

October 29, 2012

Jim Pendowski  
Program Manager  
Toxics Cleanup Program  
Department of Ecology  
PO Box 47600  
Olympia, WA 98504

RE: Proposed SMS Rule Amendment

Dear Jim:

We are writing to express our concerns with the draft amendments to WAC 173-204, the Sediment Management Standards (SMS), proposed by Ecology in August 2012. As you know, Ecology has engaged in a great deal of outreach and involvement with knowledgeable professionals and other stakeholders leading up to these proposed SMS amendments. In particular, Ecology engaged in an advisory committee process that involved multiple committees that worked together during 2009 and 2010, and then the most recent Sediment Cleanup Advisory Committee that was convened in 2011. The signatories to this letter served at Ecology's request on the final Sediment Cleanup Advisory Committee, and/or the 2009 and 2010 committees.

Many of the committee members put in a great deal of time and effort in hopes of helping Ecology find workable solutions to the MTCA/SMS problems that have posed a genuine impediment to sediment cleanups in Washington. The committees worked through a wide range of issues with Ecology staff and, based on the presentations and discussion in the last meeting of the Sediment Cleanup Advisory Committee in December 2011, we believed Ecology had charted a course for focused rule amendments that would create a workable path through some thorny MTCA/SMS issues and help expedite needed sediment cleanups. That course was the product of many vigorous discussions, active sharing of information and views, and compromise on the part of Committee members and Ecology. Although there were still differing perspectives expressed, the final Committee meeting was remarkably free of dissent, and we left the last meeting with the view that Ecology's proposed approach, which was reflected in draft rule language at that time, was basically sound.

After having been through this long yet ultimately productive process, and believing we were well on the way to workable rule changes, we were puzzled to see what appears to be a significant change in focus in the rule amendments that were proposed by Ecology in August 2012. We see some aspects of the pragmatic approach we had arrived at by the end of the Advisory Committee process, but we also see significant changes that were either never discussed, or were discussed and quickly put aside as unworkable. For example, we recall the Committee's consensus view (consistent with EPA's current sediment guidance), that there is no presumptive sediment remedy, including a requirement for "active" cleanup, for any contaminated sediment site, regardless of the contaminant or the level of risk. Given the widely

differing sediment cleanup situations in Washington State, the sediment cleanup remedy should always be the product of careful site-specific evaluations. Yet the August 2012 proposal ignores the Committee's advice and includes the requirement in WAC 173-204-570(3)(h) that "*Cleanup actions shall not rely primarily on monitored natural recovery or institutional controls and monitoring where it is technically possible to implement a more permanent cleanup action.*" This inadvisable presumptive approach will only further stymie cleanup progress.

Given how long many cleanup projects may take to implement, the Committee also recommended that Ecology **not** impose the requirement that cleanup standards be met within 10 years of *initiating* cleanup (which is a change from the current requirement of 10 years following completion of active cleanup measures), yet the August 2012 proposal ignores that recommendation. Of even more concern is the provision in the August 2012 proposal in WAC 173-340-570(5)(b) that: "*If the department approves a longer restoration time frame, the department must also establish a sediment recovery zone in accordance with WAC 173-204-590.*" We recall the Committee's advice that a sediment recovery zone requirement would certainly stymie cleanup, as this element of the SMS regulations has proved totally unworkable in the real world. Despite Ecology giving every indication that it agreed with this point, including in the December 2011 materials, the August 2012 proposal specifically requires sediment impact zones for longer term cleanups. There are important issues involved with these changes that should have been discussed in the Advisory Committee process.

We are also concerned that the August draft rules appear to have been substantially changed since the Advisory Committee last saw them to align them more closely with MTCA terminology and processes. For example, the draft sediment rules include points of compliance, and the concepts of cleanup levels and cleanup standards (i.e. a cleanup standard = cleanup level + a point of compliance + additional regulatory requirements such as institutional controls). However, we are concerned that these aspects of MTCA do not translate well to sediment environments where there are fewer remedial options, and far fewer institutional controls available than exist for upland cleanups. These are just the kinds of changes that would have benefitted from the expertise of the Advisory Committee to work through how (or whether) these concepts could translate to effective sediment cleanups.

Most notably, the draft rules proposed in August eliminate the flexibility associated with a consideration of cost in determining the cleanup level. Although the draft rules allow the cost of a remedial alternative to be factored in at the back end of the process through the use of a disproportionate cost analysis, this provides little flexibility. This is because there are a limited range of cleanup alternatives available for sediments in general, and an even more limited range in the draft rules because they restrict the use of monitored natural recovery and institutional controls when Ecology believes it is "technically possible" to implement a more "permanent" (i.e. costly) cleanup alternative. We left the Advisory Committee process believing everyone at the table understood flexibility was needed to ensure sediment cleanups move forward. We are disappointed that Ecology has opted to remove that flexibility.

After reviewing the draft rule language, it is now clear that significant aspects of what we believed were consensus approaches and solutions were abandoned in the internal Ecology

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deliberations that occurred between the December 2011 Advisory Committee meeting and the August 2012 publication of the proposed rule amendments. As you have no doubt discerned, we are dismayed that our years of work and collaboration on these issues has been discounted, and in some instances completely rejected, in favor of views and approaches that were not brought forward in the very process Ecology set up to review and discuss these issues.

This letter will not provide the array of comments that underpin our desire for the rule proposal to be significantly modified; individual comment letters will articulate our more specific concerns. However, as a group we believe that significant changes are needed to align these rule amendments with the more practicable approach needed to move forward with sediment cleanups in Washington.

Thank you for your consideration of our concerns.

Very truly yours,



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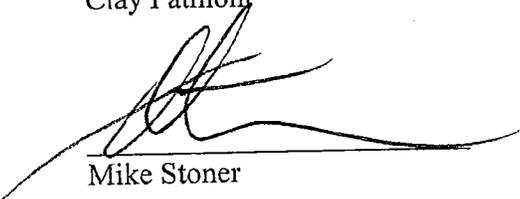
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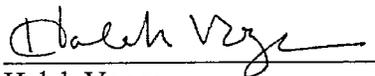
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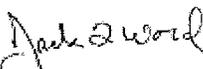
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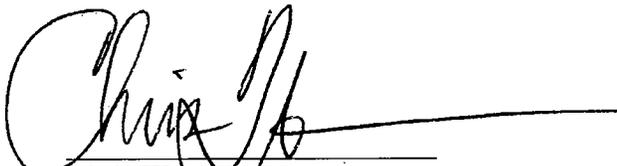
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