

Washington State Department of Ecology Sediment Management Standards Rule Review/Comment Form

Please submit all comments to RuleUpdate@ecy.wa.gov

Reviewer Name:		Mike Stoner, Port of Bellingham
Sections of Document Reviewed:		SMS sections 173-204-200, -500 - 590
Document Version/Date:		October 2011 Preliminary Draft
Page Number	Line Number	Comment
Na	Na	<p>Comments on “Framework for Sediment Cleanup Decisions”:</p> <ul style="list-style-type: none"> • Ecology is to be commended for their effort to update the SMS, including both Rule-Making and Guidance. After 20 years, Washington is still the only state in the nation with this type of stringent sediment standards. Review of the SMS is appropriate to ensure that they are both protective and implementable, as originally intended. • The current SMS rule update was initiated in coordination with a similar rule update for MTCA. In 2009 and 2010 that combined effort generated considerable input from a broad spectrum of stakeholders: public agencies, environmental groups, Tribes, industry and small businesses. However, the MTCA rule revision was postponed by the Governor, as non-critical activity, due to the current economic recession. • The current draft of the SMS demonstrates that Ecology is trying to address many of the technical and policy comments received to date in ways that meet the over-riding goal of making the SMS protective and implementable, including: <ul style="list-style-type: none"> ○ A multi-phase approach for sediment recovery over a long timeframe and broad geographic areas, ○ A regional background approach to allow incorporation of technical feasibility, cost considerations, and net environmental benefits in cleanup decisions, ○ Provisions for discrete sediment cleanup units and/or sites within larger baywide areas of sediment impact, ○ Consideration of practical incentives to encourage PLPs to take action regarding problems they can control and potential cash-out settlements for larger baywide problems, ○ Strategic analysis of how the SMS update will be interpreted and implemented by different federal, state and local environmental regulatory programs (e.g., Water Quality Program, NPDES industrial and municipal permits, MTCA, CERCLA, etc.) • However, each of these encouraging points of discussion are still raising more questions than answers within the Sediment Cleanup Advisory Committee, particularly: <ul style="list-style-type: none"> ○ Concerns that the combined application of MTCA human health risk assessment methodology, revised fish consumption rates, and the apparent toxicity of certain compounds (e.g., dioxin/furants) creates a regulatory gridlock that inappropriately defines most of Puget Sound as an SMS site. This flies in the face of local fishery programs that encourage seafood consumption for health reasons. And it imposes a drastic economic roadblock to this important industry. ○ Concerns that the regional background approach is too stringent to be practical. Case study applications using the current approach do not allow sufficient differentiation between existing MTCA sites, or the proposal for site units, and baywide contamination problems. This creates gridlock in the processing of the current back log of sediment sites. ○ Concerns that the “glide path” to achieving sediment cleanup goals is fundamentally unachievable. The glide path may work for the first phase of cleanups that can be performed under MTCA, but the assumption that the long term goal will be achieved through other programs is not realistic. In fact, it is very likely that citizen lawsuits under CWA NPDES permitting could create a surge of litigation that could drastically impact water-dependent businesses and local public agencies that are already challenged with current economic conditions. • Specific comments that follow are provided with four very important and over-riding recommendations: <ul style="list-style-type: none"> ○ First, ensure that any MTCA/SMS cleanups that are currently underway can be completed under the current regulatory framework. The Port of Bellingham alone has ten sediment sites that have been initiated under the current framework. These sites will grind to a halt, putting ecosystem recovery and water-dependent jobs at risk for years before the new approach is tested through a variety of new regulatory

Washington State Department of Ecology Sediment Management Standards Rule Review/Comment Form

Please submit all comments to RuleUpdate@ecy.wa.gov

Reviewer Name:		Mike Stoner, Port of Bellingham
Sections of Document Reviewed:		SMS sections 173-204-200, -500 - 590
Document Version/Date:		October 2011 Preliminary Draft
Page Number	Line Number	Comment
		<p>agreements, settlements and litigation. Other Ports, Cities, Counties and private PLPs will face similar impacts to ongoing cleanup projects.</p> <ul style="list-style-type: none"> ○ Second, ensure that sediment standards and action levels are clearly defined and based on an achievable regulatory framework. The framework should be protective of human health, but not forced to incorporate overly sensitive risk assessment assumptions that result in regulatory decisions that may seem laudable, but that are in fact impossible to attain. Key factors include an inflexible and largely unattainable goal of risk avoidance (1 in 1 million excess cancer risk), fish/shellfish consumption rates, fish/shellfish diet fraction, fish/shellfish life cycle and accumulation of tissue burden, and fish-catch patterns (deep water v. nearshore). ○ Third, the SMS update should ensure that the new rules establish a more clearly defined two-tier approach that encourages the cleanup of distinct “sites” under MTCA, in contrast to broad scale regulation of pollution control under other regulatory authorities (e.g., Phase II municipal permits for urban stormwater). MTCA should not be used as the default regulatory authority for regional, or bay-wide sediment impacts. ○ Fourth, ensure that the “glide path” is more thoroughly analyzed and coordinated with other federal, state and local programs before any new rules are put in place. The application of new rules as currently written, especially without any guidance, creates enormous uncertainty and potential for unintended consequences. The draft rules should be evaluated through standard legislative procedures (e.g., economic impact analysis, rule writing, and small business cost/benefit analysis) prior to any formal public review and comment on the draft rules themselves.
Fig 1		The “glide path” is a good way to understand how the SMS will be applied by other programs. And WQ programs can surely be used to work toward long-term goals. But if an exceedance of MTCA risk levels creates CWA liability for public and private NPDES permit holders, it will have drastic economic impacts. (Needs work)
Fig 2		Ditto above. The flow chart works for MTCA cleanups. But does not anticipate or provide protections for public and private NPDES permit holders.
Fig 3		Ditto above. Other federal, state and local environmental regulations may not have the same “disproportionate cost” evaluation criteria as MTCA. Without these practical considerations, the permit writers may be compelled to require much more stringent (and infeasible) requirements, or face litigation by private parties.
Fig 4		Ditto above. It is unclear how the permittee participation can be effectively managed.
10	53-60	<p>In order to promote the completion of MTCA/SMS cleanups that are currently underway, a set of new definitions should be included to differentiate “legacy” contaminants from the new wave of wide-spread and low level contaminants (e.g., dioxin/furans, phthalates, and chemicals yet to be identified) that threaten to throw the program into a regulatory grid-lock.</p> <p>If a “contaminated sediment” is anything over natural background, the incorporation of SMS requirements in other programs will create gridlock without discernible environmental benefit. The original SMS used the AET approach to strike a balance between reliability and sensitivity. The proposed definition is far too sensitive and far too unreliable – there is too much potential for false positives.</p>
11	81	See comment above. Maximum allowable may need to be redefined for the new wave of ubiquitous contaminants in order to be practical.
13	138	<p>Regional background is an important concept to include in the updated SMS, especially for the new wave of ubiquitous contaminants, but the definition needs work. There needs to be a higher degree of practical differentiation between regional background and natural background, or the concept will not be implementable.</p> <p>Regional background should also include contaminants contributed to the region from multiple urban</p>

Washington State Department of Ecology Sediment Management Standards Rule Review/Comment Form

Please submit all comments to RuleUpdate@ecy.wa.gov

Reviewer Name:		Mike Stoner, Port of Bellingham
Sections of Document Reviewed:		SMS sections 173-204-200, -500 - 590
Document Version/Date:		October 2011 Preliminary Draft
Page Number	Line Number	Comment
		stormwater sources, in order to distinguish those pollution problems from more discrete sediment sites that can be linked to a more specific, and likely historic, past practice. Regional background problems could then be addressed under the appropriate regulatory tool (e.g., Phase II municipal permits) and not site-specific MTCA enforcement.
	146	Calculation of regional background should allow for inclusion of certain contaminants if they are due to the influence of multiple urban sources. The concept of regional background should be specifically used to determine discrete MTCA sites. The achievement of higher standards could then be an aim addressed as a public works program.
14	173	The sediment cleanup objective should allow practical differentiation between legacy contaminants and the new wave of contaminants.
	179	Typo! There are two (2) paragraphs 36.
15	201	The terms "Site" and "Sediment Cleanup Unit" should be carefully reconsidered, especially relative to MTCA/SMS coordination. Perhaps the term "Site" should be reserved for MTCA, as it is defined by MTCA. The completion of remedial activities for any Sites that are currently being addressed under MTCA/SMS should be encouraged under that definition. Completion of these sites will go far in addressing the enormous backlog of sites defined by legacy contaminants. That would allow the use of a different term, e.g., "sediment unit" to define discrete sediment contamination problems that may or may not be addressed under MTCA, and some other term, e.g., "regional background impacts" that could be addressed under non-MTCA authorities.
16	12	Include language to distinguish between sites that are already in process for legacy contaminants, and any newly defined sites.
17	42	"Cleanup process expectations" needs work, specifically to distinguish between legacy sites and new sites.
	55	Aggressive source control measures needs clarification. This is already a reality for legacy sites. Agreed Orders and Consent Decrees have provisions for monitoring and contingency plans to address recontamination. However, aggressive source control for dioxins, phthalates and other ubiquitous contaminants needs to be defined in practical terms, otherwise permit writers will be compelled, under threat of citizen lawsuits, to include requirements that are unachievable. This creates a woefully unlevel playing field for businesses and municipalities relative to other areas of the country.
	56	Good!
18	69	Time frame should be 10 years from completion (not start) of active cleanup, consistent w/ page 6 of intro and p. 52.
	73-78	The term "sediment recovery zone" should be reconsidered. One term should be used to apply to site-specific circumstances (e.g., MTCA cleanup), where recovery is expected in a reasonable timeframe due to a change in conditions (e.g., cleanup, source control, etc.). Another term, e.g., "sediment monitoring area", should be used to apply to regional pollution problems where sediment recovery is less predictable due to broad spread urban stormwater contributions.
	79	Compliance monitoring should differentiate between legacy and new wave contaminants, otherwise private permit holders may be expected to pay for very expensive monitoring programs.
	99	This definition of sediment cleanup objective is too stringent, especially for the new wave of contaminants that are defined by impractical human health objectives.
19	107-111	The difference between "sediment cleanup standard" as defined here and in page 39, lines 11-13 needs clarification/explanation, especially relative to active cleanup.
	129-132	This 'grandfather' clause needs to be fleshed out as an essential component of any SMS update. It should be clarified to specifically state that it applies to sites where a consent decree is in place. Furthermore, to encourage the cleanup of legacy contaminants, it should also apply to sites where PLPs are completing an RI/FS under Agreed Order with Ecology. Otherwise, the update could trigger a long transition period where significant remedial work on current sites is halted, negotiations for PLP cost share settlements are thrown into uncertainty, there will be reluctance to perform any work until "the dust settles", and cleanup could be effectively stopped for years. In the meantime, this will have a chilling effect on redeveloping waterfront properties to support economic recovery in Washington State. Core industry and small

