RESPONSIVENESS SUMMARY

for THE MODEL TOXICS CONTROL ACT

CHAPTER 173-340 WAC

Prepared by
Hazardous Waste Investigations and Cleanup Program
Policy Section
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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.

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.

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.