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June 8, 2012

~~*Via E-Mail (cash461@ecy.wa.gov)*~~

Chance Asher
Toxics Cleanup Program
Department of Ecology
PO Box 47600
Olympia, WA 98504-7600

RE: Revisions to the Sediment Management Standards (Ch. 173-204 WAC)
Determination of Significance

Dear Ms. Asher:

Please accept these comments on the May 14, 2012 Determination of Significance and scoping for an Environmental Impact Statement for the revisions to the Sediment Management Standards on behalf of Inland Empire Paper Company.

Ecology should consider expanded scoping under WAC 197-11-410. Of particular concern to Inland Empire Paper Company is the use of arbitrary and conservative fish consumption rates to establish sediment cleanup levels and source control requirements through water quality permitting. Ecology has not engaged in an open and transparent public process in developing these new regulations. There was a brief announcement of the intention to pursue human health criteria in an advisory meeting in December 2010, but there was no public engagement in the development of a technical support document until October 2011. Since then Ecology has been engaged in an expedited rule making process that will establish new cleanup standards under the Model Toxics Control Act and by implication under the

June 8, 2012

Page 2

Water Quality Standards that will be subject to review and approval by the United States Environmental Protection Agency pursuant to 40 C.F.R. 131.13.

EPA review will occur, based on Ecology's current rule making schedule, prior to any formal consideration of implementation tools and numeric human health criteria in the state Water Quality Standards. This may result in significant constraints on Ecology's discretion to address human health criteria in the state Water Quality Standards. The state may lose, for example, the discretion to rely on the EPA National Toxics Rule for human health criteria in the state Water Quality Standards. WAC 173-201A-240(5). Washington is under no legal obligation to adopt human health criteria in its Water Quality Standards independent of the National Toxics Rule pursuant to 40 C.F.R. 131.36(c) and 131.36(d)(14). EPA has nonetheless advised Ecology in a letter dated January 17, 2012, that "it is important for you to use the recommendations presented in [the Fish Consumption Rates Technical Support Document] along with comments received to determine an appropriate rate to use in deriving the human health criteria in your SMA [sic] and WQS." This suggests that there will be very little flexibility in revising the Water Quality Standards once EPA exercises jurisdiction to review the proposed Sediment Management Standards revision. Ecology should be cautious in proceeding with a bifurcated rulemaking process that limits the authority of Ecology to address the development and implementation of new human health criteria.

It is clear that Ecology has long considered the implementation of new fish consumption rates to be part of an "integrated rule strategy." This is how it was described in the attached Director's Meeting Document dated September 2, 2011. Ecology interagency briefings have specifically acknowledged that "source control measures are considered a necessary component of effective cleanup to reduce the risk of contamination." The proposed Sediment Management Standard revision includes in cleanup process expectations the "use of aggressive source control measures to minimize future contamination." WAC 173-204-500(4)(a)(iii). In light of the interrelationship between the Sediment Management Standards and Water Quality Standards, Ecology should broaden the scope of alternatives and the environmental impact statement to include both cleanup actions and source control actions.

Ecology SEPA regulations require proposals or parts of proposals that are related or interdependent to be analyzed in the same environmental impact statement. WAC 197-11-060(3)(b). Since Ecology cannot provide a meaningful analysis of the impact of cleanup standards based on the proposed fish consumption rates without consideration of recontamination effects under source control efforts, both need to be addressed in the same document. The Sediment Management Standards would be adopted in violation of

June 8, 2012

Page 3

rulemaking requirements under RCW 34.05.570(c) to the extent Ecology unlawfully segments the SEPA review of the its proposal to implement sediment cleanup standards and water quality standards based on the fish consumption rates in the Technical Support Document. In that event, a court would be inclined to invalidate the rule and require Ecology to start over with a lawful SEPA review process.

The Determination of Significance provides several objectives for the Sediment Management Standards revision but does not specifically reference fish consumption rates. Based on the Technical Support Document it appears that one of the major objectives of the rule making is to incorporate new fish consumption rates in deriving cleanup standards and source control requirements. This should be clearly stated as an objective.

The Determination of Significance includes a vaguely stated objective to synchronize cleanup actions and source control efforts. It should be more clearly stated that the Sediment Management Standard revisions are part of a coordinated effort to develop human health criteria for toxics in sediment cleanup standards and water quality standards based on fish consumption rates discussed in the Technical Support Document.

The Determination of Significance lists two impacts from the proposed rule making: impacts due to residual concentrations and impacts due to cleanup actions. Ecology should include impacts due to potential recontamination that would be addressed in source control efforts through water quality permitting.

The five human health alternatives are similarly devoid of any discussion of source control and the potential impacts from recontamination. In numerous public meetings Ecology has described a source control effort relative to criteria based on higher fish consumption rates that could extend over fifty years. There should be a discussion of the impacts of this approach and alternative approaches, particularly any alternatives that would drive a shorter source control effort under applicable requirements in Washington. Compliance schedules in NPDES permits, for example, are limited to ten years. WAC 173-201A-510.

The scope of the environmental impact statement for human health criteria should also assess any actual substantive difference in cleanup actions based on the no action alternative and other alternatives. Ecology has proposed in WAC 173-204-570(3)(e), 4(h), and WAC 173-204-571(2)(c) that cleanup standards shall not be set below natural background concentrations as defined in WAC 173-340-200. Since this would include persistent organic compounds such as PCBs, the environmental impact statement should evaluate when the

June 8, 2012

Page 4

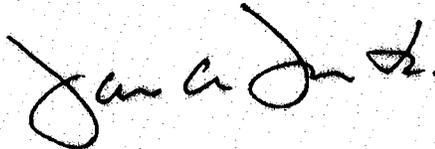
proposed human health criteria would make a difference in the derivation of sediment cleanup standards.

The alternatives should also include delayed action and specific alternatives to source control other than human health criteria that would result in effluent limits in water quality permits. Ecology has widely acknowledged that the likely water quality criteria are going to be very conservative and unattainable with current treatment technologies. The alternatives addressed in the environmental impact statement should accordingly consider other regulatory approaches to the long term reduction of persistent toxics in the environment.

On behalf of Inland Empire Paper Company, I appreciate your consideration of these comments on the Determination of Significance and the scope of the environmental impact statement for the Sediment Management Standards. I hope that Ecology will give careful consideration to the need to consolidate and evaluate the impact of cleanup and water quality standards based on higher fish consumption rates in a holistic manner. The current bifurcated rule making process with segmented environmental review will not provide adequate information for the Department of Ecology in developing revisions to the Sediment Management Standards and Water Quality Standards.

Sincerely,

TUPPER MACK WELLS PLLC

A handwritten signature in black ink, appearing to read "James A. Tupper, Jr.", written in a cursive style.

JAMES A. TUPPER, JR.

Enclosure

DIRECTOR'S MEETING DOCUMENT

(Provide completed form at least two days prior to scheduled meeting)

TODAY'S DATE: September 2, 2011

MEETING DATE: September 6, 2011

FROM: Dave Bradley
Melissa Gildersleeve

PHONE: 360 407-6907
360-407-

ISSUE: INTEGRATED RULE STRATEGY DEADLINE? YES

PURPOSE OF MEETING:

- Summarize integrated strategy for completing fish consumption rate report and amendments to the Sediment Management Standards (SMS) and Water Quality Standards (WQS) rules
- Summarize current status of fish consumption rate (FCR) report.
- Decide whether proceed with SMT briefings on rule authorization documents for the SMS and WQS rules.

DECISION NEEDED? YES. Decision is needed on whether to proceed with SMT briefings on the rule authorization documents for the SMS and WQS rule revisions.

BACKGROUND:

- **Integrated Rule Strategy**

Ecology (WQP, EAP and TCP) are working on an integrated strategy to accelerate and increase the effectiveness of actions to reduce exposures to toxic chemicals in sediments, water and fish (See Figure 1). The strategy has three main components:

- Update the default consumption rates for fish and shellfish that are used by Ecology to support decisions on sediment cleanup and water quality criteria calculation (Not a formal rulemaking process – results used to inform SMS and WQS rulemaking processes).
- Update the SMS rule to establish clear methods and policies for reaching decisions on sediment cleanup actions that take into account updated fish consumption rates, background concentrations and implementation timeframes. (Separate – but coordinated – rulemaking process)
- Update the Water Quality Standards (WQS) rule to incorporate revised implementation procedures (Phase 1) and revisions to the state's water quality criteria based on new scientific information on chemical toxicity and fish consumption rates (Phase 2). (Two discrete rulemaking processes).

DIRECTOR'S MEETING DOCUMENT

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- **Current status of fish consumption rate (FCR) report – work since June briefing**
 - Ecology (WQP and TCP) have met with EPA water quality staff and the Office of the Attorney General. The SMS rule revisions (including a default fish consumption rate) will require EPA review. However, the EPA review will not impact Ecology's ability to use the revised rule to support decisions under the Model Toxics Control Act (MTCA).
 - Sandy Howard and Seth Preston developed talking points for Karen Terwilleger to use when meeting with legislators and legislative staff.
 - Ecology distributed draft report for interagency review in July 2011. We are currently revising the report based on those comments Key conclusions:
 - Current scientific and demographic data indicate that many Washingtonians likely consume fish and shellfish at rates higher than the rates in current rules.
 - Ecology has concluded that available scientific studies support the use of a default fish consumption rate between 150 and XXX g/day
 - The selection of a specific default FCR is a risk management decision. This decision requires consideration of scientific data and several other factors (e.g., state laws, policies on who to protect at what level of protection, other exposure factors, etc.).
 - Many people in Washington eat large amounts of salmon. Salmon have great cultural significance for many Tribal Nations and Washington residents. Information on salmon consumption must be taken into account when selecting a default FCR. However, the risk management decision about how to account for salmon consumption is not straight-forward. Ecology will need to consider information on the amount of salmon people eat, the amount of contaminants salmon pick up in waters regulated under MTCA or the CWA vs. the amount picked-up in the open ocean, , etc.
 - Next steps (schedule/timeline is provided in Attachment 2).
 - Ecology plans to send the draft technical report to tribal agencies in late September and will hold a series of meetings with tribal representatives in late 2011 and early 2012.
 - Ecology will post the report on the Ecology website in late September. Both WQP and TCP will announce the posting through existing ListServs. Interested persons may review the report and provide written comments.
 - Ecology will hold meetings with interested groups to summarize key aspects of the report and obtain comments.
 - Ecology will hold a conference/workshop in late November/early December where interested persons can provide comments on the draft report.

DIRECTOR'S MEETING DOCUMENT

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- **The fish consumption rate report informs and impacts two rulemaking efforts that are ready to proceed.**
 - **Sediment Management Standards:** TCP has been working for the last year on MTCA and SMS rule revisions. MTCA rule revisions have been put on hold, but TCP is moving forward with SMS rule revisions. TCP has developed a proposed SMS Framework that takes into account the fish consumption rate work. The proposed SMS Framework is focused in the near term on maximizing implementation of critical sediment cleanups and source control to reduce regional concentrations, and then working to further reduce regional concentrations to levels protective of Washington fish and shellfish consumers. TCP will bring forward the proposed SMS Framework for stakeholder and public input in the fall.
 - **Water Quality Standards.** The Water Quality Program is formulating an approach to address updated guidance and potential rule revisions to both: a) revise tools to assist in implementation of water quality criteria; and b) to develop updated human health-based water quality criteria for Washington. The WQP will be working in coordination with EPA on this, with input from other states such as Oregon that have recently been addressing this issue. The WQP will also work with Tribes and stakeholders during the deliberation process. This work is just now being scoped.

IF DECISION NEEDED (LIST OPTIONS):

OPTION 1: SEPTEMBER 9TH BRIEFING ON THE SEDIMENT MANAGEMENT STANDARDS RULE. Brief SMT on the rule authorization document for the SMS rule on Friday (September 9th). If approved to proceed, TCP would take the following steps:

- Discuss approach on September 13 (Centennial Accord) and September 15 (Water Quality Partnership)
- Work with the Rules Unit to complete a revised CR-101 rulemaking notice.
- Update the Rule Development Plan and Communication Strategy
- Hold three Advisory Committee meetings to discuss draft rule language (Oct – Dec)

Under this option, TCP would coordinate work on the SMS rule with work on the fish consumption report and the WQP process to revise the WQS rule.

OPTION 2: SEPTEMBER 9TH BRIEFING ON THE WATER QUALITY STANDARDS RULE. Brief SMT on the rule authorization document for the WQS rule on Friday (September 9th). If approved to proceed, WQP would take the following steps:

- Discuss approach on September 13 (Centennial Accord) and September 15 (Water Quality Partnership)
- Work with the Rules Unit to update the Rulemaking Agenda
- Work with the Rules Unit to complete a CR-101 rulemaking notice.
- Prepare Rule Development Plan and Communication Strategy
- Initiate stakeholder process

DIRECTOR'S MEETING DOCUMENT

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Under this option, WQP would coordinate work on the WQS rule with work on the fish consumption report and the TCP process to revise the SMS rule.

OPTION 3: SEPTEMBER 9 SMT BRIEFING ON SEDIMENT MANAGEMENT STANDARDS RULE AND WATER QUALITY STANDARDS RULE. Brief SMT on both rules at the September 9th meeting. If approved to proceed, the TCP and WQP would take the actions described in Options 1 and 2, respectively.

OPTION 4: POSTPONE SMT BRIEFINGS ON BOTH RULES. Under this option, TCP and WQP would reschedule SMT briefings for September 23 or later.

RECOMMENDATION: Proceed with SMT briefings on revisions to the SMS and WQS rules. (Option 3). The rationale for this recommendation includes:

- This option builds on the cross-program coordination activities over the last two months.
- This option allows us to take advantage of two opportunities to describe our plans to interested parties (September 13 – Centennial Accord NR summit and September 15 – Water Quality Partnership).
- Postponing this step in the process will limit our ability to complete the rulemaking processes by November 2012.

DIRECTOR'S COMMENTS: