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Re: MTCA/SMS Integration Homework

Dear Martha:

I am writing to follow up on the homework assignment you gave the MTCA/SMS Advisory Group on a number of topics. This letter primarily concerns a proposed approach to integrating MTCA and SMS cleanup requirements so as to maximize PLPs' ability to work through the process and get cleanups done.¹ Before getting into the specifics of that proposed approach however, I will address a terminology issue and some fundamental concepts.

I. Terminology: "Sites" and "Units"

The word "site" has multiple meanings when discussing sediment cleanups. As Alex Smith's May 17 comment memorandum points out, the MTCA regulations' definition of "site" results in Ecology's default approach to remediation being to address everywhere that hazardous substance releases from a given facility have "come to be located." Given the mobility of contaminants in the aquatic environment, when natural background is used as a MTCA cleanup level the resulting MTCA "sites" can be extremely large areas involving dozens or hundreds of contributors of contamination.

In this comment letter I will use the term "site" in its MTCA sense of contamination from one or more parties across as large an area as releases from those parties' facilities can reasonably be thought to have migrated at concentrations above cleanup levels. Smaller areas that could be the

¹ The proposed approach contained in this letter reflects discussions with multiple Advisory Group members and others. You will recognize most of it from the last Group meeting and from submissions you have already received from Alex Smith, Clay Patmont and Windward Environmental.



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subject of a cleanup (but arguably are not the entire “site” for MTCA purposes) will be referred to as cleanup “units.”

II. Fundamental Concepts

1. MTCA’s best use is for addressing legacy contamination. Clean Water Act programs should be the primary regulatory tool for the stormwater and non-point sources that are the source of most of the contaminant load in surface water and in newly-deposited sediments. Our ability to reach lower and lower sediment concentrations of contaminants over broad areas will be determined primarily through non-MTCA efforts.
2. Rule changes to facilitate sediment cleanups and integrate MTCA and the SMS should focus MTCA on what MTCA does best: cleaning up areas where legacy contamination exists at levels in excess of the background conditions created by stormwater and other contamination sources that are beyond the control of a particular PLP.
3. The CWA and related efforts can be used over the long term to ratchet down contaminant sources in stormwater and get closer to the target natural background concentrations through natural recovery.
4. PLPs carrying out sediment cleanups should also be responsible for implementing facility-specific source control (e.g., groundwater, point source discharges) to ensure that their properties and operations are not creating or further contributing to high concentration areas in sediments. However, PLPs cannot be expected to clean up and maintain sediments at levels below “equilibrium” recontamination levels for their area created by stormwater runoff from areas beyond their control and from other sources for which that PLP is not responsible.
5. Planning for monitoring and studies across large areas (e.g., bay-wide) should occur outside the context of individual cleanup efforts. One potential source of funds is one-time payments from PLPs that are performing remedial actions that address the great majority of their contributions to the large area and who desire to cash out of their potential future obligations for monitoring across the larger area.
6. With MTCA cleanups in progress or completed, the Water Quality Program can use the CWA and other actions (e.g., copper brake pad legislation) to methodically reduce



background inputs over the longer term and thereby push contaminant levels in urban area sediments towards regional and natural background levels.

III. An Approach to MTCA/SMS Integration

1. Include the “Regional Background” concept in the SMS as a basis for defining sites. Ecology should have a great deal of flexibility in determining Regional Background. The fundamental idea cannot, however, be that every potentially controllable source must be excluded from all calculations of Regional Background. If that approach is taken, Regional Background will be essentially the same as Natural Background, rather than an intermediate figure between Area Background and Natural Background. Sources that are not within the reasonable control of individual PLPs (such as area-wide stormwater discharges) should be considered a component of Regional Background.
2. Within a site, individual PLPs or groups of PLPs can come forward to Ecology with proposals to investigate and remediate cleanup units involving areas of contamination that are directly related to either current or historic releases for which they are responsible. Alternatively, Ecology may require PLPs to address a cleanup unit in advance of a determination of what may be necessary across an entire urban area sediment site.
3. Ecology will address individual cleanup units with PLPs based on agency resource availability and an evaluation of whether cleanup of the proposed unit would provide sufficient environmental benefit. Although PLPs will be incentivized to bring forward proposed units that address all of the historic contributions for which they are responsible, Ecology need not agree to engage with a PLP to work through the process towards a settlement for a unit cleanup if the agency views the proposed unit area as so limited as to not be worth the necessary commitment of agency staff time.
4. Cleanup within the unit would be required to meet Regional Background levels that reflect anticipated recontamination from sources other than those within the control of the PLP. Alternatively, if the PLP does not want to go through the process of working out a Regional Background level with Ecology, the PLP can implement a remedy over the entire unit that leaves a clean cap (either dredge and cap back, or just cap).
5. In exchange for cleaning up the unit and controlling sources from its properties and operations, the PLP would receive a full consent decree including a covenant not to sue.



The reopener for the consent decree would not be triggered so long as the PLP successfully maintains the required source control efforts.

6. If Ecology finds that the unit cleanup addresses the entire area where that PLP's releases could reasonably have caused significant sediment contamination, the consent decree could cover the entire site (including any additional units and other areas that collectively make up one large site). Absent such a finding by Ecology, if the PLP wanted its consent decree to cover the full site, the PLP would have to pay into a bay-wide or site-wide fund for planning, monitoring and source control efforts. If the consent decree only covers the unit involved, then payment into the bay-wide fund would not be required and the PLP would remain potentially liable for the area of the site outside the unit.

IV. MTCA and SMS Changes Needed to Implement New Approach

1. The current MTCA regulations would need to be amended to clarify that SMS provisions govern sediment cleanups, to the extent MTCA and the SMS are inconsistent.
2. The MTCA Natural Background requirement for hazardous substances that have risk-based cleanup levels that are lower (more stringent) than current Natural Background levels would remain in place as a long-term goal.
3. The SMS would specify that Natural Background is a long-term goal (akin to a human health Sediment Quality Standard) that would not serve as the cleanup level for a sediment site if cleanup to Natural Background is not feasible.
4. The SMS would authorize calculation of unit-specific cleanup levels based on a definition of Regional Background that incorporates the reality that recontamination of a unit from sources not under the control of the PLP(s) is likely at most sites.
5. The MTCA 10^{-6} risk level would remain in place, but it would apply at sediment sites as the SQS. The CSL for human health would be a narrative standard based on the definition of Regional Background, or a 10^{-4} risk level, whichever is higher.²

² Both Alex Smith and Windward Environmental suggest retaining the SMS framework for human health sediment cleanup levels, and setting a human health CSL based on the higher of
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6. Default seafood consumption rates would be increased based on either a narrative standard or actual tribal consumption figures in different usual and accustomed fishing areas. Given the difficulties involved with rulemaking, the lack of thorough consumption studies for many tribes, and the overlap of usual and accustomed fishing areas between tribes, the best approach would seem to be use of a narrative standard that would allow Ecology and PLPs both to use the most recent information available.

V. Additional Issues and Clarifications

Alex Smith's comment letter suggested deleting the definition of "site" from the MTCA regulations in order to make it clear that PLPs need not clean up everywhere that co-mingled contamination has come to be located in order to qualify for entry into a consent decree settlement. I support this suggestion, along with everything else in Alex's excellent comment memorandum,³ even though I agree with her that technically it is not necessary.

Under MTCA, the Attorney General has broad authority to enter into settlements that include a covenant not to sue whenever the Attorney General finds that "the proposed settlement would lead to a more expeditious cleanup of hazardous substances in compliance with cleanup standards . . ." RCW 70.105D.040(4)(a). However, Ecology staff believe that the Attorney General's office will not allow any settlement to go forward unless the entire site is being cleaned up to meet cleanup standards. Removing the definition of "site" from the MTCA regulations would make it clear to both Ecology and the Attorney General's office that Ecology has broad discretion to bring forward settlements that expedite cleanup even when those cleanups do not necessarily result in the full remediation of every location where molecules of legacy contamination from a facility may possibly have come to be located since their initial release.

(. . . continued)

Regional Background or a 10^{-4} risk level. I support this approach as consistent with the existing SMS framework and as potentially much more workable than forcing cleanups in urban areas to wait until Ecology determines Regional Background for each area where a cleanup is proposed.

³ Deleting the "site" definition from the MTCA regulations would also help resolve some very significant issues with the MTCA Voluntary Cleanup Program that have been a significant impediment to brownfields cleanups. Those issues are beyond the scope of this comment letter.



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An additional issue is how cleanup “units” should be defined. Although it is tempting to put a great deal of specificity around the definition of these units in the regulations, especially for those with technical expertise, a much better approach is to leave what can and cannot be addressed as individual units as unconstrained as possible in the regulations. PLPs will not be interested in bringing forward extremely small units, as the corresponding liability relief will not be sufficient to avoid getting drawn into a bigger site at a later date.⁴ And if a PLP proposes a cleanup and consent decree settlement for an extremely small unit, Ecology will have every right to refuse to participate on that basis.

The MTCA/SMS integration approach outlined above seeks to move PLPs towards performing cleanup actions by giving them an opportunity to resolve much or all of their liability and long-term obligations by undertaking significant, but discrete, cleanup efforts. This works with a PLP’s natural inclination to address outstanding liabilities when it is possible to do so in a predictable and efficient process. Currently, PLPs avoid involvement at sediment sites whenever possible because they fear the huge transaction costs and tremendously long timelines that PLPs at large multi-party sediment sites have experienced. The structural problems with MTCA’s application to sediment sites that cause sites to be extremely large and that bring in large numbers of parties must be resolved before sediment cleanups will move forward in a timely fashion.

Those are my comments on the MTCA/SMS integration issues we have been discussing. I will follow up with some brief additional comments on the other issues you identified in your April 29 email. Thank you again for the opportunity to participate in this process.

Very truly yours,

Thomas A. Newlon

⁴ PLPs will also be incentivized to address all of the areas for which they can reasonably anticipate being held liable in order to avoid the significant accounting and environmental reserves issues that otherwise arise. Those issues can constitute major limitations on the financial capacity of public and private entities alike.