

December 31, 2009

Greetings,

Happy New Year, everyone!!!

Our next meeting is right around the corner. Again we have three topics on the agenda. Based on our discussions December 18, 2009, it made sense to organize the day as follows:

1. Addressing background concentrations (in sediments, soil, and air)
2. Institutional controls & periodic reviews
3. Revisions to cleanup standards based on new scientific and regulatory information

### **Topic 1: Background concentrations**

Risk-based cleanup levels for some chemicals often fall below background concentrations. We discussed this situation for sediment contamination on December 18. Several committee members noted that this dilemma isn't unique to sediments; similar challenges exist when dealing with soil, groundwater, and vapor intrusion problems.

On January 11, 2010, we would like to continue talking about sediment background considerations and then expand the discussion to include other media and situations. We will distribute materials on this topic early next week.

### **Topic 2: Institutional controls and periodic reviews**

Final cleanup actions often include containment and/or management measures for soil, sediment, or groundwater for concentrations exceeding one or more cleanup levels. In these situations, the current MTCA rule (WAC 173-340-440) requires cleanup proponents to implement certain types of institutional controls to ensure that the containment or management measures continue to be implemented over extended periods of time.

The current MTCA rule (WAC 173-340-420) also requires Ecology to periodically review the effectiveness of the cleanup measures to ensure the cleanup continues to protect human health and the environment.

The MTCA requirements for institutional controls and periodic reviews apply to both upland and sediment cleanup actions.

In 2007, the legislature passed the Uniform Environmental Covenants Act (UECA or Chapter 64.70 RCW). This act establishes the legal basis for ensuring that restrictive covenants (now called environmental covenants):

- remain in place when property changes ownership

- are enforceable
- are periodically reviewed for effectiveness

Numerous changes are needed to make the MTCA rule conform to this new statute. We are providing you with early preliminary DRAFT proposed changes to Section 420 (Periodic Reviews) and Section 440 (Institutional Controls). Attached you will find:

1. A copy of the August, 2009 Issue Paper on Institutional Controls & Periodic Reviews
2. A draft format version of Sections 420 and 440 of the MTCA rule (showing all strikeouts and additions)
3. For easier reading, a “clean” version of Sections 420 and 440 (with all the strikeouts removed and new additions highlighted in red).
4. A copy of the Uniform Environmental Covenants Act, as passed by the legislature.

The proposed draft revisions are intended to address changes needed to get the MTCA rule to conform to UECA, plus address implementation issues that have arisen since 2001. (On a related note, Ecology is reviewing our environmental covenant boilerplate, which may lead to additional rule changes.)

**For properties owned by potentially liable parties (PLPs)**, the current rule states that institutional controls must be described in a restrictive covenant (environmental covenant) on the property. The UECA describes required and optional contents for environmental covenants. The attached draft rule language incorporates both required and optional UECA language.

**Releases may impact multiple properties.** Some impacted properties may be owned by persons that are not potentially liable under MTCA. (For example, this is frequently the case with vapor intrusion problems.) In these cases, the rule provides the flexibility to use other legal or administrative mechanisms (examples are zoning overlays or public notices) in lieu of an environmental covenant.

- Do you have experience on the use of other legal or administrative mechanisms for these situations? If so, are there lessons we can learn from those experiences?
- In order to use other legal or administrative mechanisms, the PLP must make a good faith effort to obtain an environmental covenant. Should Ecology provide a definition on what constitutes a good faith effort?

**For properties owned by local, state or federal government entities**, the current rule provides the flexibility for these entities to use alternative systems that provide for the ongoing management of residual contamination. These situations may arise with local right of ways and state-managed tidelands.

- Do you believe that Ecology should include more specific requirements for developing and using alternative systems applicable to right of ways?

**Application to sediment sites.** The UECA and MTCA provisions for institutional controls and periodic reviews apply to both upland and aquatic cleanup actions conducted under MTCA.

- Do you have experience implementing institutional controls at sediment cleanup sites? If so, what mechanisms have been used? How have these worked?
- Are there practical considerations that Ecology should evaluate regarding the how to apply UECA and MTCA institutional control provisions to sediment cleanup actions?

**Financial assurances.** The current rule states that Ecology will, as appropriate, require financial assurance mechanisms at sites where the cleanup action includes engineered or institutional controls. The rule also states that Ecology will not require financial assurances if that would result in the PLP having insufficient funds to conduct the cleanup or being forced into bankruptcy. Given the current economic climate and recent bankruptcies, Ecology is evaluating whether the financial assurance provisions need to be strengthened.

- Do you have experience meeting the MTCA financial assurance requirements? If so, what mechanisms have been used? How have these worked?
- Are there practical considerations (such as the availability of environmental liability insurance) that Ecology should consider when evaluating this issue?

**Topic 3: Discussion on revisions to cleanup standards based on new scientific and regulatory information.**

We are intending to set the stage for a productive meeting February 22, 2010, by providing a somewhat detailed preview of new science related to toxicity of contaminants to humans. This includes new toxicity parameters, the effects of early life stage (i.e. in utero ) exposure to chemical carcinogens, and lead toxicity. Also, we'll begin discussion of exposure issues, including exposure pathways and fish consumption rates. We will distribute materials on this topic early next week.

Yes, this is a full agenda. Thank you in advance for your continuing participation in this process.

See you Next Year!  
Martha Hankins

Meeting materials are located at:

<http://www.ecy.wa.gov/programs/tcp/regs/2009MTCA/mtcaAmend.html>

Go to MTCA/SMS Advisory Group (on the left side of the window).