

King County Comments on Draft Revisions to the Sediment Management Standards
 Comments are referenced to the currently posted version with the heading November 2011 preliminary draft

Clarification: These comments represent the thoughts of the Sediment Cleanup Advisory Committee member as this round of comments was intended for Committee input to help Ecology shape the draft rule. Although the Committee member solicited comments from others in King County and has attempted to raise local government concerns, the comments do not necessarily represent the position of King County. The County will be submitting comments on the later draft rule. Note also that not all of the comments made at the meetings are reproduced herein but all those comments should still be considered.

Page	Lines	Comment
General		Upon initial review, it is apparent that I (or the other Committee members) have not found all of the substantial (and minor) issues that this rewrite generates. This can be expected from a fairly extensive rewrite of a complex regulation. Not only are there many significant changes recommended in the comments below, I feel that the comments made at the Committee meetings have also identified many significant issues that will require substantial rewrite of the current draft. There are several big concepts that are still not practically worked out. The scope of the changes needed in next draft is bound to result in almost as many issues that will need to be identified and fixed as this draft had. Again, this can be expected from a fairly extensive rewrite of a complex regulation. However, the next draft should not go out for rulemaking as it will need another fairly extensive review by a broad group of stakeholders before it is close enough to final for the rulemaking process. If the second draft is sent directly to rulemaking, it will surely need enough substantive revisions that it would require another round of rulemaking. I think that can be avoided by having a second, more informal, round of review prior to rulemaking. Unfortunately, this is not consistent with your proposed schedule. But with the significance of the issues at stake here and the amount of revisions and additional rule or guidance that still needs to be drafted for the first time, it is not an unreasonable request that you revise the schedule to factor in the additional steps requested.
General		While we understand the concept forwarded in this draft was an attempt to reduce the uncertainty with allowing individual cleanups to move forward when there is technical infeasibility in achieving human health risk-based cleanup objectives, the changes proposed create even more uncertainty in other ways. Of great concern to local governments, is that this uncertainty does not assist in municipal planning and may scare away new business investment. One critical example of this is that since a few human health risk-based cleanup objectives will now be below natural background, many if not all water bodies will be impaired. Ecology is not allowed under the Pinto Creek Supreme Court decision to permit any new or increased discharges in impaired water bodies without an existing waste load allocation in an approved TMDL. This has significant implications to new development and could even require moratoriums if treatment plants can not expand their TMDLs as completed. This is an example of the implementation issues raised by these changes and may signal the need for further discussions about the general approach to these revisions if such implementation issues cannot be worked through in such a way that all the impacts can be clearly defined and there are reasonable ways for those impacts to be addressed.
General		Another example where uncertainty has been increased is in the approach to defining background. It would seem the first cleanup proposed in any embayment or water body would have the responsibility to define area background before any cleanup could occur. This is an extremely large request for any party to resolve and would seem to effectively stop any cleanups until that regional background has been set. This is opposite the stated purpose of the approach. And even if a party does want to move forward, it is not clear in the current rule just how regional background is determined. This process should be clearly set out and vetted prior to adoption of the rule. It may be more appropriate in guidance but would still need to be refined prior to this rule moving forward. And for all these same situations, natural background also has to be determined. This has not been done for most water bodies and adds another practical implementation barrier to the proposed approach. One option is for the state to conduct all these studies. However, this would require significant funding and has the potential for further diverting MTCA funds that local governments need. Again, the approach to this process needs to be proposed and vetted with affected parties prior to this rule being adopted.
General		Of very significant concern to local governments is that the proposed approach allows individual parties to settle liability for partial cleanups but there is not a clear approach to the broader cleanup process that eventually will be required in each water body. While the intent is that those parties are still liable for contributions to that larger cleanup, that is of course dependent on the language of individual consent decrees. Since the local governments are also given liability for the larger cleanups in each area due to ownership of the sewer and stormwater conveyance systems, they will also have some responsibility for the larger water body cleanups. Without a clear agreement on how Ecology plans to proceed with these area-wide cleanups, the local governments are left in a completely unacceptable situation. Just to protect the public's resources, local jurisdictions would have to monitor and review all cleanup plans in their region to ensure that the individual parties remain liable for that piece or that the settlement agreement for that piece is adequate. This is clearly not their role and it should not be made to be under this rule. Of course there is no way to determine what an adequate settlement would be until both a complete allocation of contributions to that area-wide problem and a cleanup plan has been developed and costed. Clearly, this process cannot be conducted in this order, so the local governments are the entities that are left at risk. Even if it was to work out in a location, local governments are then left trying to recover cleanup costs from all the parties that did not settle. Again this should not be local government's role or should it be made to be under this rule. All of this needs to be addressed prior to the rule being adopted.
General		The Sediment Phthalate Work Group (SPWG), which included senior Ecology staff from both the toxics and water programs, made particular recommendations to address the recontamination problem of pervasive pollutants that do not have existing source control options to remain below SMS over time, at least in the near future. The document can be found at http://www.ecy.wa.gov/programs/tcp/smu/phthalates/Summary%20of%20Findings%20and%20Recommendations%20FINAL%20092807.pdf . Specifically the SPWG asked to address in in the next SMS rule revision "to add consideration to SMS for addressing pervasive pollutants, such as protocols for making decisions regarding the cleanup trigger for phthalates and similar pollutants. Consider narrative criteria that could be added to SMS based on additional information collected in the Work Group. In doing so, the think through MTCAs/SMS relationships." King County requests that this issue be incorporated into the current revision. At a minimum, the original intent to address re-occurring localized benthic effects from these persistent chemicals needs to be incorporated for this rule to be a workable solution in urban waters while still assuring environmental protection. But additional chemicals will also be in this same boat with the proposed approach for human health risk and likely affects larger areas of more water bodies. So working out a practicable solution for these situations may also be key in addressing the entire source control solution that these changes raise. Members of the SPWG would be happy to share insight into what the group was thinking and help to develop a workable approach.
General		As identified in several comments above, long term source control becomes central to meeting cleanup objectives for several pollutants. However, it is not clear how the text in Part IV is changing in relationship to the revisions to Part V so it is not possible to completely assess the approach to source control and see how the regulations will really apply. Part IV certainly can't stay as current. In addition, there are many questions raised by the process of determining the time period needed for sediment recovery zones. As originally envisioned, meeting the SMS was likely. Now under the proposed revisions, much of every water body will be under such a structure. Expanding the process from a small area, addressing one or a few sources, to large areas with multiple sources and pathways is an entirely different issue. The little direction provided in the rule is not adequate to determine how source control can be practically achieved and it is not clear that it is consistent with or would allow details presented at the Dec 9th meeting. Ecology gave some mention that these should also be in guidance. The significance of this approach and the potential impact at all discharges is likely to be significant. This process needs to be proposed and vetted with affected parties prior to this rule being adopted. In addition, the actions proposed here are typically conducted under the water program in Ecology and it needs to remain under that program. These staff have the background to work on such issues and determine the appropriate actions and compliance. This is not something in which toxics staff have experience or should they be expected to have or get. It is not clear how the toxics program coordinates with the water program to produce the expected results and to get it incorporated into the cleanup action decision.
9	3-4	This could create significant problems. Have you checked all definitions in MTCA that show up in this code to ensure they were intended to work the same? In general it is better to just include any definitions you need and not x-reference.
9	9	why are you using natural recovery instead of monitored natural recovery. See comment on page 12.
10	36	a majority of are generally found in valleys. Not sure this helps for determining site specific depths. Suggest need to specify by mass or abundance and set a clear bar such as >50% or go to mean or 75 percentile of void depths.
10	49	Consider the need for definitions of specific actions if you already have this definition.
10	58	Do not agree with this change. This is not consistent with MTCA either as explanation suggests. This sets all chemicals at natural background when that only applies to risk-based thresholds that are below background. While that is the case for a few human health concerns, it is certainly not true for many ecological thresholds. The old language still applies but some additional text will be needed to incorporate other human health and ecological thresholds.
11	68	Change caption to placement as ENR is not designed as a cap or intended to function like one
12	99	Need to incorporate monitoring into the definition as it is central this cleanup action approach. Suggest changing name to monitored natural recovery to clearly differentiate with enhanced natural recovery
12	117	definition is not hyphenated in text
13	138	Add average after widespread. Also there appears to be a structural problem with the way it is written. Check punctuation. Also not sure the definition as worded would ever be met by any process used to calculate a regional background. For example directly influenced on line 147 and attributable on line 151 are problematic in demonstrating these conditions have been met. This could create legal issues. Not sure how to fix but this is a sticky issue that needs to be worked through.
14	170-72	Subsection c is not needed in the definition since once this happens and settles it meets the earlier definition. If you are trying to expand the concept of sediment to material transported through water, this is very problematic and would create all sorts of problems.
14	198	"historical releases and ongoing releases" should be "historical releases or ongoing releases" otherwise, it is very limited in scope.
14	173-85	Definitions 36 and 37 (sic) language beyond the first sentence in 36 and second sentence in 37 should really be in sections of the code and not as definitions. Suggest add second sentence in 37 to 36.
14	176	Add sediment after establishing and before cleanup
15	208	Do not cite another definition in another code, just add the same language used for that definition here.
15	212	Do not understand the purpose of the second sentence of definition. It is not needed and should be deleted. If material is exposed it is now surface sediment by definition. And the other part of the sentence cannot be defined and would effectively make it apply to any depth.
15	215-16	Delete the first and/or and replace with a comma and change the second and/or to or. This series is or. Also add sediment before cleanup.
16	3	delete Overview of
17	62-72	Why would active be required if the site assessment showed that MNR works in the acceptable time frame? This is a significant change from the current cleanup priorities and will cause a lot of impacts that could be avoided. In particular recent national studies have shown that active cleanups are meeting their goals less often than natural recovery. Residuals are the primary reason for this but this fact seems to be ignored in this policy shift. Recommend retain the original intent here as it has been demonstrated to be more protective with less disturbance.
18	69	Do not support moving from current end of construction criteria. Particularly since dredging can set back an area and needs to allow for that impact. Leaving as existing is clearer and at larger sites that may take several years is the only true way to apply.
19	115	This makes no sense as there are conditions when active would not be better than passive. See comment on page 17 above.
19	122	this is way to restrictive and is not globally justified. Why limit use for same reasons above. If can meet the restoration time frame, why limit it as less destructive and all soils are met? Do not understand this change in direction.
19	131-2	Understand need but the last condition can never be met with the new HH criteria so why have it then?
21	44	insert . after level and before human
23	18	there is an extra "5" listed for WAC 173-205-572
23	26	consider using same phrasing here and 510(2)(c) to eliminate potential confusion
25	69	insert . after level and before human
27	52-3	can't comply with RI and FS. Should delete.
30	37	How does this remaining change effect MTCA eligibility? These cleanups need to still remain eligible for MTCA funds. Can support revisions but need to have corresponding change in MTCA to keep eligible.
30	40	Consider changing approach to this sentence to make it be not inconsistent with the requirements... Often these actions do not need to do everything under this chapter.
33	84-9	Unclear how this works with the site unit concept.
36	169-70	If compliance is defined by exposure and that is surface, then how is this relevant? This should not be a metric used to assess alternatives.
39	13	Same comment as above on ten year start time.

40	30-3	Not clear what the purpose of this subsection is for. Any cleanup should have had some assessment of adequacy of source control to avoid recontamination. But this section seems to waive that if the source is not controlled by you. This cannot work. Sources needing control are usually out of control of the entity doing the cleanup, but that should not mean they get to get a lower cleanup standard. It just means the cleanup may wait while that source is controlled. Do not support this condition.
41	57-8	This change is not needed and still needs to be worked out in the rule. MNR is not a recovery zone, it is a cleanup action. The criteria is met at the end of the action. By revising to tie to active this problem is created. Can avoid by deleting active and then would not need the ten year language either.
41	59	This line states that one of both conditions of subsection (e) should be met. Subsection (e), lines 63-64 only list one condition. It appears that line 59 should refer to subsection (h), lines 68-71. In general need to fix subsection order starting with (a) not (d).
42	9	Appears to be a structural and language problem with subsections 2 and 3 here. Cant refer to "both" when there are 3 subsections. Need to reorganize both subsections 2 and 3. Also as written, I think c still applies which is not correct.
44		Add the definition of Total PCBs that is entered under the freshwater chemical standards to the marine sediment section.
45	54-57	It seems confusing to require that both the detection limit and the practical quantitation limit be at or below the SQS chemical criteria value. This should be required for only the MDL.
45-46	65-69	These lines imply that all chemical parameter criteria are normalized to TOC, which is not appropriate.
46	66-69	There is no discussion of when TOC normalization is inappropriate for Trace Organic analyses. DOE has clarified in other documents that when the ppm dry weight TOC is <5000 or >50,000 that it may not be appropriate to TOC normalize the results. In those cases the results should be dry weight corrected and compared against dry weight criteria.
46	69	The added equation should state that the decimal percent TOC (dry wt) be used not just % TOC.
48	100	P<=0.05 should read p<=0.10 to be consistent with Table V.
54	47-48	For Total PAHs, delete benzo(b) fluoranthene and benzo(k) fluoranthene individual values since they are covered by the total benzo(a)anthracenes.
54	50	Delete Aroclor 1268 from the definition of Total PCBs. It isn't commonly included in most testing.
9	58	PCB 1268 should not be required as it is a very rare PCB (<10% of the world wide production). It is also not a standard PCB listed in EPA 8082.
54	51-52	Eliminate o,p'-DDD from analyses and criteria. Use only p,p'-DDD. We recommend this because of coelution issues with other pesticides and the following verbiage from EPA 8081B: (11.6.4) DDT -- Technical DDT consists primarily of a mixture of 4,4'-DDT (approximately 75%) and 2,4'-DDT (approximately 25%). As DDT weathers, 4,4'-DDE, 2,4'-DDE, 4,4'-DDD, and 2,4'-DDD are formed. Since the 4,4'-isomers of DDT, DDE, and DDD predominate in the environment, and these are the isomers normally regulated by EPA, sample extracts should be quantitated against standards of the respective pure isomers of 4,4'-DDT, 4,4'-DDE, and 4,4'-DDD.
54	53-54	Eliminate o,p'-DDE from analyses and criteria. Use only p,p'-DDE. We recommend this because of coelution issues with other pesticides and the following verbiage from EPA 8081B: (11.6.4) DDT -- Technical DDT consists primarily of a mixture of 4,4'-DDT (approximately 75%) and 2,4'-DDT (approximately 25%). As DDT weathers, 4,4'-DDE, 2,4'-DDE, 4,4'-DDD, and 2,4'-DDD are formed. Since the 4,4'-isomers of DDT, DDE, and DDD predominate in the environment, and these are the isomers normally regulated by EPA, sample extracts should be quantitated against standards of the respective pure isomers of 4,4'-DDT, 4,4'-DDE, and 4,4'-DDD.
54	55-56	Eliminate o,p'-DDT from analyses and criteria. Use only p,p'-DDT. We recommend this because of coelution issues with other pesticides and the following verbiage from EPA 8081B: (11.6.4) DDT -- Technical DDT consists primarily of a mixture of 4,4'-DDT (approximately 75%) and 2,4'-DDT (approximately 25%). As DDT weathers, 4,4'-DDE, 2,4'-DDE, 4,4'-DDD, and 2,4'-DDD are formed. Since the 4,4'-isomers of DDT, DDE, and DDD predominate in the environment, and these are the isomers normally regulated by EPA, sample extracts should be quantitated against standards of the respective pure isomers of 4,4'-DDT, 4,4'-DDE, and 4,4'-DDD.
55	94-96	Change Total DDDs criteria to 4,4'-DDD criteria. See above for rationale.
55	94-96	Change Total DDEs criteria to 4,4'-DDE criteria. See above for rationale.
55	94-96	Change Total DDTs criteria to 4,4'-DDT criteria. See above for rationale.
55	99-100	Please define what is meant by TPH-Diesel and TPH-Residual. Are Diesel Range and Lube Oil Range acceptable reportable parameters?
59	22	add "and will be considered bioaccumulative contaminants of concern (BCoCs)" after receptors
59	28	Delete last sentence of (ii).
59	37	Guidance for this?? This is really vague.
61	33	Same comment as above about change to start of construction
61	51	Confused about use of restoration of ... future use. Is this intended to relate to beneficial uses? If not should remove as not relevant for a cleanup.
62	68-9	Why should there be this preference when there is no preference for other factors like less adverse impacts. Should remove last phrase as inappropriate and there is no clear account of what is considered under meeting restore anyway so problematic. Besides already factored into k.
62	85	Confused how this factors into this list. It would be subjective to assume degree of control apportion. Not clear how this could be workable
62	87	would place after line 85. Also hard to see how this is really better than capping. In fact, based on what is known about dredging today, hard to see how any dredging with its residuals can really be assumed to be more effective than capping. This factor should really be based on the ability to reduce exposure -- not mass. And depending on site conditions, it is not clear there is a set order.
66	31	This should be discussed further. May actually not be workable. If decision is that cannot meet goals in an area, then making it have to meet minimum practicable effectively means need to clean up even though know can't meet goal -- sort of defeats purpose of recovery zone.
66	60	See earlier comments on MNR. Need to rectify inconsistency with recovery zone timing. Maybe this needs to be set as 10 years after completion of cleanup actions. That would remove conflict with MNR timing. Otherwise this is just an MNR area as it meets standard in 10 years.
Table V		A larval test reference sediment performance std. should be provided with the correct mathematical formula (consistent with MyEIM) so laboratories can assess test performance.
Table VI		Abnormality/Mortality should be replaced with "Normal Survivorship" to be consistent with the endpoint terminology used in MyEIM.
Table VI		Neantbes test "28 day growth" should be changed to "20 day growth".