categorical exemptions for Ecology, WAC 197-11-855, also exempt the issuance of waste discharge permits, issuance of short-term water quality standards modifications, and the approval of engineering plans from the SEPA process. If Ecology is relying on these categorical exemptions for the proposition that some or all of its decisions under the Act and the proposed regulations are not subject to environmental review, the reliance should be disclosed clearly. If there are actions which Ecology does not include in the exemption category, that too should be disclosed in these regulations.

Our concerns about SEPA and its application to the processes to be governed by the proposed regulations pertain not only to disclosure by Ecology of the extent to which the processes apply,

but also to the time SEPA compliance will take. Generally, the process of preparing an Environmental Impact Statement ("EIS"), will add at least twelve months to any action. If there is a legal challenge to the sufficiency of the EIS, the permitting agency may have to wait up to two years for a judicial determination of the issue. Again, these concerns warrant a careful review of the proposed deadlines in Section 140.

IV. PLANS REQUIRED FOR REMEDIAL ACTIONS.

The process created by these regulations is quite cumbersome. For purposes of illustration, assume that a current release is detected by the owner or operator of a facility. A report must be made to the department, to an as yet unspecified person or position. The report must contain the following information: the identification and location of the hazardous substance, the circumstances of the release and the discovery, and any remedial actions that are planned or underway. Section 300(2).

Upon receipt of the release report, the agency must perform an initial site investigation. Section 310(1). An agency report must be prepared. The agency may chose one of several options for further action. If the site is assessed as posing a threat or potential threat to human health or the environment under the site hazard assessment procedure, the agency may require a remedial action. Section 310 (5). If, in the meantime, an interim remedial action is undertaken, another report must be submitted to the agency. Section 430. The report must be accompanied by a compliance monitoring plan, a safety and health plan, and a sampling and analysis plan. Section 430(4). A public participation plan may also be required.

Assuming either that the potentially liable parties and the agency reach an agreement on what should be done or the agency makes a unilateral determination and issues an order, another round of report writing begins. Section 510. A report must be submitted at the completion of the remedial investigation/ feasibility study ("RI/FS"). The contents of the report, for all sites unless otherwise determined by the department, are listed in Section 350. In addition, a sampling and analysis plan must be prepared as required by Section 820; a safety and health plan pursuant to Section 820 must be submitted and a public participation plan must be prepared pursuant to Section 600(8).

Selection of the cleanup actions triggers another series of plans and reports. The department is required to issue draft and final cleanup action plans. Section 360. The parties implementing the plan are required to prepare sampling and analysis plans, health and worker safety plans and a public participation plan. In addition, the following reports will be required: the design engineering report, Section 400(4)(a); the construction plans and specifications, Section 400(4)(b); an operation and maintenance plan, Section 400(4)(c); and such other information as may be requested by the department. Section 400(5).

As construction is underway, detailed records of the construction with specified contents must be kept. Section 400(7)(b). As built reports must be submitted to the department. Section 400(7)(b)(ii).

After the cleanup action is constructed, compliance monitoring will be undertaken. A plan for that monitoring, along with a sampling and analysis plan must be submitted to Ecology. Section 410.

The regulation as proposed would require the preparation of up to twenty separate reports and plans by the agency and the responsible parties. It does allow the agency to modify the requirements and to allow combination of two or more reports into one and the use of plans prepared for one phase of activity at a site to be used for a later phase. The regulations should be written in the reverse. That is, the general rule for state sites should be that the reports and plans required are combined to the maximum extent possible. If, for some reason, the conditions at a particular site require more analysis or study, Ecology can require that study via an order or as a part of a consent decree.

A second point must be made about the various reports and plans. The regulations state that the plans and reports must be submitted to Ecology, and imply that no further action can be taken until Ecology approves the submittals. There is, however, no requirement that the agency review the submittals in a timely fashion, nor is there any provision in the deadlines section, Section 140, for extensions of deadlines occasioned by Ecology's delay in reviewing various documents. It appears that the system as proposed will quickly reduce the agency to foundering in paper and will hamper, rather than hasten, remedial actions throughout

the state. A thirty day period during which Ecology will review and approve submittals should be included in the regulations.

Finally, with regard to the health and safety and sampling and analysis plans, a couple of comments are offered. The section on health and safety plans, Section 810, refers to existing regulations on worker safety that are already in place. In addition, the proposed regulation notes that Ecology does not intend to supplant those regulations. If that is the case, the regulation should properly note the existence of the other regulations and direct that actions undertaken pursuant to the Act should comply with the extant regulations. There is no reason to demand a separate "health and safety plan." Finally, the sampling and analysis plans appear to duplicate some aspects of the laboratory certification regulations. If that is the case, the use of a state or federally certified lab with quality control/quality assurance procedures in place should exempt one from the requirements of Section 820 that are repetitive.

V. INDEPENDENT REMEDIAL ACTIONS.

The regulation discusses independent actions in a couple of ways which, because of the structure of the regulations, may create more uncertainty than certainty about the manner in which an independent action may be undertaken and reviewed by the agency. First, in the Overview, the regulation notes that nothing in the chapter prohibits persons from undertaking an independent investigation or cleanup at the site. Section 120(6)(b). This is repeated in Section 510(4). These sections suggest that independent actions are just that, independent of agency review and oversight. Other sections of the proposed regulation appear to require persons conducting independent actions to submit various reports to Ecology and, presumably, to obtain Ecology approval before proceeding. See, Section 400. Section 360 requires Ecology to prepare a cleanup plan for "cleanup actions conducted under the provisions of this chapter," presumably including independent actions as well as state-supervised actions.

Further confusion is added by Section 300(4)(a) which lists specific information that must be included in the report to be prepared by the person who undertook an independent action. When Section 300(4) is read with the sections described in the previous paragraph of these comments, it is unclear whether all of the reporting and plan preparation requirements of the regulations apply to independent actions or whether only the

limited provisions of Section 300(4) apply. A thoughtful review of the various provisions pertaining to independent actions should be performed.

Two concerns should be considered during the agency review of its approach to independent actions. The first pertains to which of them must be reported. The second pertains to the nature and contents of the report to be made when required.

Our first concern is that the proposed regulations require reports on too many independent actions. As noted in Section II of these comments, only releases that pose a real significant threat or potential threat to human health or the environment would be reported. The independent action reporting requirements should be similarly limited. Only independent actions undertaken to remedy reportable releases should trigger a reporting requirement. Other releases and the independent actions to remedy them should not be subject to the reporting requirement.

Of course, any person undertaking an independent action does so at his or her own risk. The report to the agency will trigger the initial investigation requirements of the statute and proposed regulations and may lead Ecology to take an active role at the site. The person taking the action will also always have the option of advising the agency of its intended course of action and may, in certain circumstances, request that an agreed order or consent decree be negotiated under Sections 520 and 530 to limit the risk of Ecology imposing additional requirements on the action.

Second, without agency involvement, there is no need for an independent action to follow the planning and reporting requirements for agency supervised or agency implemented actions. With an independent remedial action, the interest of the agency is in determining, upon receipt of the report of a release, whether the site poses a threat to human health and the environment. The various reports that would be required during the course of an agency supervised action are not necessary to achieve this goal. Reports including only the information specified in Section 300(4) will give Ecology adequate information for the initial investigation it must perform. Additional information necessary to evaluate the threat posed at a particular facility can be collected by Ecology using the procedures of Sections 310 and 320. Other reporting requirements should be clarified to eliminate the confusion about their applicability to independent actions.

The proposed regulatory structure is a disincentive to voluntary action. The statutory goal is to achieve expeditious cleanup of [illegible]minated sites throughout the state. The suggested c[illegible] in the proposed regulations pertaining to independent actions foster voluntary actions and should be made.

VI. SITE REGISTER.

The regulations create a new "site register" on which reported various sorts of information will be listed. Section 600(6). Some thirteen types of notices will be routinely published in the site register. They range from determinations that no further action is required to the availability of various plans and reports for review. There are some problems with the register as it is proposed.

First, the regulations do not state where this register will be kept, where it will be published, or how it will be distributed. Further, the regulations do not require the department to notify the owner/operator of the site when the site is, in fact, listed on the site register. More detail should be provided on the creation and maintenance of this register.

Next, Section 140(4) requires the state to develop a list of high priority sites that will appear in the register. Various actions pertaining to these listed sites are also required later in the chapter. There is, however, no clear statement defining what "high priority" means. As noted in the first section of these comments, that omission should be rectified. Further, these sites should appear on the hazardous sites list, and, the notice of their inclusion on the list should be published in the state register.

Finally, there should be clear provisions for site owners and operators and other potentially liable parties at a site to receive notice of all of the listings in the register of information pertaining to their sites. An opportunity to comment and a vehicle for publishing the comments and the agency responses to the comments in the register should also be included.

VII. PUBLIC PARTICIPATION.

Our comments on the proposed scheme for ensuring public participation in the remedial action process have two parts. The first pertains to Section 600 of the proposed regulation. The second involves the eligibility requirements for citizen members of the regional advisory committees. The subsequent paragraphs address each of these issues.

A. Section 600. Public participation is a critical part of the remedial action process. However, it appears that Section 600(2) of the regulation oversteps the bounds of the agency's authority by creating a process that will generate public concern when, in fact, there may be none. An example of this is the subsection that states that the department will send notice to those residents of the "potentially affected vicinity." The latter term is imperfectly defined, and is perhaps incapable of definition. There is no apparent reason for expanding the list of those who receive direct mailings beyond those who live or work adjacent to the site or who are directly affected by the site.

The requirement that a public participation plan be prepared at every site is ill-conceived with regard to many potential sites. Not all sites will need a public participation plan. Similarly, the opportunities and reasons for public involvement will vary from site to site. The regulations create a mountain out of a molehill by creating public concern, then responding to it. Finally, the cost of preparing and executing a public participation plan will be high. The expenditure of limited public and private resources to comply with the proposed regulation will be significant. This requirement should be eliminated altogether and replaced with one that directs either the agency or the parties performing the remedial action to provide appropriate notice of and information about the ongoing events and to create appropriate opportunities for public comment on the remedial action process.

B. Citizens' Advisory Committees. Another concern we have about the public participation portions of the regulation pertains to the composition of the regional citizens' advisory committees. The proposal would eliminate from consideration all potentially liable persons ("PLPs"), whether the site at which the liability may have arisen is in the region or even in the state or not; as well as agents or employees of potentially liable persons. This combination of exclusions is likely to result in the appointment of committees around the state on which there is little experience with the cleanup process.

Furthermore, anyone can become a PLP. For example, if Ecology determined that the best way to cleanup a municipal landfill that was posing a threat to the environment were to notify every person who dumped garbage at the landfill of his or her PLP status, most citizens of a large area would be eliminated from the committees. The better solution would be to allow a PLP, its agent or employee, to serve on the regional citizens' advisory committee on condition that the PLP does not participate in any recommendations to the department that pertain to its site(s) within the region.

VIII. COST RECOVERY AND CONTRIBUTION.

A. Cost recovery. Section 550 of the proposed regulation presents several problems. First, the stated basis of the section is the premise that the state is required to seek recovery of the cost of its investigative and remedial actions. Section 550(1). In fact, Section 5(3) of the Act directs the Attorney General, not the state, to seek to recover the amounts spent by the department in investigative and remedial actions. Under that circumstance, the agency with the authority to promulgate regulations for cost recovery is the Attorney General's Office, not Ecology. Again, Ecology appears to have overstepped its statutory directions.

Second, the proposed regulation purports to allow Ecology to recover, in advance, the costs of reviewing proposed remedial actions and the various reports submitted by liable or potentially liable parties. Sections 130(3)(a)(ii), 330(4)(b). These provisions are not within the agency's authority and should be deleted from the regulation. There is no statutory authority for this approach to increasing the level of resources available to Ecology for the hazardous waste site investigation and cleanup program.

Finally, the regulations purport to allow the agency to collect a portion of its overhead attributable to each remedial action and to charge interest on past due cost requests. Section 550(1),(4). There is no authority in the Act for the recovery of either of these items. The inclusion of overhead and prejudgment interest should be deleted. stricken.

B. Contribution. Section 550(5) notes that contribution actions may be available to persons who incur remedial action

costs. It also notes that the availability of the statutory contribution action furthers the purposes of the Act because it provides an incentive to undertake remedial action in concert with the department. There is no such provision in the Act. The purpose of this section is not clear, nor is the reason for its inclusion. This is not an interpretation or implementation of the statute. It is more like a judicial pronouncement than an administrative act and should, therefore, be deleted.

X. MISCELLANEOUS COMMENTS.

Finally, we offer some comments on two other issues - de minimis contributors to a site and communication of Ecology's decision to require additional action at a site.

A. De Minimis Contributors. Section 4(4)(a) of the Act allows the Attorney General to expedite a settlement with those PLPs who have made de minimis contributions, as measured by toxicity and amount, to a site. The regulations provide no guidance for the agency in determining who the de minimis contributors are nor in assisting the attorney general in making the second finding required by the Act. The second finding is that the settlement is practicable and in the public interest. It is our recommendation that the regulation address both of those issues.

B. Notice of Additional Action Requirements. Section 320(6) should include a time line for communication of the decision on additional action at the site following Ecology's site hazard assessment. Section 140(5) requires Ecology to decide whether additional action is required at a site within thirty days of the assessment. Section 320(6) requires the agency to publish a "no further action required" decision in the site register. There is, however, no time frame within which the decision must be published in the register or communicated to interested parties. A deadline for that communication of thirty days from the decision should be included in the regulation. This would facilitate planning for either future use of the site or remedial action if that were necessary.

We would be pleased to discuss these comments with you or to answer any questions you may have. Thank you for the opportunity to comment on these important regulations.

Very truly yours,

HELLER, EHRMAN, WHITE & McAULIFFE

Leslie C. Nellermoe

cc: Peter W. Hildebrandt
Kaiser Aluminum and Chemical Corporations
Reynolds Metals
Intalco Aluminum Corp.
Aluminum Company of America
Vanalco, Inc.

A Burlington
Environmental Inc
Company

November 20, 1989

Ms. Pam Jenkins
Environmental Engineer
Solid and Hazardous Waste Program
Washington Department of Ecology
Mail Stop PV-11
Olympia, Washington 98504-8711

Dear Ms. Jenkins:

Re: Proposed Model Toxics Control Act Cleanup Regulations
WAC 173-340

Chemical Processors, Inc. has reviewed the proposed Model Toxics Control Act cleanup regulations and offers the following comments for your consideration:

Applicability 173-340-110(2)

It is unclear how Ecology intends to handle sites which are currently involved in cleanup efforts under EPA's RCRA and CERCLA programs. How will the federal cleanup standards apply to a new site on the hazardous site list? Also, how will Ecology's proposed groundwater cleanup standards incorporated into this program?

Overview 173-340-120(3)(C) and 173-340-340

Will the biennial program report prepared for the legislature be available to potentially liable parties and the general public?

Administrative Principles 173-340-130

In subsection (2) it is stated that it is the policy of the department to make available information about releases or threatened releases with property owners or other persons with potential liability for a site in order to encourage them to conduct prompt remedial action. The use of the term "threatened releases" should be more clearly defined. If this applies to situations where a threat of a release may exist, or a suspected release is still under investigation, this should be clarified.

CHEMICAL PROCESSORS, INC
2203 Airport Way South . Suite 400 • Seattle, Washington 98134
(206) 223-0500 • FAX 223-7791

In subsection (3)(a) of the section on information exchange, Ecology advises persons requiring site-specific legal or technical assistance to hire an attorney or engineering consultant with the appropriate environmental expertise. Following that, in subsection (3)(b), Ecology discusses terms for providing technical assistance which include circumstances for payment. Ecology's technical assistance should be limited to regulatory advice and review/approval of cleanup proposals and related investigations, without operating as a technical consultant to the public or potentially liable parties.

Re: subsections (6) and (7), the provision for combining steps in the cleanup process (such as RI/FS, remedial design, and implementation steps) is a good one. Provisions for approving routine cleanups via a simplified process are also a good idea, however, the definition of routine cleanups is still vague. The definition should be clarified to avoid further confusion.

Definitions 173-340-200

Under subsection (32), how will Ecology define the affected vicinity of the proposed action for the purposes of providing public notice? The method for defining the affected vicinity should be defined more clearly to avoid confusion on the part of the public, agencies, and potentially liable parties.

Site Hazard Assessment 173-340-320

If characterization of subsurface and groundwater conditions is required, more than 180 days may be needed to complete the site hazard assessment. Provisions for an extension should be included in the regulations.

Hazardous Sites List 173-340-330

Our reading of the requirement leads us to believe that a release or threat of release is sufficient to cause a site to be included on the hazardous sites list. If sites with threats of releases are included on the list, there should be separate requirements for rankings and investigations under these circumstances.

Provisions for petitioning Ecology to remove a site from the hazardous sites list state that the department may require payment of costs incurred for review and verification of the work performed to demonstrate that cleanup standards have been acheived. We believe the petition process should be offered without a requirement for payment to Ecology. Also, a

schedule for petition review should be clearly stated in these regulations, rather than the current language offering petition review "at [Ecology's] discretion and as time and resources allow."

Consent Decrees 173-340-520

As a general comment, the information that Ecology requests be provided in the letter initiating a consent decree appears to be extremely complex and detailed. We believe it is more appropriate to present much of this detailed information during the consent decree negotiation process, or even after the consent decree is negotiated. The process for initiating a consent decree should be simplified to encourage potentially liable parties to enter into consent decrees, and to avoid unnecessary delays when entering the consent decree process.

Thank you for the opportunity to comment on the proposed regulations. If you have any questions regarding our comments, please contact me at (206) 223-0500.

Sincerely,

Susan B. Donahue CB

Susan B. Donahue
Environmental Programs Manager

cc: D.F. Stefani, Chemical Processors, Inc.

November 16, 1989

Re: Model Toxic Control Act - 2010

COMMENTS FROM BONNIE ORME

Some of us were born in an era when love of country was a conditioned response to our flag, our anthem, and believed "God shed His grace on thee". I love my land no less, but ache in shame for the disreputable scientists and politicians who intentionally allowed the devastation of Seattle's shorelines for toxic waste disposal in the guise of commerce economy; for the health department with facts for at least twenty years, failing to warn marine recreationalists the growing hazard from a toxic beach; for the media's reluctance to shame and identify the greedy quest. With justice for all, we share the expense for quality water-in us and on us.

Lead, cyanide, and arsenic are prevelant toxic wastes at ship building and maintanance facilities. An industrial energy use of coal - fossil fuels (i.e. steel mills, gas works, power plants) have decades of discharged organic hydrocarbons-PACs. Chemical "processors" - oil recycle facilities, and landfills have knowingly discharged to West Point's primary sewage effluent for the "right" price. Marinas and ferry terminals have knowingly discharged PAH, raw sewage and tributyltin.

Magnolia, the most valuable residential community in King County, has been **THE** state's permitted hazardous waste disposal site at about two thirds of its periphery. The devastation of its schools and shorelines is a criminal toss up. The bioaccumulation in living mussel tissue of toxic chemicals and heavy metals for the last four years is more than any of the tested, **MOST** contaminated shorelines in the country. The significant drop in academic achievment scores may correlate more to white flight than lead exposure. I believe the rate of communicable disease - hepatitis, etc., multiple sclerosis, and cancer can be correlated to West Point effluent, if not dredge disposal at Pier 91 and Four Mile Dump Site, or Renton's and Alki's effluent. (Magnolia or Hanford?)

We all need tertiary treatment (best available) of our waste, a significant limit of phosphates to lessen red tide; contained, upland treatment-disposal sites before river deposition; more red hens than red faces, and all bureacrats and teachers certified in environmental ethics.

An expanding Metro and Port may not create the toxic, industrial waste, but **THEY** control the rate, quality, and location of discharge. We, the public have allowed the quality of statesmanship to put most of the rotten eggs in one basket - on Magnolia. The grandest jury or Ecology can relocate known point sources now, and control nonpoint sources by 2010. The Clean Water Act has flunked its first twenty years in Washington. Property rights should inspire environmental concensus on risk assessment. Interim disposal criteria was and is a scandal. An elected public health director from each county, should be the commission under an elected Public Health Director. A two thirds majority would be a check and balance of the enforcement of the Toxic Control Act.

Golder Associates Inc.
CONSULTING ENGINEERS

November 16, 1989

Our ref: 773-1910

Washington State Department of Ecology
Hazardous Waste Investigation and Cleanup Program
Woodland Square, Mail Stop PV-11
Olympia, Washington 98504-8711

ATTENTION: Ms. Phyllis Baas

Dear Ms. Baas:

Golder Associates Inc. offers the following comments on the proposed Model Toxics Control Act cleanup regulations (Chapter 173-340 WAC):

Deadlines

The deadlines proposed under WAC 173-340-140 appear achievable, therefore "reasonable," with the exception of the remedial investigation/feasibility study deadline in subsection (6). Eighteen months for the completion of a remedial investigation/feasibility study at a high priority site with a complex environmental setting is unlikely to be achievable based on the historical performance in Washington State and the rest of the country. The possibility of a deadline extension to 30 months offers little relief when the necessary stages of remedial investigation/feasibility study planning, execution, and reporting are subjected to departmental plan and report review cycles that take four to twelve months or more. These routine departmental review times, coupled with additional public participation requirements of WAC 173-340-600, the need to obtain permits, and the need to address SEPA, will seriously jeopardize the ability to complete many remedial investigation/ feasibility studies within the proposed timeframes.

We recommend that an approved sampling and analysis plan, containing an agreed-upon schedule, be incorporated into each consent decree or agreed order. This approach will provide for site specificity, thereby resulting in realistic deadlines. Adequate time must be allocated for plan development and departmental review and approval.

To expedite the schedule, we further recommend that WAC 173-340-140 be modified to specify reasonable departmental review deadlines for each stage of the remedial action process.

Cost Recovery

Section 4(2) of Initiative 97 explicitly states that "[t]he attorney general, at the request of the department, is empowered to recover all costs . . . ." Note that it is the attorney general, not the department, who is so empowered.

We recommend that WAC 173-340-550 be modified so that "attorney general" is substituted for "department" to be consistent with statutory authorities. We further recommend that the advance payment provisions of WAC 173-340-130(3)(b)(ii) and WAC 173-340-330(4)(b), and the interest charges provision of WAC 173-340-550(4), be stricken due to a lack of departmental statutory authority. The law clearly limits the attorney general's authority to cost recovery; no statutory provision is made for either collection of advance deposits or interest.

Safety and Health Authority

WAC 173-340-810(2) requires the submittal of a safety and health plan to the department for "review and comment." However, the preceding paragraph clearly, and accurately, indicates that the department has no statutory authority over such plans or the regulations and laws requiring such plans.

We recommend that this submittal requirement be deleted due to lack of departmental statutory authority. The department should not be commenting on plans over which they have no authority, or departmental expertise other than that of providing for the safety and health of their own employees. Potentially liable persons should not be held responsible for departmental costs and delays incurred through such statutorily unauthorized reviews. If the appropriate state regulatory authority (i.e., the Department of Labor and Industry) deems regulatory reviews of such plans necessary, we recommend that the appropriate authority be assigned responsibility for such reviews.

Clarity

The proposed regulations are generally quite readable. We recommend only a few minor changes to enhance their clarity.

WAC 173-340-200(13) defines the term "environment" to include ". . . energy and natural resources, transportation facilities and utilities." WA 173-340-200(35) defines the term "release" as the ". . . intentional or unintentional entry of any hazardous substance into the environment . . . ." We have difficulty envisioning anything of concern that would constitute an entry of a hazardous substance into an energy resource, transportation facility, or transportation utility. We recommend that references to energy resources, transportation facilities, and transportation utilities be deleted from the definition of the environment.

Without modification, the fueling of motor vehicles, aircraft, and vessels, for example, would constitute releases of hazardous substances into the environment.

The terms "Model Toxics Control Act" and "chapter 2, Laws of 1989" appear to be used interchangeably throughout the proposed regulations. We recommend the use of one term throughout. As the title of these regulations will be "Model Toxics Control Act - Cleanup," we suggest the use of the former term for consistency.

The terms "cleanup" and "remedy" (or "remedial action") appear to be used in situations where they are synonymous. We recommend that one or the other term be adopted and the appropriate substitutions be made throughout the proposed regulations. The use of a single term will greatly enhance clarity.

Routine Cleanup Actions

The concept of routine cleanup actions is a good one; however, the conjunctive criteria specified, in WAC 173-340-130(7)(a), for considering a cleanup action routine are so restrictive as to prevent such an action from ever occurring.

We recommend that the department take another, hard look at WAC 173-340-130(7)(a) and attempt to make routine cleanup actions in Washington State a potential reality by imposing less restrictive criteria.

Permits and SEPA

We understand that the Model Toxics Control Act does not provide for remedial action exemptions from permitting and SEPA. This oversight will prove to be a major hindrance to performing timely and cost-effective remedial actions in this state. Without a specific exemption from SEPA requirements, many, if not all, cleanups will be subject to an environmental impact statement.

We recommend that the department pursue some means of streamlining, if not exempting, the permitting and SEPA processes for remedial actions conducted under Chapter 173-340 WAC. We believe that the department has the authority to determine, by rule, that the remedial action process is functionally equivalent to the permitting and SEPA processes. EPA and federal courts have come to this decision with respect to CERCLA and NEPA; we believe this state should do the same. If the department decides that this is not feasible, we recommend that action be initiated to amend Chapter 197-11 WAC to provide for a categorical exemption of remedial actions performed under Chapter 173-340 WAC.

Definition of Remedial Investigation/Feasibility Study Objectives

WAC 173-340-350(1) states that "[t]he purpose of a state remedial investigation/feasibility study is to collect, develop, and evaluate sufficient information . . ." (our emphasis added). We believe that the words "the necessary and" need to be inserted between "evaluate" and "sufficient," and that the concept of "necessary and sufficient" be prominently displayed throughout the regulations and all departmental guidance developed pursuant to these regulations.

The concept of a "necessary and sufficient" level of effort for a remedial investigation/feasibility study is an established, but all too often ignored, U.S. Environmental Protection Agency (EPA) policy for the federal cleanup process (CERCLA). This policy is documented in EPA's 1985 remedial investigation guidance document (EPA/540/G-85/002, Section 7.2.3, p. 7-6) and is reemphasized in EPA's current, interim final remedial investigation/feasibility study guidance document (EPA/540/G-89/004, Section 1.1, p. 1-3). Because this promulgated policy has been historically ignored, the CERCLA process has been plagued with cost and schedule overruns. To avoid these problems under the Model Toxic Control Act, and to make the act a true, results-oriented model (we construe results, within the context of the act, to mean actual cleanups, not unnecessary investigations), we propose that the department adopt this policy by rule, and that the director strictly enforce it.

Departmental Priorities

We have concerns regarding the system to be used to determine site priorities for remedial action. Historically, the department's prioritization methods have appeared arbitrary and somewhat capricious. Although a relatively objective process of ranking sites is proposed under WAC 173-340-330(2)(a) in the form of a "Washington Ranking Method Scoring Manual," there are too many loopholes that allow for subjectivity which would undoubtedly result in a continuance of arbitrary and capricious prioritization. Examples of such loopholes include: WAC 173-340-130(3)(b), WAC 173-340-140(3), WAC 173-340-330(4)(b), and WAC 173-340-330(5). Of greatest concern, is the appearance that remedial action priorities will be driven predominantly by cash receipts from potentially liable persons [see WAC 173-340-130(3)(b)(ii) and WAC 173-340-330(4)(b)] rather than by objectively determined environmental and human health risks.

We recommend that the department close these subjectivity loopholes, finalize the "Washington Ranking Method Scoring Manual" so that it is objective and realistic to the extent feasible, and then apply these objective determinations in utilizing state resources on established remedial action priorities. In addition, state resources should be allocated to the review of independent actions reported under WAC 173-340-300(4), as this reporting requirement will otherwise result in a hazardous sites list containing numerous remediated sites.

Release Reporting

With no specified threshold quantities for reportable releases, the requirements of WAC 173-340-300(2) are unrealistic. Either the department will be inundated with reports of insignificant releases, or the vast majority of releases subject to reporting will go unreported.

We recommend the promulgation of reportable threshold quantities for releases of hazardous substances. These thresholds should be set so as to prevent the department from becoming encumbered with insignificant, non-problem releases.

Public Participation and Commenting

We note that public participation requirements comprise well over fifteen percent of the body of the proposed cleanup regulations. It is interesting to note that WAC 173-340-600 is far more extensive than CERCLA requirements (40 CFR Part 300.67), and even more extensive than either NEPA (40 CFR Part 1503) or SEPA (WAC 197-11-500 through WAC 197-11-570) requirements.

We recommend that requirements for comment specificity, along the lines of the requirements of WAC 197-11-550 and 40 CFR Part 1503.3, be incorporated into WAC 173-340-600. Such requirements should be applied to not only public comments, but also agency comments, including departmental comments on potentially-liable-person-conducted remedial actions. Examples of such requirements are:

Comments on any remedial action plan or report shall be as specific as possible and may address either the adequacy of the plan or report or, when appropriate, the merits of the alternatives discussed or both.

When a commentor criticizes a predictive methodology, the commentor shall describe an alternative methodology which the commentor prefers and provide a logical rationale for the preference.

Commentors shall briefly describe the nature of any documents referenced in their comments, indicating the material's relevance, and shall indicate where the material can be reviewed or obtained.

When a commentor objects to or expresses concerns about a proposal, the commentor shall specify remediation or mitigation measures believed necessary to allow the proposal to be implemented. A logical rationale for the measures specified shall be provided by the commentor.

If a commentor believes that additional information or remediation or mitigation measures are necessary, the commentor shall specify the types and quantities of such information and measures and provide a logical rationale for their needs.

These requirements will allow for constructive comments and will save much time and paper work in the public participation and departmental review and approval processes.

If you have any questions on our comments, please feel free to contact me at our Redmond office. We thank you for the opportunity to comment on the proposed cleanup regulations.

Sincerely,

GOLDER ASSOCIATES INC.

Anthony S. Burgess, P.E.
Principal

Boeing Support Services
P.O. Box 3707
Seattle, WA 98124-2207

4-1241-KJH-382
November 17, 1989

BOEING

Carol Fleskes
Washington Department of Ecology
Woodland Square Building
Mail Stop PV-11
Olympia, Washington 98504-8711

Dear Ms. Fleskes:

The Boeing Company appreciates the Department of Ecology's use of the negotiated rulemaking process in the development of regulations to implement the Model Toxics Control Act. Although building consensus among environmental groups, public entities, and the regulated community requires more time and effort on the part of Ecology staff, the process is important in producing a workable program. We appreciate the opportunity to be a part of this process. Our comments and suggestions for change on individual sections of the regulations have been made throughout the last year during the external workgroup meetings. We believe some additional changes to the proposed regulations are appropriate as outlined in the comments submitted to Ecology by the Association of Washington Business.

The cleanup standards and remedy selection process will be a critical part of the Model Toxics Control Act regulations. We expect that Ecology will maintain its commitment to achieving consensus during the development of these remaining crucial sections of the regulations.

Sincerely,

K. J. Thomson
Manager, Environmental Affairs
Orgn. 4-1240, M/S 6U-02
Phone: (206) 393-4780

WSPA believes that there are many many UST cases where subsurface water may be impacted, but that fact in and of itself does not justify the time and expense necessary to address the site through an overly-complex (non-routine) cleanup process. Determination of routine or non-routine status should be made on the basis of the complexity of the site and the contamination, and the relative risk to human health and the environment. We do not believe it is appropriate to impose an arbitrary requirement that a site with subsurface water impact cannot "normally be considered" routine.

We note that the proposed wording allows the department to make exceptions, presumably to address some sites with subsurface water impact as routine cleanups. Our experience with similar requirements, however, has shown the reluctance on the part of department staff to allow what may be perceived as a less restrictive approach, especially given the strength of the proposed regulatory language. To summarize: WSPA believes the "ground water exclusion" should be removed from the routine cleanup criteria; and the definition of ground water should be amended.

Another area where we feel the proposed routine cleanup criteria are overly restrictive is the requirement that cleanup standards for each hazardous substance in question be "obvious and undisputed." Unfortunately, we can think of very few hazardous substances where the cleanup standards truly meet this criteria. Experience with the Cleanup Standards Work Group over the past several months has shown that unanimity on appropriate cleanup levels is almost never achieved. An "undisputed" cleanup standard with an adequate margin of safety is virtually impossible, even for those substances which are well-studied and relatively well-understood.

We are sorry to report that publication of media specific state cleanup standards will do little, in our opinion, to quell the age-old dispute over "how clean is clean?" It is inevitable that experienced professionals on both sides of the debate will continue to have legitimate differences over where cleanup levels should be set. WSPA believes that the wording of this criteria must be changed or virtually no sites will ever be considered routine cleanups.

2. The cleanup process for UST sites is unduly cumbersome, puts an enormous burden on the department, and provides numerous disincentives for potentially liable persons to act independently. These problems will undoubtedly increase the time involved for LUST cleanups substantially without a commensurate gain in environmental protection. More importantly, it is not at all unlikely that fewer UST cleanups will be undertaken than are currently being carried out under today's requirements. Clearly, this is counter to the goals of the MTCA and these regulations.

First, some background. A large percentage of petroleum UST releases are discovered when existing tanks are excavated for removal. Contamination is often found which is not attributable

to a leak in the tanks or piping, but rather the "dirty dirt" is due to minor spills and tank overfills which may have occurred over the life of the tank system.

The majority of petroleum underground tank removals take place for one of two reasons. Either 1) New (replacement) tanks are being installed for continued operation of the fueling system; or 2) the property where the tank is located is being sold to a person who does not plan to operate the UST system. In both cases, time is of the essence. In the former case, it is important that quick decisions be made regarding cleanup because the fueling system must be put back into service as expeditiously as possible. For a service station, the operator cannot continue to make a living without functional UST's. Every day his fueling system is out can be extremely damaging from a financial standpoint.

Similarly, in the latter case where the property is being sold, the former owner will generally want to operate the underground storage tanks right up to the point of sale. (Again, in the case of a service station, the UST's provide the operator's principle source of income.) If contamination is found during tank removals, it is clear that quick decisions must be made regarding investigation and cleanup in order to allow the property transfer transaction to proceed. With the tremendous level of uncertainty brought on by these regulations, it is questionable whether or not financial institutions will lend money to finance these types of property sales. We are fearful that transactions involving property with existing or former UST's could grind to a halt in the State of Washington.

To illustrate these points, let's consider an example:

An independent service station owner/operator decides to replace (upgrade) his underground storage tanks to meet the requirements of the federal (RCRA Subtitle I) regulations. His lot is small so the new tanks must go in the same location as the old. Upon excavation and removal of the existing tanks he finds some petroleum contaminated soil in the tank excavation. Subsurface water is not encountered so (if we put aside for a moment the arguments offered above) this site could be a candidate for a routine cleanup action. Unfortunately, it is not at all clear in this case what is gained by this distinction.

As required by the proposed regulations, the owner/operator reports his initial discovery of petroleum contaminated soil to the department. The next step is for the department to conduct an initial investigation of the site <u>within 90 days</u>. It is obvious that the owner/operator cannot afford (for a number of reasons) to leave an open tank excavation on his property for up to 3 months waiting for the DOE to conduct an investigation. So his only viable option is to conduct the next phase of the investigation as an independent action, explicitly without any approval or oversight from DOE. The proposed regulations make it very clear that any independent actions are carried out at the PLP's own risk, but it does not appear that the UST owner/operator has much choice in the matter.

For the sake of this example, let's assume that our owner/operator makes the determination that his petroleum contaminated soil does in fact qualify for a routine cleanup action. Again, he is "at risk" in doing so, but the only way to gain any department approval of his actions is through one of the Administrative Options outlined in WAC 173-340-510 through 530. These options were, of course, developed with complex hazardous waste sites in mind, and are probably more involved than is necessary for this site.

Since he believes his site qualifies as a routine cleanup action, our owner/operator conducts a single investigation which "includes a site hazard assessment and a simplified state remedial action/feasibility study and engineering design plan." He determines that the vertical and lateral migration of the petroleum contaminated soil is limited, and that the petroleum in question is highly volatile (gasoline). He decides that the most practicable method of cleanup is excavation of the contaminated soils and on-site aeration. (In current practice this generally occurs within a day or two of the initial discovery.)

Once again, if the owner/operator wants the department's approval of his cleanup plan, he must use one of the Administrative Options. (If this were a different example and the UST was removed in anticipation of property sale, then it is highly unlikely that the buyer would be able to obtain financing without this explicit DOE approval.) To request an Agreed Order, the simplest administrative option, the owner/operator must submit to the department a detailed letter together with three copies of a Public Participation Plan, a Safety and Health Plan and a Sampling and Analysis Plan (unless otherwise directed). The department has up to 60 days to respond.

Okay, let's assume our owner/operator cannot afford to wait up to two months, so he decides to perform the cleanup as an independent action in spite of the risks. (As noted above, for property transfers, this most likely would not be possible.) To comply with the Public Participation requirements of 173-340-600 (15), the owner/operator must provide public notice of the proposed routine cleanup action and invite public input over a 30 day comment period. Presumably he cannot proceed with the cleanup until this comment period is over, although this is not at all clear in the proposed regulations. In the meantime, the owner/operator is quite obviously out of business in terms of selling gasoline.

Assuming the proposed cleanup action meets with no serious public objections (and it is unclear how this determination is to be made), the owner/operator can proceed with his "routine" independent cleanup. Since the over-excavation of contaminated soils most likely qualifies as "construction," this activity can only proceed under the direct or indirect supervision of a registered professional engineer (173-340-400(7)(b)(i)). It seems obvious that some flexibility is needed in this requirement since most of the people in the state who are qualified to direct this

type of work are not professional engineers.

During any cleanup process, several occasions will undoubtedly arise where site specific professional judgment must be exercised. In this case, the most obvious example is the determination of the number and types of soil samples required during excavation to confirm compliance with cleanup standards. For every decision which is made, the PLP increases his chance that the department will "disapprove" of the cleanup after-the-fact when the report of the independent action is reviewed. In this scenario, the owner/operator has a tremendous incentive to carry out the cleanup to DOE's satisfaction because the comparative cost to "go back" after new tanks are installed is enormous. He has, however, no "official" way to know up-front what the department will require unless he goes through the cumbersome and time-consuming process of obtaining an Agreed Order or a Consent Decree.

Within 90 days of completion of the independent routine cleanup action the owner/operator must submit a report to the department. The proposed regulations, however, impose no obligation on the department to respond to this report, and any response does nothing to reduce or limit the PLP's liability. In effect, there is no way to obtain any sort of DOE "sign off" for independent actions. Given the example described above, we are tremendously concerned about the adverse effect this will have on the buying and selling of real estate in Washington.

Please understand that this example was drawn for the purposes of illustration. We recognize and appreciate the fact that the department would not normally take 60 or 90 days to respond to an urgent request by a service station owner/operator who is out of business. In fact, our members relationships with DOE staff members responding to UST releases has been very good. We used the maximum time periods only to show the "worst case" that the proposed regulations allow.

It is clear that this regulation was not written with UST sites in mind. Many requirements which are undoubtedly needed for toxic waste sites simply do not apply to releases from underground storage tanks. In most of these cases, there is little question about who is the potentially liable person, and he or she is usually willing (and often eager) to get on with the cleanup. WSPA firmly believes that the proposed regulations must be amended to create a less cumbersome process for independent investigations and cleanups. Additionally, the process must provide the PLP with more certainty that he or she is meeting DOE's requirements as independent actions are carried out. Given the number of UST sites in the state, it is easy to see how this program could quickly be overburdened if the UST process is not simplified.

Ideally, we would suggest that UST releases be explicitly excluded from this regulation, and addressed instead by the UST rules which we currently under development. We believe that the UST regulations are an appropriate vehicle for defining the process of responding to UST release. The department is already directed by statute to include release detection and release reporting

requirements in the UST rules, so it seems logical that the remainder of the process (i.e. investigation and cleanup requirements) can be covered as well.

The alternative would be to develop within this regulation a separate, relatively independent section covering UST sites. This approach is not as simple, and will undoubtedly create more confusion in the regulated community. We recognize, however, that the MTCA may preclude exclusion of UST releases from this regulation.

One final comment: In section 173-340-110(3), the proposed regulation states that the MTCA cleanup process can be used to revisit sites which have been previously addressed by actions under other laws or regulations. Cleanups of UST releases have been taking place under the direction of DOE for a number of years, and in the past 2 years or so, written regional guidelines have been developed to facilitate this process. We are concerned about the potential widespread implications of "going back" to these sites which have previously been addressed in accordance with prevailing DOE requirements. While we recognize and share the department's concern over any sites which may pose a significant risk, we suggest that the wording of this section be changed to more explicitly exclude those sites which have previously been adequately cleaned up.

The Western States Petroleum Association appreciates the opportunity to provide comments on this important regulation. We look forward to continuing to work with the department as the regulatory process progresses.

Steven E. Merritt
Chairman, Fuel Storage Resource Group

/mpc

AWB

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Your statewide
business advocate

Ms. Phyllis Baas
Washington Dept. of Ecology
MS PV-11
Olympia, WA 98504

Dear Ms. Baas:

RE: WSR 89-20-059:

The Association of Washington business has reviewed proposed Chapter 173-340 WAC and submits the following comments. We would be happy to explain or clarify them if such would assist with your rule-making. We are advised that an additional comment period will be available for these rules, and we may wish to make additional comment.

Negotiated Rulemaking

AWB commends Ecology for its commitment to negotiated rulemaking with respect to the MTCA cleanup process rules. A number of factors indicate the importance of negotiated rulemaking for MTCA rules. The campaign which led to the passage of Initiative 97 was divisive and reflected strong opinions in the community as to the best method for implementing a program of cleanup of hazardous waste sites. An overwhelming majority of the public saw the need for such a program and most people familiar with the federal program felt a strong need to develop a state program which would make greater progress toward cleanup of sites. Drafters of Initiative 97 were limited by space considerations and as a result numerous concepts which are important to a regulatory program for cleanup of hazardous waste sites were left to the rulemaking process. There was a strong need to fill in the gaps and the MTCA left considerable discretion to Ecology. It was important for Ecology to hear from the various interests before exercising that discretion by adopting rules.

Recognizing and accommodating the concerns of environmental, public, and regulated communities in advance of the rulemaking can go a long way toward preventing implementation problems which can lead to litigation and stifle a regulatory program. Many of the issues which came up in the negotiated rulemaking process were readily capable of resolution between the diverse communities without changing the intent of the MTCA.

AWB encourages Ecology's continued use of negotiated rulemaking. We believe it is particularly important with respect to the cleanup standards' portion of the MTCA rules which is currently in progress. Initial reports on the progress of those rules is not encouraging in terms of the willingness of the parties involved to engage in a meaningful dialog leading toward consensus. We encourage continued Ecology effort on this point as the success of the entire MTCA program could be very seriously impacted by the selection of inappropriate cleanup standards. The willingness of the regulated community to engage in negotiated rulemaking with respect to the cleanup process was very much predicated on a similar process being conducted for cleanup standards. AWB remains interested in and willing to participate in the cleanup standards process.

Flexible Cleanup Process

AWB supports the effort Ecology has made to include flexibility in the draft rules in an effort to expedite the process. There are a number of provisions in the cleanup process rules which indicate that flexibility, including the administrative principles and the recognition of routine actions (WAC 173-340-130); the early notice letter (WAC 173-340-310 (5)); the availability of petitions for delisting (WAC 173-340-330 (4) (b)); the scope of a remedial investigation/feasibility study being dependent upon the characteristics of a specific facility and being determined on a site-by-site basis (WAC 173-340-350 (5)); the level of detail with respect to the preparation of engineering documents being determined on a site-by-site basis (WAC 173-340-400 (4), (5), (7) (b) (iii)); use of interim actions (WAC 173-340-430); recognition of the availability of independent remedial actions under the MTCA (WAC 173-340-510) (5)); the use of agreed orders (WAC 173-340-530); and numerous other provisions.

We see a potential problem with use of the flexibility that has been included in the proposed rules. The rules are heavily study oriented and call for comprehensive documentation. That may be appropriate at certain sites. But, the focus on documentation should not thwart the express intent that when enough information has been gathered to make a decision, action should proceed. WAC 173-340-130 (5). In order for the program to make significant progress it will be critical for Ecology management to communicate an intent to utilize rule flexibility to staff and to support staff who will be implementing the act on a site-by-site basis.

Recent federal Superfund studies have indicated that only as much as one third of the money spent so far has gone to actual decontamination of toxic sites. The balance of the money has gone to administration and studies, rather than remediation. .

A survey of approximately 25 Federal Superfund projects of varying sizes found that just putting the work plans and RI/FS reports on paper amounted to 25 to 30 percent of the RI/FS cost.

The proposed MTCA rules have the potential for a similar misplaced emphasis, unless they are indeed implemented in a flexible manner. We strongly urge Ecology to educate the staff on the importance of flexibility and to regularly ensure that the rules are being implemented to their fullest.

Language, such as the following, could be inserted to encourage appropriate flexibility:

> "Normally a sampling and analysis plan will be expected to contain the following types of information...however, the exact contents will vary depending on the specific circumstances at the particular site".

This would provide guidance for PLPs in preparing plans and reports, yet allow the documents to be customized to fit the particular site circumstances.

Although the draft regulation contains language concerning the use of consolidation and incorporation by reference, the placement and tone of the language implies that these concepts are afterthoughts or that they should apply only in special situations rather than being a central theme of the site cleanup program. To strengthen the statement of these concepts, we suggest that language such as the following be incorporated at appropriate places in the regulation:

> "The following information normally will be expected to be developed as part of the RI/FS and RD process. Although it is described herein in terms of separate documents, the Department expects that the documents will be consolidated to the degree possible and that incorporation by reference will be used to avoid redundancy and reduce the time and cost of document preparation and review."

In addition, alternatives should be used to reduce the need for or the scope of formal documents whenever possible to expedite the cleanup process. Examples of alternatives include use of working documents rather than formal deliverables and use of occasional status-review meetings to discuss technical results and formulate plans for moving forward.

Agreed Orders

An agreed order process is essential to the success of the MTCA. Nothing in the MTCA precludes Ecology from entering into an agreement with a potential liable person with respect to issuance of an order. Sections 3 and 5 authorize the issuance of orders by Ecology. A viable agreed order process is important because it provides certainty for the numerous interim steps associated with the cleanup process. Such certainty is important for the business community in dealing with internal management, auditors, insurers and others. In addition, it provides the mechanism for securing budget authorization within many business entities. Many of the steps along the way of a PLP-initiated cleanup should be accomplished through the agreed order process, rather than the more detailed and potentially more time consuming consuming consent order process.

The draft rules should more fully recognize agreed orders as one of the administrative options for remedial actions. We request that Ecology amend WAC 173-340-510 (3) as follows:

> Add new (b) and renumber rest of existing subsections
>
> "(b) Issuing a letter inviting negotiation on an agreed order under WAC 173-340-530; or"

AWB also recommends that Ecology amend WAC 173-340-530 (6) as follows:

> Change the second sentence by adding the following underlined language.
>
> "If the agreed order is for a routine cleanup action and any person requests judicial review <u>and the department determines there is a basis for such review,</u> then the applicable consent decree procedures under WAC 173-340-520 will be initiated."

The reason for this amendment is a concern that as presently drafted the section leaves Ecology open to the potential that there would be frivolous requests for judicial review.

Property Access

It is important for Ecology to make reasonable efforts to notify persons before entry and to provide reasonable notice. With respect to reasonable notice, AWB suggests the following addition to the rules. WAC 173-340-800 (1) should be amended as follows:

Add new (c)

"(c) Provide the site owner and operator with information regarding the reason for proposed entry, including the location and nature of a release or threatened release."

In many instances, it is important for potentially liable persons who are conducting remedial actions under either an order or decree to secure access to real property. There are times when the inability to secure access is a hindrance to completion of an order or decree and prevents the cleanup from going forward. In those instances, it is important for Ecology to exercise it's full authority on behalf of the potentially liable person to facilitate the cleanup. The language in WAC 173-340-800(8) helps in this regard, but does not go far enough. AWB suggests the following to be added:

Add at the end of subsection 173-340-800(8)

". including, where appropriate, the designation of such persons as agents of the department"

At WAC 173-340-800(9), the proposed rule indicates that Ecology will provide documents and factual information, on releases or threatened releases, obtained through the property access section to persons who request such information. AWB is concerned that this sharing of information is too open ended and that there is a potential that proprietary financial or commercial information, trade secrets and similar information regarding business operation is not adequately protected from general disclosure. There should be a procedure for the person from whom access has been secured to designate documents as confidential and for such documents to be protected from general disclosure. At a minimum, parties from whom Ecology has secured such information should have adequate notice and opportunity to seek court protection under RCW 42.17.330 or utilize RCW 43.21A.160.

The proposed rules do not fully reflect the importance of inter-agency coordination. Proposed WAC 173-340-130(9) covers this subject in a general fashion. AWB is concerned in particular with two areas of coordination. In the first place, it is important that Ecology express a commitment to coordinate cleanups under the MTCA with cleanups under the Federal Superfund program. Persons who have completed studies under the Federal program should be assured that those studies will satisfy the MTCA. In addition, it would be appropriate if Ecology would indicate its inclination to decline action under the MTCA in the event that a site is being remediated through the Federal program.

AWB is concerned about the respective roles of the Attorney General and Ecology with respect to implementation of the MTCA. AWB is aware that there was considerable discussion between Ecology and the Attorney General's Office with respect to their relative roles and we believe that it is important for the community to be advised as to what agreements have been reached between those two agencies with respect to MTCA implementation. The regulated community should be informed of those instances in which the Attorney General is acting as counsel for Ecology and those instances where the Attorney General is acting pursuant to some perceived independent authority under the MTCA. We are concerned that the program could become bottle-necked at times because of uncertainties between relative roles and the potential for "turf" battles between the agencies. See our discussion of cost recovery issues for an example of this type of uncertainty.

Cost Recovery

The cost recovery section has been changed to "Payment of Remedial Action Costs." WAC 173-340-550. The title should be changed to "Recovery of Remedial Action Costs," since payment implies that such costs are clearly due--an implication with which many disagree. The Model Toxics Control Act does not provide a strong basis for a pay-as-you-go scheme of remedial action costs. The language of Section 550 (1) allows for a case-by-case determination of cost recovery but provides that "the Department generally will seek payment of costs as they are incurred." The MTCA provides that the Attorney General, not Ecology, may recover costs, and recover clearly connotes a retrospective perspective. The last sentence of 550 (1) should be removed from the regulation. In fact we question whether Ecology has the legal authority to promulgate a rule on remedial action costs, since the authority to recover remedial action costs resides with the Attorney General.

Section 550 (4) sets forth interest charges at a rate of 12% and attempts to define remedial action costs to include interest charges. Quite simply, "interest" is not a remedial action cost, and the attempt to so define it is an illegal prejudgment penalty. WAC 173-340-550 (4) should be deleted.

Ecology should be applauded in its attempt to affirm any private right of contribution in the MTCA. WAC 173-340-550 (5).

Mixed Funding

The mixed funding section, WAC 173-340-560, overstates the authority of the Director to make mixed funding decisions. The last sentence of -560 (1) should be deleted, as well as the third sentence of -560 (4), because the statute sets forth the standards by which the Director shall evaluate mixed funding. Therefore, it is not "solely in the discretion of the Director."

Another major shortcoming of the mixed funding section is Ecology's failure to commit to set aside an amount for mixed funding. The State Toxics Fund should be available to pick up the "orphan" or abandoned shares of remedial actions when potentially liable parties ("PLP") are otherwise willing to come forward and pay some portion of the remedial action costs and conduct the cleanup. The provision of mixed funding in those situations provides for more expeditious cleanup and prevents economic hardship or unfairness, yet no commitment has come from the Department to set aside a certain amount of money for mixed funding each year. Absent such a set aside, any particular PLP is prejudiced because he is competing directly with the Department for funds while at the same time the Department is making the decision as to whether or not to provide mixed funding.

The following definitions are contained in the proposed rule (WAC 173-40-20):

"**Ground Water**" means subsurface water that occurs in soils and geologic formations that are fully saturated.

"**Release**" means any intentional or unintentional entry of any hazardous substance into the environment, including but not limited to the abandonment or disposal of containers of hazardous substances.

"**Environment**" means the natural and built environment within Washington or under jurisdiction of the state including surface waters, ground water, drinking water supply, land surface, soils, bedrock, tidelands,

shorelands, sediments, subsurface, ambient air, plants, animals, energy and natural resources, transportation facilities, and utilities.

GROUNDWATER

The definition of groundwater is satisfactory from a technical point of view, but is too broad when considered in the context of the regulation. The regulation establishes the processes and standards to identify, investigate and cleanup facilities where hazardous substances have come to be located. If based on the definition of groundwater, hazardous substances have become located in any soil or geologic formation that is fully saturated, cleanup to standards would be required. This will lead to an inefficient use of resources because there are situations where groundwater which contains hazardous substances does not pose a risk to human health and the environment. Possible situations include: perched groundwater; seasonally saturated soils; shallow unproductive aquifier units which discharge directly to large surface water bodies; saturated clay and silt zones, saline groundwater adjacent to tidally-influenced surface water bodies; and groundwater which naturally exceeds cleanup standards. The regulation could require that the PLP demonstrate that no potential exposure pathway exists for such groundwater systems.

"RELEASE" AND "ENVIRONMENT"

The definition of "release," per se, is a reasonable one. However, it hinges upon the definition of "environment," which AWB believes needs to be modified. As defined, the environment includes both natural and built components and, thus, would appear to exclude virtually nothing. By including the built environment without qualification, the following circumstances could be considered "releases:"

- Placement of a hazardous substance into a tank or other container permitted for that purpose (a tank would be part of the built environment, and placement of a hazardous substance into it would constitute "entry").

- Collection of spilled hazardous substances or leachate in a secondary containment structure.

- Placement of a hazardous waste into a permitted landfill cell or treatment facility.

- Spillage of a hazardous substance into a contained area of a workplace.

These might seem to be far-fetched examples, but they follow from strict interpretation of the proposed definition of "environment."

We can find nothing in the law or the history of Initiative 97 which suggests that such a comprehensive approach be taken to defining releases. In addition, trying to regulate releases into workplaces (a segment of the built environment) would likely lead to jurisdictional conflicts with OSHA/WISHA regulations.

The proposed definition of environment appears to have been developed by slightly modifying the definition contained in CERCLA and expanding it with the undefined concept of the built environment. Review of the definition of "built environment" contained in the State SEPA regulation (at WAC 197-11-718 attached) shows that this definition is not at all appropriate for use in the context of defining releases of hazardous substances and, indeed, AWB does not feel that the concept of the built environment is necessary for defining a release in a manner consistent with the intent of the law.

The focus in CERCLA's definition of "environment" is appropriately on the natural environment, much in the sense of "natural environment" in the SEPA regulation (WAC 197-11-770). Placing the emphasis on the natural environment does not prevent the State from responding to those releases into the built environment that threaten the natural environment, as both the State and federal laws allow response to a "threatened release" which poses a threat to human health or the environment. AWB feels that the CERCLA definition has proved to be a workable one and therefore, suggests that Ecology use a definition of environment such as the following:

"Environment" means any surface water, ground water, drinking water supply, land surface (including state tidelands and shorelands) or subsurface strata, or ambient air with the State of Washington or under the jurisdiction of the State of Washington.

Sincerely,

Roger von Gohren

Roger von Gohren
Research Analyst

Seattle
Solid Waste Utility
Division of Seattle Engineering Department

Gary Zarker, Director of Engineering
Diana Gale, Director, Solid Waste Utility

November 21, 1989

Phyllis Baas
Department of Ecology
MS PV-11
Olympia, Washington 98504

SUBJECT: Comments on Draft MTCA Regulations

Dear Ms. Baas:

Although the draft MTCA regulations will be published again with another review period, you expressed a desire to get as many comments now as possible. I have compiled a list of draft comments from numerous reviewers that I am sending you before they have been "quality assured". If they help you now, that's great. If not, we will look at them again during the next review process.

Two general comments not on the attached list are:

1. Provide a flow chart showing how a site would go through the cleanup process.

2. The process seems to overwhelm Ecology with responsibility. It seems to me that an effort should be made to simplify the process and to reduce the required reviews and approvals by Ecology. If Ecology cannot cope with the resulting workload, site cleanups will be delayed or performed inadequately or inefficiently.

If you have any questions about these comments, please feel free to call me at 684-7641. If I can't help you I will get you in touch with the person who made the comment.

Sincerely,

BRUCE D. JONES, P.E.
Director of Landfill Closures

BDJ:mls

COMMENTS ON DRAFT MTCA REGULATIONS

Part I - Overall Cleanup Process (WAC 173-340-100 thru 140)

Section -120 (2)(b). This section should be amended to include a description and examples or scenarios of what could be investigated and to what extent. Since the initial investigation will determine if a site is listed, it is important that each initial investigation be done thoroughly. This section should be further clarified to state if the initial investigation is to be completed, with a determination made, withing the 90 day period. It currently states that the department will conduct an initial investigation within 90 days.

Section -120 (4)(a). The last sentence of this section should be revised to say "The state remedial investigation/feasibility study determines what problems exist and defines the extent of the problems..."

Part III - Site Reports and Cleanup Decisions (WAC 173-340-300 thru 360)

Section -310 (4)(d). This section should be modified to include situations where there has been a release or a threatened release of hazardous substances, but in the department's judgement, independent cleanup actions conducted under WAC 173-340-300 have resulted in the cleanup of the site to all applicable standards or requirements. Therefore, the site would require no additional action under this chapter at this time.

Section -310 (5)(b). The first sentence should be reworded as follows: "The notification shall be a letter sent to the person by certified mail, return receipt requested, or personal service, and shall include:"

Section -310 (5)(b), last sentence. Except for some situations requiring emergency remedial actions, Ecology should always be required to notify the site owner, operator, and any potentially liable persons known to the department at that time, that an emergency action, interim action or cleanup action is required. These persons should always be offered the option of undertaking the appropriate remedial actions themselves before Ecology undertakes any remedial actions.

Section -320 (6). Ecology should be required to make the results of the site hazardous assessment available to the site owner, operator, and any potentially liable persons, within thirty days of completion of the assessment.

Section -330 (2), line 6. The site hazard assessment should specifically consider sensitive environments and critical habitats.

WSPA
Western States Petroleum Association

Del J. Fogelquist
Northwest Regional Manager

December 6, 1989

Ms. Phyllis Baas
Washington State Department of Ecology
Hazardous Waste Investigations and Cleanup Programs
Mail Stop PV-11
Olympia, Washington 98503

Dear Ms. Baas,

Attached are our Association's comments on the proposed Cleanup Regulations under the Model Toxics Control Act. Although it is unclear at this point what the final deadline for comments will be, we are hopeful that the department will seriously consider our remarks and suggestions in any subsequent drafts of the regulations.

Please do not hesitate to contact this office if you have any questions or wish to discuss our concerns in greater detail.

Sincerely,

Del J. Fogelquist

/mpc

attachments

c: Mr. Roger von Gohren, Association of Washington Business
Mr. Fred Shiosaki, Chairman, WA State Ecological Commission
Vern Lindskog
NW Environmental Resource Group
NW Fuel Storage Resource Group

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December 6, 1989

COMMENTS ON THE PROPOSED CLEANUP REGULATIONS UNDER THE MODEL TOXICS CONTROL ACT

The Western States Petroleum Association (WSPA) is a trade association whose members conduct much of the producing, refining, transporting and marketing of petroleum and petroleum products in the western United States. We appreciate the opportunity to comment on these proposed regulations.

A primary concern of our members is how these regulations will apply to the investigation and cleanup of petroleum releases from underground storage tank (UST) sites. We have expressed this concern over the past several months primarily through active participation in the department's Cleanup Standards External Work Group, and more recently, through participation in the DOE's UST Advisory Committee. We have repeatedly been assured in informal discussions with DOE staff that the department intended to establish a streamlined regulatory program for leaking petroleum UST sites. The Western States Petroleum Association firmly believes that this is the correct approach for a number of reasons, some technical and others merely from the standpoint of practicality. Unfortunately, we do not feel that the proposed regulations as currently drafted will allow a simplified approach to release investigations and cleanups for the majority of UST cases.

In our opinion, two primary problems exist:

1. The criteria for Routine Cleanup Actions are too narrowly drawn. In particular, we are concerned with the statement that: "cleanup of ground water will not normally be considered a routine cleanup action (emphasis added)." While we agree that cleanup of an aquifer which is providing a beneficial use should probably not be considered a routine cleanup action, we most definitely do not agree that any impact to subsurface water occurring in "fully saturated" soils should automatically cause the site to become "non-routine."

The crux of this problem of course lies in the proposed definition of "ground water," which essentially includes any wet dirt found beneath the surface of the ground. The definition does not consider the vertical or lateral extent of this "fully saturated" zone, its hydrogeologic setting, or whether or not the subsurface water has any actual or potential beneficial use. Perhaps more importantly, the definition does not even contemplate whether or not the water can be reasonably brought to the surface in sufficient quantities to fulfill a beneficial use.

We are encouraged that the department recognizes a difference between water found in the subsurface and true ground water (beneficial use). (Section 173-340-320(4)(f).) We would strongly encourage the department to continue this critical and necessary distinction throughout this regulation (as well as in the Groundwater Quality Standards currently under development).

Section -330 (3)(a). PLP's should be notified within 30 days of having been placed on the hazardous sites list. No one should be forced to wait up to a year to find out that they have been placed on this list.

Section -330 (4)(b), last sentence. Ecology should be required to respond to petitions to have a new site removed from the hazardous sites list within 60 days. Being placed on the list has significant and far-reaching impacts on the PLP's. Ecology should not be able to delay such an important decision indefinitely.

Section -350 (1). The first sentence should be reworded as follows: "The purpose of a state remedial investigation/feasibility study is to collect, develop, and evaluate information regarding a site sufficient to enable the selection of a cleanup action under WAC 173-340-360."

Section -350 (5). The second sentence should be reworded to further indicate what unnecessary information is. There is a major tendency in RI/FS studies to collect data that has no bearing on developing or selecting cleanup actions. The result has been a tremendous expenditure of time, manpower and financial resources that would be better applied to implementing site cleanups.

Section -350 (6)(h). It is unclear from this sentence as to whether an environmental analysis is required as a part of the RI/FS process, or whether a cleanup project will have to comply with SEPA requirements in their entirety. An environmental analysis as part of the RI/FS process is necessary and appropriate. There will be times when proposed cleanup actions will require mitigative measures to off-set impacts or will be more impacting than the hazardous waste site itself. However, compliance with the entire SEPA process is unnecessary. Although some portions of the EIS could be prepared concurrently with the RI/FS reports, the majority of it could not be prepared until the RI/FS was completed and perhaps even the final settlement reached. Complying with the SEPA process in its entirety would result in the delay of the start of any cleanup actions by nine months to two years. Design of the selected cleanup actions could not be initiated until after the EIS process was completed. The point of this whole process is to protect human health and the environment by getting these sites cleaned up! Complying with the entire SEPA process is in conflict with this goal.

Part IV - Site Cleanup and Monitoring (WAC 173-340 thru 400)

Section -400 (4)(a)(vii). A conceptual plan of the proposed cleanup action, including treatment units, facilities, and processes should be included in the feasibility study portion of the RI/FS process. After all, the FS report includes treatability studies and other analyses detailed enough to select an alternative for implementation. The engineering design report should not duplicate these efforts; rather it should focus on the information

necessary to move onto the next step, design.

Section -400 (4)(b)(ix). Construction specifications should include the specific site characterization information necessary for a contractor to develop an health and safety plan for employees on the project. However, the specifications should not include specific contaminant action levels and contingency plans. This puts the responsibility on the owners and leaves them wide open to contractor claims. The responsibility for employee safety should be placed on the contractor. The contractor should be required to prepare a project specific health and safety plan, provide a qualified site safety officer, and provide the necessary training for employees.

Section -400 (4)(c)(ii). Since most operation and maintenance plans are prepared after the project is completed (it must be based on as-builts), it is not appropriate to include a cleanup action implementation schedule in the document.

Section -400 (7)(c). Ecology should be obligated to review and respond to design changes on change orders with approval or disapproval with 48 hours. Delays in response may cause substantial delays in the cleanup project and leave the responsible party open to significant contractor claims.

Section -410 (3)(b). I do not understand the application of statistical methods here. For most media, being in compliance means you either meet a standard or you don't at the particular sampling point. Unless the purpose of the use of statistical methods is presented here, it seems a waste of time.

Section -430 (3)(b). Cleanup actions should comply with applicable laws, as well as with cleanup standards.

Part V - Administrative Procedures for Remedial Actions (WAC 173-340-500 thru 560)

Section -500 (1). Status letters should be issued when the department has credible evidence and not wait until it is ready to proceed with a remedial action. The delay is not in the department's best interest and it also precludes the PLP's assessment which could be more accurate and relevant for expeditious site cleanup.

Section -500 (3). Most PLP's will not have the resources available to respond in thirty days. The thirty day comment period should be extended to sixty days (60) to give the PLP a better opportunity to review existing data, hire a technical consultant and prepare a preliminary site evaluation in response to the letter.

Section -500 (5). Why does accepting status as a PLP waive their right to notice and comment? This subsection needs to be expanded and clarified.

Section -510 (4). More than a reasonable effort should be made to notify PLP's to be consistent with Section -520 for a more expedited cleanup under a consent decree or Section -530 the agreed order. Would it not be in the department's interest to seek voluntary cleanup rather than pursue the recovery of public funds after the fact?

Section -520 (1)(a)(i). A proposed remedial action and a schedule is an inappropriate submittal to the department based on procedures recommended under Guidance for Conducting Remedial Investigation and Feasibility Studies under CERCLA (EPA October 1988). Although this document is not final, it is the most reliable framework for conducting the RA and is based on real work efforts. No more than a work plan of the Scoping phase should be required prior to entering into negotiations with the department at this time.

Section -520 (1)(a)(iv). Please see Chapter 2, Section 2.2 Project Planning of the above referenced document to define requirements for this Section.

Section - 520 (1)(a)(vi & vii). Detailed proposals, as identified by EPA, should be the required work plan. If any plans or procedures are developed prior to that time, it only makes compliance with accepted procedures that much more difficult to manage. It should be the responsibility of the department to develop regulations consistent with accepted practices and not list new theories and ways of doing work. This will only delay cleanup activities.

Section -520 (1)(b)(i). Comments above suggest the waiver process may be the only realistic mechanism to avoid complying with the requirements for a detailed proposal at this step.

Section -520 (1)(c). The level of detail should be consistent with EPA's Scoping activities.

Section -520 (1)(e). How can the department enter into a consent decree negotiation without fully completing this step? It again seems to be in the interests of the department to identify and notify all PLP's.

Section -520 (1)(f)(iv). The department should review CERCLA guidance prior to requiring these steps. It is unreasonable to require a schedule from the PLP when Ecology will probably control the timing and length of negotiations.

Section -520 (1)(h). Will negotiation with PLP's be individual or as a group? Individual and sequential negotiations could delay cleanup implementation for an unreasonable time.

Section -520 (2)(a). The comment period should be sixty (60) days. (see comment on Section 500 (3).)

Section -520 (2)(c). The letter should request the PLP to respond. This would meet the voluntary cleanup policy as stated.

Section -530 (1). The first sentence is not clear. It would be helpful to define the interim actions that can be covered by an Agreed Order, or at least provide examples. An agreed order should provide for mixed funding since the project will meet the same criteria as stated in Section 173-340-560.

Section -530 (3). See comment to Section -520 (1)(e).

Section -550 (3). The department should also be required to provide all backup documentation to support costs in the itemized statement.

Section -560 (2)(a). Mixed funding should be available to all parties who meet 173-340-560 (3) and not be limited to only those parties under a consent decree.

Section -560 (4). Project costs are accumulated under specific project budget tracking systems. Unless the department provides a clear task to cost allocation procedure, the PLP should be able to explain and defend funding determinations during a review process.

Part VIII - General Provisions (WAC 173-340-800 thru 890)

Section -810 (2). It seems the subsection (2) should be deleted in it's entirety. If WDOE is not the agency with the authority to enforce WISHA Ch49.17 RCW, how will the department review and comment on safety and health plans? Will the department approve the plans? If the department is commenting and/or approving the plans, is the department accepting responsibility for the site worker's safety and health protection? Will the department be liable?

Section -820 (1). The second sentence which reads "The level of detail required in the sampling and analysis plan vary with the scope and purpose of the sampling activity." is ambiguous. The content is clearly spelled out in subsection (2) and therefore each plan can be evaluated against the content items for level of detail. This sentence should be deleted.

Section -820 (2). The first and second sentences are ambiguous. How is "sufficient quality" defined? Who defines this? and when? (1st sentence) - delete. The second sentence should be deleted. The content of the plan described in this subsection is already very detailed and will cover enough information to "ensure proper planning and implementation of sampling activities."
The second sentence allows for anything to be added to the plan since it is vague and undefined.

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November 20, 1989

Ms. Phyllis Baas
Department of Ecology
Mail Stop PV-11
Olympia, Washington 98504-8711

BY FAX

Subject: Comments on Proposed Rules for the Model Toxics Control Act (Initiative 97)

Dear Ms. Baas:

This letter provides preliminary comments on behalf of the Public Private Cleanup Coalition, a group of public entities and private companies which share the common objectives of achieving effective and expeditious cleanups of hazardous waste sites.

A copy of the Coalition's objectives, previously given to the Department of Ecology, is attached. These objectives provide the criteria we have used to evaluate the rules and have guided our participation throughout the rulemaking process. Interests actively involved in the rulemaking process, including the department, have expressed strong agreement with most of these objectives.

Background on these Preliminary Comments

By way of introduction, the department notified us of a postponement in the rulemaking process as a result of an error in the publication of the proposed rule. Despite our efforts, we were unable to obtain clarification from the department as to the role of any comments submitted on the original deadline until this past Friday afternoon, November 17. With regard to the formalities of the rulemaking process, therefore, we note for the record that the department suspended the November 17 comment deadline, but requested us to submit these comments by Monday, November 20, and we have preserved all rights by so doing.

Although we have had a number of meetings to develop comments on the proposed rules, the Coalition members concluded that our efforts would be directed toward providing detailed comments during the new January commenting period. On Friday, November 17, we were informed of the department's approach of convening the Cleanup Process Workgroup and incorporating important comments now in an effort to reduce the prospect of another round of re-publication. While this approach is a good idea, our letter necessarily contains preliminary comments, and we expect to have some additional comments in January.

We have made an effort to focus this letter on our highest priority concerns, rather than every textual change we will recommend for the rules. In addition, we felt you should be aware that several Coalition members including various port districts felt sufficiently strongly about comments in this letter that they were planning to submit individual letters as well. We encourage the department to address the problems identified and incorporate the kinds of revisions noted in this letter. In particular, we would direct your attention to the high priority issues in Parts I, III, and V of the proposed rules.

General Comment

We commend the Department of Ecology on the proposed rules and the rulemaking process. We believe the proposed rules generally provide a workable process which encourages responsible parties to come forward to clean up sites. We also want to commend Ecology for proposing a comprehensive rule for the cleanup process, as well as for the effort made to organize and draft a regulation that can be used by managers and the public.

In this regard, we are enclosing the October 24, 1989 joint statement by members of the environmental, business, and governmental communities and related materials so that they will be included in the department's official rulemaking record and file.

Although there are a number of areas where we believe the rules can and should be improved, the proposed rules are a big step forward, especially when compared with the previous interim rules Ecology issued for hazardous waste cleanups.

We would also emphasize the importance of addressing several remaining issues in the rules, having workable and realistic companion rules for cleanup standards and rules for funding under the act, and ensuring that Ecology staff are continuously trained and assisted in carrying out these rules and policies in practice. The department should be cognizant of the fact that the progress made on the cleanup process could be undone by the cleanup standards rule and by uneven implementation.

Use of Preamble and Policy Statements

Some of our greatest concerns and comments on the proposed rules involve matters of interpretation. These might be resolved if the department issues an explanatory statement in the notice of the proposed rule (its "preamble") and in interpretive or policy statements accompanying the rule.

As to the former, the newly revised state Administrative Procedure Act (APA) provides that the notice of a proposed rule shall include "agency comments or recommendations, if any, regarding statutory language, implementation, enforcement, and fiscal matters pertaining to the rule" and "a short explanation of the rule, its purpose, and anticipated effects...." RCW 34.05.320(1)(f) and (j). A "concise explanatory statement" is also required when an agency adopts a rule. RCW 34.05.355.

The new APA also contains a provision stating: "If the adoption of rules is not feasible and practicable, an agency is encouraged to advise the public of its current opinions, approaches, and likely courses of action by means of interpretive or policy statements." RCW 34.05.230(1).

The stated intent of the new APA is to have definite policies articulated in rules, and not vice versa. There may be some areas, however, where the intent or explanation of how the new MTCA rules will be implemented would be appropriately handled through brief preamble and policy statements. We make an effort to note these potential areas in our comments.

While there may be some flexibility to address certain issues outside the actual text of the proposed rules, any such resolution of an issue should be included *in* the notice of the proposed rule and not simply be a promise to followup on the comment in the future. This would avoid continuing uncertainties and inviting unnecessary and wasteful litigation.

PART I: OVERALL CLEANUP PROCESS

Section 130 - Administrative Principles

Highest Priority Comments:

Comment. The first sentence of subsection (5) should read (shown in redline):

> "It is the department's intention that cleanup decisions shall be made as soon as adequate information is obtained ~~will be gathered at a site to enable decisions on appropriate actions~~."

Reason. As currently drafted, subsection (5) does not convey the strong consensus on the policy to move to cleanup decisions rather than studying a site to death, one of the biggest criticisms of the federal process. Furthermore, the phrase "enable decisions on appropriate actions" is vague at best. Because this is such a key comment, it is mentioned first.

Comment. "Can" should be "should" in the first sentence of subsection (6) because the rules need to be unequivocal that steps are intended to be combined "when appropriate".

Reason. This has been one of the fundamental policies and building blocks of the MTCA rules throughout the rulemaking process (it is one of the reforms likely to be incorporated into the new NCP to achieve expeditious cleanups). A value-neutral statement simply allowing combination of steps will not accomplish its purpose. Among other things, it will undermine the policy of the rules. From a practical standpoint, it will discourage volunteers and will put an unfair burden on parties trying to get a cleanup going to persuade regional staff to have the courage to combine steps. From a political standpoint, without explicit encouragement, appropriate combining of steps may appear to be an end-run on proper process rather than being – as intended – standard operating procedure.

Comment. The interagency coordination provisions are not yet adequate, and the problem cannot simply be attributed to statutory limitations. Whether coordination with EPA, SEPA, Shorelines, RCRA or other issues, these and associated rules and policies need to go further, and we are willing to explore these approaches over the coming weeks, as are other interests.

At a minimum, a new paragraph (d), which Ecology has amply authority to promulgate under Section 3 of the MTCA, should be added to subsection (9) now:

> "In order to provide for expeditious cleanup actions, all state and local agencies are authorized to combine notices, meeting, hearings, and other documents and proceedings under other laws, whether legislative or adjudicatory, with those under this chapter unless expressly prohibited from doing so by law."

Reason. Ecology staff and PLPs (to whom substation 9(a) gives substantial responsibility for agency coordination) need to be able to point to a statewide regulation that shifts the burden to the other agencies to show why they cannot integrate their processes if requested.

It can be extremely difficult – and more to the point, time consuming – to try to convince a staff member of another agency who is inexperienced in superfund to allow a proceeding that agency has always used for one purpose to be used for another as well. This one sentence can shift the focus to a problem-solving mode: not *whether*, but *how* to integrate the processes. This sentence was previously recommended by the Cleanup Process Workgroup and was drafted with and supported by local government representatives.

Concerns to be Addressed (possibly in preamble or policies):

Comment. The third sentence in paragraph (3)(a) should be preceded by the following clarification: "Unless the department is providing guidance for the implementation of an order or decree, ..."

Reason. This subsection is addressing informal advice and assistance leading to formal approvals. Once an order or decree is being implemented, Ecology staff will frequently be giving advice or direction to PLPs. It would be both impractical and absurd to obtain or formally amend the order or decree every time an implementation question arose, which could be the literal consequence of the current text. To the extent formal amendments are needed, the order or decree will contain a provision governing when and how these are done.

The use of the word "such" in the sentence is apparently intended to convey this, so it may be possible to address this concern by clarifying the intent in a one-sentence explanatory statement or policy. For example: "This subsection is intended to apply to planning activities leading up to orders or decrees; it is not intended to require an obtaining or amending an order or decree any time issues are resolved during the implementation of an order or decree."

Comment. Subparagraph (3)(a) or an explanatory statement needs to clarify that the subsection is not an absolute bar on approvals for certain kinds of preliminary planning activities. One example which the Workgroup discussed on several occasions is staff concurrence in obtaining reliable off-site data to enable a party to develop a remedial action proposal to submit to Ecology. The following kind of clarification is needed:

"The department may approve the scope of planning activities needed to obtain adequate data to propose an order or decree for a remedial action. However, such approvals should not substitute for approvals that would typically be involved in an order or decree, such as the scope of work for site characterizations or choice of alternatives."

Other:

Minor comments. Subparagraph 3(a) should be (b). "Small" should be deleted in subsection (5), because the relevant fact is that groundwater impacts are minimal; the size of the site is irrelevant.

PART II - DEFINITIONS AND USAGE

Section 200 - Definitions

Priorities. Although the definitions need some cleaning up, at this time we would suggest revising or adding the following. Of the following, correcting the definitions for agency, cleanup action, interim action, PLP, and potential hazardous release are highest priority.

> "Agency" means any governmental body including federal, state, regional, local governments and the official governing body of an Indian tribe.

Reason. The term is used throughout the rules, but the reader may not understand its meaning. Indian Tribes or regional governmental bodies may not think of themselves as "agencies". An inclusive definition would avoid future problems.

> "Cleanup action" means a remedial action that complies with cleanup standards promulgated by the department and specifically set forth in the approved cleanup action plan for a facility.

Reason. The laundry list in subsection 3 is presents the classic problem of selectivity and obsolescence, both in terms of cleanup activities and cleanup standards. The absence of cleanup standard rules should not necessitate such a problem definition. A parenthetical phrase after "promulgated by the department" such as "(or, until such standards are adopted, the requirements of 173-340-360)" could solve that dilemma.

> "Interim action" means a remedial action conducted under 173-340-430 that partially addresses a potential hazardous release. It is an action which, at the time it is approved or required, the department cannot conclude will be in compliance with cleanup standards. An interim action does not include cleanup actions that are approved because they are expected to meet performance standards when completed.

Reason. These are essential attributes of an interim action, yet they are never explained anywhere in the rule, including in Section 430. The concept of a "discrete remedial action" in the proposed rule does not contribute to understanding what distinguishes an interim action from any other kind of remedial action.

> "Potential hazardous release" means a release or threatened release of a hazardous substance that may pose a threat or potential threat to human health or the environment.

Reason. Now that there is time to reflect on it, we also believe that defining and using the phrase "potential hazardous release" will prove a significant improvement both to the rules and the drafting of letters, orders, and decrees and strongly urge its adoption, regardless of how frequently it actually replaces the 23-word litany in the regulations proper.

> "Potentially liable person" means any person whom the department finds, based on credible evidence, to be potentially liable after following the notice and comment process set forth in 173-340-500.

Reason. There is no reason to compound the inadvertent problem in the statute in the rules as well. The above definition is drafted in a way that it relates to the *process* set forth in the rules and therefore does not conflict with the statute.

> "Sensitive environment" means an area of special environmental value where a release could pose a greater threat than in other areas of the environment, such as (laundry list if necessary).

Reason. The proposed definition ranges from awkward to inaccurate because by definition every environment has a particular value (or "niche" in ecological terms). The function of the term in the body of the rules is to highlight areas where potential hazardous releases poses *greater* threats than in other areas. This concept is missing from the proposed definition. In addition, there remains the potential for confusing this term with SEPA, which should be clarified.

Section 210 - Usage

Comment. The following should be added to usage, as each appears in the rules and would substantially assist the reader to avoid questions or confusion in interpreting and using the rules:

> "Laws" means any federal, state, local or other statutes, ordinances, resolutions, and duly promulgated regulations.
>
> "Prepare or preparation" means preparing or supervising the preparation of documents, including writing, issuing, filing, circulating, and related activities.
>
> "Submit" means furnish documents or other material to the department unless otherwise specified.

PART III - SITE REPORTS AND CLEANUP DECISIONS

Highest Priority Comments:

Section 310 - Initial Investigation

Comment. The content of the early notice letter in paragraph 6(b) continues to omit essential items to enable the process to work as intended. It should be revised as follows (redline):

"(b) The notification shall be a letter mailed to the person ~~which includes~~ that:

> (i) Provides the basis for the department's decision and invites the person to review the data;
> (ii) Includes a statement that it is the department's policy to work cooperatively with persons to accomplish prompt and effective cleanups;
> (iii) States that the letter is not a determination of liability and that proceeding with planning or conducting remedial actions is not an admission of guilt or liability;
> (iv) States the department's commitment to fair examination of alternative cleanup methods for any remedial actions that may be necessary; and
> (v) Provides a person or office of the department to contact regarding the contents of the letter."

Reason. This is the *first* substantive communication a party is likely to receive from Ecology. As such, it will have a formative influence on the willingness of the party to step forward and on the relationship with the department. If there is any one comment we have heard most frequently from clients -- both small and large municipalities and companies -- it is that the first contact can make or break the process and that the suggested additions to the content of this early notice letter are crucial for starting out the process right.

The two earlier concerns we understood Ecology had about this comment were that specifying the content of the letter did not need to be in the rules, and if it was included, it was too detailed. As to the first, this policy direction is so important that needs to be stated in the rules and cannot be left to agency policies or handbooks, which can be unilaterally changed by staff in the future without public review. To address the second concern, we have substantially pared back the amount of text to be added. There are other materials we believe should be included with the letter as a matter of good public policy (such as a plain English, graphically simple explanation of the cleanup process), but we are willing to leave this to Ecology's implementation.

Comment. The following should be added to paragraph 5(d):

> "(iii) One of the reasons stated in 173-340-310(2)(b)."

Reason. The proposed rule currently only allows two bases for the department not to take action after an initial investigation. Yet there are two other bases for not conducting an initial investigation (310(2)(b)). For example, federal remedial action or corrective action under another law (such as RCRA or the Clean Water Act) may be underway at a site. Under the exemption, this would not require an initial investigation under the MTCA. But, if an initial investigation did occur -- and discovered that a remedial or corrective action under another authority was underway to address a threat or potential threat -- the proposed rule as drafted would not allow Ecology to refrain from further action. This inconsistency should be corrected. Followup action does not seem to make sense in circumstances that do not even require an initial investigation at all.

Section 320 - Site Hazard Assessment

Comment. Subsection 4 still fails to describe what the assessment *is* intended to be and how it differs from a state RI/FS. It should be revised to include the following:

> "A site hazard assessment should have a level of detail appropriate to a site survey. It should provide a basis for identifying areas that may need more detailed study."

Section 350 - State RI/FS

Comment. Subsection 5 should have an additional sentence, as follows:

"A state RI/FS typically need not have the scope and complexity of a federal RI/FS."

Reason. Subsection 5 tries to provide some flexibility to tailor the scope of the state RI/FS, but Ecology staff continue inappropriately to use federal guidance in directing PLPs and consultants on the scope of the study. Although cleanups at NPL sites will produce documents that meet federal and state regulations, most state sites are not NPL sites, and it would seriously delay proper cleanups to treat them as such. This additional clarification will be important for all concerned.

Concerns to be Addressed (possibly in preamble or policies):

Section 300 - Site Discovery

Comment. If the rules do not contain a reportable quantity threshold (and we understand this is still be explored), there should be rules or guidance to help people understand the types of reporting of de minimis quantities or events that Ecology does not intend to occur. In addition, we think it would be helpful for the preamble to the republished proposed rule specifically to invite comments on this subject.

Sections 350 and 360 - State RI/FS and Cleanup Decision

Comment. The typical packaging of the state RI/FS, draft cleanup action plan, and SEPA documents -- followed by the final cleanup plan, SEPA documents, and proposed consent decree needs to be more explicit intention of consulting with interested parties during this time, especially on a cooperative with PLPs who have proposed cleanups, should be stated as well. Although we found some concern about having two 30-day public and agency comment periods, we generally found a lot of support for this approach in constituent briefings. We found, however, that readers of the proposed rules were unaware of this integrated approach simply from reading the rules and are similarly concerned that Ecology staff have guidance so that they are aware of this intent.

PART IV - SITE CLEANUP AND MONITORING

Section 400 - Cleanup Actions

Comment. Paragraphs 1(b) through (d) should be deleted.

Reason. They duplicate paragraph 1(a), and, as such, cause confusion and create an overlay on a very simple hierarchy established by the rules: Section 350 sets forth criteria for evaluating alternatives; Section 360 sets forth requirements for cleanup action plans and final decisions; Section 400 implements the cleanup action plan and decision. In short, Section 400 should not contain another set of cleanup standards. These are articulated in Section 360.

Comment. The level of detail and number of different plans required is duplicative and overly detailed for the rules. Although we appreciate the "rule of reason" qualifiers in subsection 4, we are quite concerned that more attention will be given to checking off all of the more than 50 individual items listed than to figuring out what is appropriate. If this level of detail is retained in the rule itself, the rule or policy should make it clearer that this is a "menu" approach.

Section 420 - Periodic Review

Comment. This section should be clarified or deleted. No one at Ecology has yet been able to explain how it relates to compliance monitoring, delisting, or other sections of the rules. As the previous section already requires compliance monitoring plans, this section presumably adds something in addition. The last clause could be revised to be consistent with other rules as follows:

> "...every five years after the initiation of such cleanup action and until delisting to assure that human health and the environment are being protected. This section pertains to review by the department and does not cause oversight or other recoverable costs or

require the department or a party to conduct monitoring at a minimum of five year intervals."

In any event, as currently drafted neither its purpose nor its language is clear, and, if read literally, it could undermine other provisions of the rules and statute.

Other:

Section 430 - Interim Actions

The word "fully" should be deleted from the third sentence in paragraph (1)(d), as it is only mischievous does not help the example. Perhaps the concept of "sufficiently defining the extent of contamination to select a cleanup action" is what was intended.

PART V - ADMINISTRATIVE PROCEDURES FOR REMEDIAL ACTIONS

Highest Priority Comments:

Section 500 - Determination of Status as a PLP

Comment. Subsection 4 should be revised to insert "potential" prior between "finding of" and "liability". In the alternative, the phrase could be revised to read: "...credible evidence supports its finding, then the department...."

Reason. This has been a long-standing problem, which has been addressed in every other section of the rules but here. As we have discussed and agreed, it does not serve the department's, the public's, or the PLP's interest to force someone into a position of asserting or accepting "liability" -- in contrast to "potential liability". In fact, it is counterproductive, because it often leads to parties' contesting the finding, which they would have no need to do if it referred to their potential liability.

The basic resolution contained in Section 500 to solve the statutory definition problem is that the department would issue a "determination of potentially liable person status". This sentence needs to be made consistent with this approach.

Section 510 - Administration Options for Remedial Actions

Comment/Reason. The first sentence of subsection 1 is not in the statute. Rather, it creates a new requirement that exceeds Ecology's statutory authority. It should either be deleted or revised as has previously been recommended to follow paragraph 1(4) of the MTCA:

> "It is the responsibility of each and every liable person to conduct remedial actions so that sites are cleanup up well and expeditiously."

Comment. Add a new subsection (5) as follows:

"(5) Informal review. (a) If, during the planning, negotiating, or implementation of a remedial action a potentially liable party believes it has been advised or directed by the department to proceed in a manner inconsistent with this chapter or an order or decree, the party may submit a letter to the official who is responsible for managing the department's hazardous waste cleanup program to request informal review. The letter shall cite the relevant

provision and briefly describe the disagreement and possible resolution. A party making such a request shall be presumed to be doing so in good faith.

(b) The manager shall respond orally or in writing within 14 days and may:

(i) Make an interpretation or determination in the matter;
(ii) Initiate efforts to facilitate resolution of the dispute, or designate a person or panel to do so;
(iii) Provide written reasons for declining to act on the matter; or
(iv) Take such other action as the manager deems appropriate.

(c) This informal review shall not be used to supersede specific dispute resolution, appeal, or enforcement provisions contained in this chapter or in an order or decree."

Reason. This is not a new concern. For more than a year during the development of the proposed rules, many interests have agreed on the need for the rules to recognize an informal review to resolve problems as they arise and to avoid placing parties in the untenable position of being improperly perceived as "going around" or "over the heads of" regional staff who may not be implementing the MTCA rules and policies. We noted this several times during the final weeks when the proposed rule was being developed. It is crucial that this kind of process be incorporated in the rules to allow an escape value when the dynamic on a site begins to turn sour and what could have been a good cleanup becomes a disaster for all concerned.

We believe .. subsection along the lines above carefully avoids typical problems: by not specifying the title of the official (the reorganization problem); by giving the official maximum flexibility in responding; by not labelling the process an appeal and by not letting it undermine dispute resolution or appeal provisions; by keeping it short, informal, and minimizing procedural requirements.

Section 530 - Agreed Orders

Comment. The following sentence should be added (probably to subsection 1 or a new final subsection):

"An agreed order between the department and another governmental entity which meets the requirements of this section may be titled a memorandum of agreement."

Reason. Agreements between governmental bodies usually take the form of a memorandum of agreement. This is valuable for a number of reasons, especially that public officials readily understand and enter into such agreements; the title conveys an interagency cooperation to solve public problems affecting both agencies; and the media and public generally perceive their elected officials as acting in the public interest when entering into these cooperative agreements.

For these reasons, cleanups are likely to be initiated and proposed earlier if agency staff can recommend entering into a memorandum of agreement with Ecology. Public officials are less likely to feel threatened or be resistent to getting into the cleanup process. Quite a few public officials supportive of the proposed rules made this point to us. It would seem that Ecology could accomplish quite a lot in terms of its relations with sister agencies under the MTCA with this brief sentence.

Given the careful consideration and drafting of the agreed order provision, however, we recognize that any change should not affect the process or product required by Section 530.

The revision would not change the current negotiation process or content of the agreed order document in any way. It would simply allow the result of the Section 530 process to be titled a memorandum of agreement when the PLPs are state or local agencies. The precise document title would probably be something like: "Memorandum of Agreement by and between the Washington State Department of Ecology and (named agency) for an Agreed Order on (type of remedial action) at (name of facility)", but this level of detail seemed a bit much for the rules themselves.

Section 540 - Enforcement Orders

Comment. The following phrase should be added to the end of the first sentence:

"and the early notice letter under 173-340-310(6)."

Reason. If the fundamental policy to encourage PLPs to propose remedial actions and work cooperatively with Ecology is to work, it is essential that PLPs *at least be given an opportunity* to propose a cleanup. This is basic fairness, as well as common sense.

Nothing in this addition would undermine Ecology's enforcement authority or the timing of enforcement actions. The provision already incorporates the 30-day comment process for PLP status letters as a prerequisite for enforcement. The point of the early notice letter is that it occurs once, at the outset of the process. Ecology would not be required to issue one each time it was considering an enforcement action. Furthermore, the early notice letter can indicate the need to develop a proposal on a short timeframe if the problem is somewhat urgent but less than an emergency.

The only argument we have heard voiced against this approach is that there may be recalcitrant PLPs with whom Ecology has had bad experiences. This is a self-defeating proposition. From our own experience, we have seen people learn from experience or even act differently at different sites. The cleanup system, like our jurisprudence, should not find a party guilty before the fact.

Section 550 - Payment of Remedial Action Costs

Comment. The final sentence of subsection 1 should be revised to put a period after "basis." Another approach would be to change the "seek payment..." to "periodically notify parties of the amount of costs being incurred."

Reason. Although we agree with PLPs paying for the cost their preparation of RI/FSs, we strongly as we disagree with the general policy of "pay-as-you-go" for oversight costs. It is a considerable disincentive for parties to get into the process -- and especially to take the initiative -- if they must pay for the privilege of being responsible citizens.

We are aware of the funding dilemma facing the program, but there are better ways to solve the problem, such as reducing the amount skimmed off the state toxics fund for general Ecology purposes or increasing legislative support for the program (with businesses, local governments, and environmental groups joining to explain how Ecology needs more resources). Another approach that could prove acceptable would be setting a permit fee schedule, where applicants routinely expect to pay for reasonable staff time spent in reviewing their applications.

We note that this sentence is the only provision in this section that is at odds with the compromise framework developed in the Workgroup. We would be glad to explore alternatives with you.

Concerns to be Addressed (possibly in preamble or policies):

Section 560 - Mixed Funding

Comment. We recommend including a commitment in this section, section 340, or possibly in preamble or policy that the department will determine an annual or biennial basis the amount of the state toxics account to be available for mixed funding and provide the legislature with an accounting of the prior year's expenditure of mixed funding.

Reason. This would provide important certainty and accountability for mixed funding and for reduce pressure on the department to put all program costs on the back of PLPs through the use of oversight costs.

Comment/Reason. The rule, definitions, or preamble or policies to clarify that governmental agencies may qualify for mixed funding (i.e., they can have economic hardship). This was included in previous drafts for mixed fund rules, and we are not aware of any change in policy.

Part VI, Section 600 - Public Participation

Comment/Reason. We have concerns about how Ecology field staff will interpret the "affected vicinity" element of the public notice provision because, unlike local agency staff, they are not usually aware of the practical difficulties in targeting direct mail notices. If the rules cannot provide a more creative solution or provide guidance, the preamble or policies need to make sure this is interpreted and administered in a practical way.

Part VII - Cleanup Standards (see general comment)

Part VIII - General Provisions

Comment. Several of the plan requirements in this part need to be made consistent with the requirements in preceding parts of the rules, especially in Sections 400 - 420.

CONCLUSION

We hope these comments are helpful. Please let us know if you have any questions about their intent. We have made an effort to include top priority comments. Although we have unfortunately not had an opportunity to consult with other members of the Cleanup Process Workgroup prior to submitting this letter, most of the comments have been suggested or favorably received by the Cleanup Process Workgroup over the past months.

We appreciate the thoughtful review and inclusion of many of our comments on the previous draft of the rules, and we would request that you consult with us prior to re-publication if you are unable to incorporate the above comments.

Respectfully submitted,

PRESTON, THORGRIMSON, ELLIS & HOLMAN

Kenneth S. Weiner

Attachments

cc: Ecology Cleanup Process Workgroup
Public Private Cleanup Coalition Steering Committee

PUBLIC PRIVATE CLEANUP COALITION
OBJECTIVES IN RULEMAKING PROCESS

1. Create a workable process to achieve effective and expeditious cleanups. Provide as much certainty as possible with respect to the overall process while providing flexibility to address specific sites and parties.

2. Provide a non-adversarial, non-litigious process to the extent possible.

3. Adopt regulations for the overall cleanup procedures, so that people know what the process is and have a common interpretation of key provisions. Codify key incentives to promote cleanups and to imposing disincentives by regional staff.

4. Develop rules and policies with a minimum of technical or legal jargon that can be understood and used by managers and citizens, similar to the 1983 SEPA reforms (except for the appeal section of course).

5. Encourage cooperative problem-solving at all sites, and provide for early information sharing by Ecology of suspected problems. As a general policy, encourage parties to propose remedial actions and use Ecology-initiated actions as a fallback. Provide incentives for interested parties and agencies to develop cooperative, coordinated plans at complex multiparty sites. Provide for parties who want to move through the process expeditiously to do so without charging them for the 'privilege' of Ecology paying attention to them.

6. Integrate federal, state, and local environmental review and permit requirements (including alternatives analyses), public participation, and appeals with the Toxics Control Act -- both in terms of procedures and substantive cleanup standards -- to minimize duplication, delay, paperwork, and confusion. Avoid duplicating the complexity of the federal superfund process.

7. Simplify the process as much as possible for emergency, immediate, or relatively rountine cleanup situations ("minor sites") and minor involvement ("de minimis").

8. Simplify the hazard ranking system, including establishing groups of priority sites, not ranking minor or routine sites, and integrating it with other criteria in Ecology's setting of priorities.

9. Encourage early and constructive public education and participation, recognizing the constraints of property transactions and the frequent need for preliminary informal planning and agency consultation.

10. Promote fair and adequate funding and technical assistance for remedial activities, recognizing the general concept that the "polluter pays", while instituting methods for long term payments.

ATTACHMENTS

to comment letter to

Department of Ecology

for the rulemaking record
and rulemaking file under
RCW 34.05.370

November 20, 1989

October 24, 1989

STATEMENT

A year ago at this time, there was a vigorous statewide debate on the best law for cleaning up hazardous waste sites in Washington state. After the divisiveness of the election campaign, no one knew whether environmentalists, business, and public agencies could find any common ground on the implementation of Initiative 97, the Model Toxics Control Act. Each of us, from our different perspectives, were concerned that the department might adopt policies and rules that would undermine the ability to accomplish cleanups.

We commend the Department of Ecology for the rules it has just proposed for the cleanup process under Initiative 97. The rules probably provide for more effective public participation than any other environmental law in the state, which is relevant because the law was enacted by a citizens' initiative. We believe the proposed rules generally provide a workable process which encourages responsible parties to come forward to clean up sites.

We would emphasize that these are "proposed" rules, which merit a serious look by anyone interested in hazardous waste cleanups. We will continue to work to improve them during the public comment process and encourage others to do likewise.

We especially want to commend the Department of Ecology for its rulemaking process, which took a consensus approach to developing the rules. Although none of us got our wish lists, the proposed rules are a big step toward meeting the letter and spirit of the act and establishing a process that will get prompt and effective cleanups. We are also pleased with efforts to minimize the jargon and write the rules in English, so that citizens and managers can use them. A great deal of credit belongs to Ecology Director Chris Gregoire and her top staff for their active participation in pursuing these goals and for Governor Gardner's support of the process.

The success of the state's hazardous waste cleanup effort will ultimately depend on whether workable and realistic companion rules for cleanup standards and rules for funding under the act can also be developed and on whether all of these rules and policies are carried out in practice.

Dave Bricklin
Rod Brown
Nancy Pearson
Bruce Wishart
Initiative 97 Coalition

Kathleen Collins
Association of Washington Cities

Jim Brewer
Senior Deputy Prosecuting Attorney
King County

Don White
Washington Public Ports Association

Dave McEntee
Simpson Tacoma Kraft Company

Jim Hodge
Rabanco

Art Zaegel
Burlington Northern Railroad

EDITORIALS

STATE TOXIC-WASTE CLEANUP

Environmentalists, businesses join hands

PASSAGE last year of environmentalist-backed Initiative 97, the state toxic-waste-cleanup law, was not a happy event for state lawmakers and business groups that backed the less stringent Alternative Measure 97B.

The loss was particularly bitter due to overheated rhetoric flung by both sides during the 97-97B battle. Many predicted that the divisive campaign would sour relations between environmentalists and the business community for years.

Happily, those election-night predictions proved to be wrong. Together the two camps have helped create enlightened regulations, promulgated under the new law, that promise to make Washington a model for other states.

Although both sides attacked each other viciously during the campaign, they knew that 97 and 97B were merely frameworks for a toxics program.

The guts of the law – how hazardous-waste cleanup would actually be carried out – depend largely on the new regulations created.

Under the wise direction of Chris Gregoire, director of the state Department of Ecology, environmentalists, local-government officials, farmers, and business groups were invited to help write the rules.

The proposed regulations conscientiously steer away from the combative approach taken by the federal Superfund program.

- Instead of threatening potentially liable parties with lawsuits, the program will emphasize cooperation between state regulators and private parties in identifying contaminated sites.
- Instead of imposing action plans on parties, the state will allow extensive public participation.
- Instead of wasting years on time-consuming studies, the regulations set deadlines for cleaning up top-priority sites.

Cooperation – not coercion – is the only effective way to clean up toxic sites, as the paralysis of federal efforts has sadly shown. The willing cooperation of diverse groups in drafting state regulations is an excellent beginning.

Two sides laud rules for toxic cleanup

by Bill Dietrich
Times staff reporter

What a difference a year of negotiation makes.

One year ago at this time, environmentalists and business were locked in a bitter election campaign over Initiative 97, the tough toxic-waste cleanup proposal voters ultimately approved over a business-preferred version.

Today, both sides were lauding the state Department of Ecology for winning a consensus on the rules to put 97 into effect.

The regulations try to avoid the litigation and delay that have hampered the federal Superfund program.

Ken Weiner, an attorney who worked on the rules for a coalition of public agencies and private businesses, said the rules use a carrot-and-stick approach to reward companies for getting on with cleanups instead of delaying with litigation.

"There was a surprising degree of consensus from all sides on why we need to make this process work," Weiner said of the yearlong negotiation process. "We decided we don't want to waste a lot of time on the front end (of a cleanup project) fighting over who is liable, and instead focus on the cleanup plan."

Fred Fenske, environmental manager for the Simpson Tacoma Kraft mill, said the approach "encourages private companies to take the initiative."

Enthusiasm for the new rules is no accident. The day after last year's election, Ecology Director Chris Gregoire spent the day on the telephone urging both sides not to let political rancor get in the way of cleanups. In a letter, Gov. Booth Gardner urged the same.

A committee made up of a variety of interests, ranging from The Boeing Co. to the Washington Environmental Council, was formed to work out the proposed regulations.

"This is the first time the Department of Ecology has done negotiated, consensus rule-making," said Rod Brown, an environmental attorney who helped write Initiative 97. "It's the first time the parties are in agreement instead of suing to overturn the rules."

However, Brown said that the acrimonious campaign over 97 was probably necessary.

"It forced everyone to come to the table and get along," he said.

The new rules will govern cleanup of the state's 250 known hazardous-waste sites and 300 more suspected sites.

The cleanup is expected to take two decades, and mopping up just the 50 most contaminated sites is estimated to cost $730 million plus $16 million a year for administration. Estimates of total toxic-waste-cleanup costs have ranged up to $2 billion.

The cost of cleaning sites falls mainly to companies that dirtied them.

While 97 became law in March, "the initiative itself is basically a framework, and the real cleanup program was going to be set out in the regulations," Weiner said.

Those new regulations are now subject to public comment, and final adoption is scheduled for January 1990 at the earliest.

Weiner noted that the business-environmental cooperation seems to be a trend. Next week, he noted, the Association of Washington Business and the Washington Environmental Council are co-sponsoring a banquet to discuss future environmental programs. And environmentalists and the timber industry have been compromising on logging practices under a state agreement called Timber-Fish-Wildlife.

BASIC STEPS IN CLEANUP PROCESS

UNDER THE MODEL TOXICS CONTROL ACT PROPOSED RULES

Step 1:

SITE DISCOVERY

↓

Step 2:

INITIAL SITE STUDY

↓

Step 3:

SITE PRIORITIES

↓

Step 4:

DETAILED SITE STUDY

↓

Step 5:

CLEANUP ACTION PLAN

↓

Step 6:

CLEANUP & MONITORING

KEY PRINCIPLES IN THE PROPOSED STATE RULES

The following actions occur <u>at any time</u> in the cleanup process:

- potentially liable parties can propose remedial actions
- cleanups should be conducted as soon as adequate information has been obtained
- steps in the typical process can be combined into fewer steps
- documents are tailored to the level of detail appropriate for the particular site and the remedial action
- Ecology can take emergency or enforcement action
- interim actions (partial cleanup activities) can be taken to protect health and the environment
- public participation is included and encouraged at each step

PROPOSED CLEANUP PROCESS

BASIC STEPS	*BASIC COMPONENTS*
Step 1: **SITE DISCOVERY** ↓	• report within 90 days; allows time to verify data • **initial investigation** by Ecology to check out the site within 90 days of report • if further study or action needed, Ecology sends **early notice letter** inviting owner or operator to review the data and work cooperatively with the state • Ecology can take emergency action anytime; owner or operator can independently clean up site at own risk, reporting the cleanup to Ecology within 90 days
Step 2: **INITIAL SITE STUDY** ↓	• a **site hazard assessment** is prepared to survey the site and identify the potential threat to human health and the environment • it identifies areas needing more detailed study • it can be expanded to include a cleanup action plan and combined with next three steps if the release can be readily addressed • if Ecology concludes no further action is needed, the public will notified through the new **state site register**
Step 3: **SITE PRIORITIES** ↓	• Ecology creates a state **hazardous sites list** • Listed sites are ranked in groups by putting the data from the site hazard assessment into a model developed by the state's scientific advisory board • Every two years, Ecology decides its priorities for cleaning up sites by developing a **biennial program plan** with the legislature and public • strict **deadlines** for developing cleanup plans apply to high priority sites
Step 4: **DETAILED SITE STUDY** ↓	• a detailed study of the site and the reasonable alternatives for cleaning it up – **a state remedial investigation/feasibility study (state RI/FS)** – is prepared and circulated for at least a 30-day public and agency review • a public **scoping process** helps identify cleanup options • for complex cleanups, the state RI/FS may involve special studies or pilot tests for new technologies; for routine cleanups, it can be brief and combined with the site hazard assessment • the state RI/FS compares the alternatives to cleanup standards and criteria applicable to the site

Kenneth S. Weiner/Preston Thorgrimson Ellis & Holman
KSW7062/10-89

CLEANUP PROCESS (continued)

BASIC STEPS	*BASIC COMPONENTS*
Step 5: **CLEANUP ACTION PLAN**	• a draft cleanup action plan is prepared and circulated for public and agency comment, typically with the detailed site study (state RI/FS) – this step is the main focus of public comment under the rules • it identifies the preferred cleanup methods and schedule • the state approves a final cleanup action plan by an order (issued by Ecology for enforcement actions or routine cleanups) or by a consent decree (approved by a judge after the formal filing of a lawsuit) • a final cleanup plan typically will be circulated with a proposed order or decree for final public and agency review (similar to reviewing final permit conditions to be sure they adequately provide for implementing the approved plan)
↓	
Step 6: **CLEANUP & MONITORING**	• several reports are required prior to starting a cleanup, including: design engineering report, construction plans and specifications, operation and maintenance plan, construction documentation (as built reports) • many of these reports also require the following plans: contingency plans, compliance monitoring plans, worker health and safety plans, sampling and analysis plans • additional public notice and review occurs for substantial changes in a cleanup action plan • a site may be taken off the hazardous sites list after a cleanup is completed and cleanup standards are met

RELATED ASPECTS OF THE CLEANUP PROCESS

How remedial actions are approved or required:

- if Ecology and the responsible parties agree, an agreed order or a consent decree (settlement agreement) are used; the former is administrative, the latter judicial
- if Ecology and the responsible parties do not agree, Ecology can issue a unilateral enforcement order or can actually do the work itself and seek reimbursement from the responsible parties

Who can conduct remedial actions:

- remedial actions (studies and cleanups) typically occur 4 ways: (1) **a potentially liable party initiates** a cleanup proposal by requesting Ecology's approval; (2) **Ecology initiates** a cleanup proposal by inviting or requiring a potentially liable party to do so or by conducting the remedial action itself and then recovering the cost; (3) **a potentially liable party independently** conducts a remedial action without Ecology's approval; (4) **a site cleanup under federal superfund**, where Ecology and EPA agree on which agency will take responsibility
- the cleanup process in the rules generally governs the first two (PLP-and Ecology-initiated cleanups); the National Contingency Plan (federal superfund regulations currently being revised) governs federal cleanups; independent remedial actions (3 above) are reported to Ecology, which reserves the right to require additional or different cleanup actions on the site
- potentially liable parties or their contractors usually prepare the detailed studies and related documents and implement the cleanup plan, with independent evaluation and supervision from Ecology

How do you know who is responsible for cleanup:

- if Ecology has credible evidence that a person may be liable, Ecology sends the party a **potentially liable status letter**, allowing for a 30-day comment period
- Ecology then issues a **determination of potentially liable status**; except in an emergency, Ecology cannot implement enforcement action before issuing this determination
- if Ecology identifies additional potentially liable persons (PLPs), it will also notify parties who previously received status letters for the site
- to encourage cleanups, a person may plan or conduct a remedial action or accept potentially liable party status without agreeing to be "liable" for the release

Who pays for the remedial work:

- liable parties are "jointly and severally" responsible; in practice, the costs are typically shared among them
- some parties may wish to proceed while others may not agree with the cleanup plan or their share; the proposed rules recognize a **right of contribution**, so that the parties who wish to proceed may seek reimbursement from the parties who do not
- the act requires the state to seek to recover amounts spent by the Ecology for remedial actions; in order to ensure accountability that state toxic account funds are actually spent on cleanup activities, Ecology must provide an **itemized statement for costs reasonably attributable** to the site

TYPICAL INTEGRATION OF SUPERFUND AND SEPA PROCESSES

(permits?)

RI/FS scoping

EIS scoping*

DRAFT RI/FS +	DRAFT CLEANUP ACTION PLAN +	S E P A DOCUMENT: CHECKLIST OR DEIS)

min. 30-day public/agency comment period

(FINAL RI/FS)**	FINAL CLEANUP ACTION PLAN +	FEIS OR DNS
	PROPOSED CONSENT DECREE***	

min. 30-day public/agency comment period

FINAL CONSENT DECREE/JUDICIAL APPROVAL

(permits)

CLEANUP

* SEPA DS/scoping may occur at start of FS phase of study

** Typically would not need final RI/FS; Final cleanup action plan would suffice

*** Administrative orders (agreed/enforcement orders) may be used for some cleanups

HIGHLIGHTS OF THE NEW WASHINGTON STATE "MODEL TOXICS CONTROL ACT" PROPOSED REGULATIONS

1. Encouraging Parties to Initiate Proposals

The process encourages volunteers to propose remedial studies and cleanup actions in several ways, including:

- sharing information with interested parties early on.
- sending an early notice letter inviting cooperative planning for remedial actions.
- providing for a non-adversarial process to approve remedial studies and routine cleanup actions, including use of administrative "agreed orders", rather than requiring litigation and consent decrees as a matter of course.
- providing greater flexibility in deadlines for parties initiating remedial action proposals.

2. Public Participation

The process provides for public participation at each stage, tailored to the nature of and interest in the site. While the problem of premature notice for unconfirmed releases is avoided, citizens receive much earlier notice than most laws, including a decision by the state to enter into negotiations on an order or decree. Key elements include:

- a statewide hazardous sites register that provides early notice of studies, cleanup actions, changes in site status, and development of cleanup action plans.
- development of a public participation plan for most sites, which specifies the public notice and involvement process for that site, which is both flexible and provides better public participation than mailed or newspaper notice of remedial actions.
- regional citizen advisory committees to advice the state on site priorities and the effectiveness of the program.

3. Focus on Achieving Effective Cleanups Rather than Perfect Characterizations

The rules emphasize making cleanup decisions as soon as adequate information is obtained. The process revolves around the development of a "cleanup action plan", which is typically issued in draft along with the state RI/FS. This enables the potentially liable parties to work with the state in developing and proposing cleanup plans along with the detailed site studies. It allows the public to focus its attention and comments on the proposed cleanup method (similar to NEPA's requirement to identify a preferred alternative if one exists).

4. Federal-State Consistency with State Simplicity

Although the process uses parallel steps to the federal process to allow for consistency with the NCP where needed for cost recovery and for sites that are on both federal and state lists, it simplifies the procedures and allows for steps to be combined to encourage cleanups.

The regulations also consolidate and simplify concepts that have been unduly complex in federal rules. For example, the concept of "interim actions" includes – with appropriate protections – all partial cleanups, rather than using several different and overlapping terms to describe the concept (such as "response", "expedited", "interim", "operable unit", and so on).