Port of Olympia

Commissioners

Bill McGregor
George Barner
Jeff Davis

October 29, 2012

Adrienne Dorrah
Washington Department of Ecology
Toxics Cleanup Program
P.O. Box 47600
Olympia, WA 98504-7600

Subject: Draft Sediment Management Standards Amendments

Dear Ms. Dorrah:

The Port of Olympia (the "Port") appreciates the opportunity to submit the enclosed comments on the Draft Sediment Management Standards (SMS) Rule Proposed Amendments (August 15, 2012 Review Version). The Port also appreciates Ecology's granting of a two-week extension to the comment deadline.

A copy of the Port's comments were also sent via e-mail to RuleUpdate@ecy.wa.gov. If you have any questions about the attached or would like the Port to clarify any of its comments, please do not hesitate to contact me.

Sincerely,

Alexandra K. Smith
Director of Environmental Programs

Enclosure

Draft Sediment Management Standards Chapter 173-204 WAC Amendments
Public Comment Form

Name of Commenter:	Alex Smith
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General	N/A	The Port of Olympia (the "Port") appreciates the work Ecology put into this effort. Overall, Ecology worked hard to strike a balance between environmental protection and risk reduction on the one hand, and implementability and incentivizing sediment cleanups on the other. The Port has concerns, however, that the changes taken together will lead to cleanup levels at or close to natural background, and few implementable remedial alternatives. Although many of the changes in isolation do not appear to lead to this result, taken together, the removal of cost from the calculation of cleanup levels, the definition of regional background, and the inability to rely on monitored natural recovery when a more "permanent" cleanup can be engineered (regardless of cost) have the potential to lead to cleanups that require extensive (and expensive) dredging and/or capping. The Port is concerned that Ecology's goal of incentivizing sediment cleanups will not be met with these draft rule revisions.
11	N/A	Figure 1 shows the two-tier framework for establishing cleanup standards under the revised rule. There are two concerns with Figure 1: First, the original SMS rules and the prior drafts both allowed cost to explicitly be taken into account in setting sediment cleanup levels (or standards). The ability to consider cost in setting sediment cleanup levels provided essential flexibility to ensure that cleanup actions selected for a site were ultimately implementable (i.e. the PLP could afford to implement them). There are so few cleanup alternatives for sediment sites – either high cost dredging or thick layer capping (or a combination of the two), or lower cost enhanced or monitored natural recovery – and the cost difference between these two sets of cleanup actions is great. What cleanup level is set for the site will determine whether a PLP will be required to implement the costly dredging and/or capping, or can rely on enhanced or monitored natural recovery. Unlike an upland cleanup, it is unlikely that a disproportionate cost analysis will help the PLP. At an upland cleanup, a PLP can argue that a less expensive remedy than excavation of all contaminated material (like isolation of contaminants under an impermeable cap, or a conditional point of compliance) will achieve cleanup levels. In a sediment cleanup, however, those kinds of alternatives are simply not available. If the sediment cleanup levels are set at a low level for the protection of human health, it could well be that the only cleanup actions that will achieve them are costly dredging and/or capping. Since these will be the only remedial alternatives evaluated in a disproportionate cost analysis, it will provide little flexibility, and PLPs are not likely to have high incentives to move forward on sediment cleanups. Second, the following language about where the site-specific cleanup level should be set has the potential to confuse: "Set as Close as Practicable to Sediment Cleanup Objective based on Technical Possibility and Adverse Environmental Impacts" The area of confusion comes in the definitions of the terms "practicable" and "technically possible." Section 173-204-200(34) (page 33, ll. 371-72) defines "practicable" as "able to be completed in consideration of environmental effects, technical feasibility ***and cost***." Section 173-204-200(49) (p. 37, ll. 457-58) defines "technically possible" as "capable of being designed, constructed and implemented in a reliable and effective manner, ***regardless of cost***." This results in an internally inconsistent requirement of setting the cleanup level "as close to the SCO as able to be completed, taking into account environmental effects, technical feasibility and cost; based on whether a remedy meeting the cleanup levels can be designed, constructed and implemented regardless of cost." To address both these concerns, the Port of Olympia prefers that the language in the chart read "Set as Close as **Practicable** to the Sediment Cleanup Objectives," and that rule language in 173-204-560 be similarly changed.
36	440	The definition of a "Sediment recovery zone" ("SRZ") indicates that an SRZ may be established when Ecology determines the selected cleanup actions cannot achieve the applicable cleanup

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		standard “”within ten years after the start of the cleanup action.” The primary concern is that the ten year period for achieving cleanup standards begins at “the start of the cleanup action,” rather than at the completion of active cleanup. As has been expressed to Ecology, the reality of sediment cleanups is that they sometimes have to span more than one construction season due to no fault of the PLP. In addition, because of the cost of mobilizing dredging equipment, barges, etc., PLPs are already motivated to complete active cleanups as quickly as they can. Accordingly, a more appropriate trigger for the 10 year period to achieve cleanup standards is “at the completion of active cleanup actions.”
36-37	443-450	The definition of “Sediment site unit” sets out a very helpful concept. It allows smaller portions of a larger site to be addressed expeditiously, and allows a PLP to move forward with some cleanup and achieve a measure of finality, even when development is a driver behind cleanup. This incentivizes cleanup that might not otherwise occur.
xciv-xcvi	1480-1525	The “Cleanup process expectations” set out in 173-204-500 are a helpful context for how Ecology will implement these cleanup rules. In particular, it is helpful to have explicit mention of Ecology’s expectations in the event of recontamination (ll. 1494-1499). It would be helpful if the rules explicitly indicate that the demonstration a PLP is required to make to prove it did not recontaminate is that the PLP complied with the source control requirements for its property or facility. As indicated above, the Port also believes the use of a sediment recovery zone should only occur if a cleanup cannot achieve cleanup standards within 10 years from the completion of active cleanup, rather than from the start of active cleanup (ll. 1508-1511).
xcvii	1537-1547	For the reasons set forth above in our comment on Figure 1 (on page 11), the Port of Olympia is concerned that cost is not taken into account in setting site-specific sediment cleanup levels, and the Port’s comments on Figure 1 are incorporated by reference here. Although the draft rule still allows cleanup levels to be set within a range, we believe the range is less meaningful when “technical possibility” (i.e. whether something can be engineered, regardless of cost) is what determines how close to the sediment cleanup objective the cleanup level must be set. The Port would prefer that lines 1540 through 1543 read as follows: “The sediment cleanup level shall be the sediment cleanup objective and shall be adjusted upward as required based on what is ~~technically possible~~ **practicable** and whether meeting the sediment cleanup objective will have an adverse impact on the aquatic environment, including natural resources and habitat.”
xcix	1588	The Port believes this should read “A site **or sediment cleanup unit** cleaned up with sediment standards determined in (a) of this subsection . . . . “ It seems that this provision should apply to both sites and sediment cleanup units.
cxvi	1890-1893	The Port appreciates that the concept of “Incidental cleanups” is retained in the rules. The Port would like to tie this section to WAC 173-322-070 to allow for ports and other local governments to utilize grant funds, where appropriate, to help defray the costs of incidental cleanups. As one way to address this issue, the Port suggests adding a subsection to the regulation governing Remedial Action Grants – specifically WAC 173-322-080(2). The Port proposes a new subsection (d) that reads “The applicant must have completed incidental cleanup actions within the meaning of WAC 173-204-540(c) and must have ensured that the Department’s requirements for such incidental cleanup actions were incorporated into the federal or state permits authorizing the applicant’s activities.” For incidental cleanups completed as part of a larger site for which Oversight Remedial Action Grants have already been awarded, it would be helpful if Ecology could work with an eligible PLP to allow for the use of grant funds where available and appropriate.
cxxxi	2196-2197	The Port’s concerns here are the same as expressed above about cost no longer being taken into

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		account when setting site-specific cleanup levels. The Port prefers that 173-204-560(2)(a)(i)(A) read "Whether it is ~~technically possible~~ **practicable** to achieve the sediment cleanup level at the applicable point of compliance within the site or sediment cleanup unit." A countervailing concern was raised about the difficulty or uncertainty of how to factor cost into setting the cleanup level – and then evaluating cost again as part of a disproportionate cost analysis. Yet, if a PLP is putting together an RI/FS for a sediment site, it will know the range of cleanup alternatives as it puts that document together. Given the high costs of cleanups, PLPs will want to do whatever analysis is required to come up with a protective, yet implementable, cleanup level. It is not a difficult exercise to assess the likely costs at the time the PLP evaluates what the cleanup level should be. In addition, the current version of the SMS (which has been in effect for close to 20 years) provided for the consideration of cost in setting cleanup levels, and both Ecology and the regulated community have used these rules without this cost evaluation being an issue.
cxxxv-cxxxvi	2275-2297	The Port appreciates that Ecology has simplified the definition of "Regional background" from previous versions of the rule. Yet, as others have expressed, we have concerns that the rule does not appear to allow the calculation of regional background to include low-level contamination from diffuse stormwater that happens to be collected into a pipe, such as a municipal CSO, before it is discharged into the water body at issue. The language in this section provides a fair amount of discretion to Ecology as to how regional background can be calculated, so until we have a better sense of how Ecology will implement this section, it is hard to evaluate its impact on the regulated community. A comment on the bigger picture – it is important for regional background to be meaningfully different from natural background. The fear of having to cleanup large contaminated embayments to natural background has been one reason many PLPs have been reluctant to move forward on sediment cleanups. Without a meaningful difference between regional and natural background, the two tier paradigm for setting sediment cleanup levels is also meaningless, and the "glide path" to achieving the sediment cleanup objective that was discussed in the SMS Advisory Group becomes a sheer cliff face. If a goal of this rule revision process was to incentivize getting some active cleanups going (on the theory that getting some cleanups done is better than none), it is critical that there be a meaningful difference between regional background and natural background.
clxxv	2897-2900	As previously indicated, the Port believes that the time frame for achieving cleanup standards (the reasonable restoration timeframe) should be ten years from the completion of active cleanup, not from the "start of the cleanup action."
clxxv	2906-2910	For the reasons set forth by other commenters, the Port would like the language in this section changed to read: "Cleanup actions shall not rely ~~primarily~~ <u>exclusively</u> on monitored natural recovery or institutional controls and monitoring where it is technically possible to implement a more permanent cleanup action." In addition, this section provides that if institutional controls are used, Ecology will give preference to "the types of institutional controls with a demonstrated ability to control exposures and ensure the integrity of the cleanup action." What institutional controls did Ecology have in mind that meet this criteria? In the Port's experience, there are few institutional controls available for sediment cleanups, and even fewer that have "a demonstrated ability to control exposures and ensure the integrity of the cleanup action."
clvvvi	2920-2923	This section is the place where the draft SCUM II indicates an evaluation of cost is factored into the equation. Yet, it is far from an explicit reference to cost in the draft rules. Instead it is a general reference to WAC 173-340-360, which includes at subsection (3)(e) a disproportionate cost analysis. This could lead to confusion as to whether the SMS rules are intended to include a disproportionate cost analysis at all. The Port would prefer an explicit reference to the disproportionate cost analysis of WAC 173-340-360(3)(e) in this section of the SMS, especially if

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		this will be the only place in a sediment cleanup evaluation where cost is taken into account.
clxxvi – clxxvii	2920-2938	The Port has concerns with the hierarchy of cleanup action alternatives. More than at an upland site, how contaminated material can be remediated or disposed of varies significantly from one sediment site to another. This is because of differences in what can be disposed of at open water sites, whether it is even possible to treat certain sediment contamination, the difficulty in siting and permitting near-shore or in-water disposal facilities, etc. It is likely that the ultimate protection of human health and the environment and the long-term effectiveness of the remedies will be the same for a number of remedial alternatives, but some that rank high on the hierarchy will be impractical or cost-prohibitive at a given site due to site-specific conditions. In addition, as sediment remediation technologies are developed, this hierarchy does not account for them or allow for them to be factored into future analyses of remedial alternatives. If Ecology places a great deal of weight on this remedial alternatives hierarchy when deciding which remedial alternative should be implemented at a site, the Port has concerns. The Port prefers that the hierarchy be removed altogether, as it is ultimately not necessary for successful sediment cleanups or the successful implementation of these rules.
clxxxi	3014-3018	As indicated in comments above, the Port has concerns with the requirement that cleanup standards be met within ten years of the start of a cleanup action; the Port prefers that the trigger for this time frame is the completion of active cleanup. The Port has a second concern about the timing of Ecology's determination "that the selected cleanup actions cannot practicably achieve sediment cleanup standards within a ten year restoration time frame[.]" If would be helpful if the rules identified when that determination will be made.