



PORT

OF PORT ANGELES

WASHINGTON

October 29, 2012

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

BY EMAIL (to RuleUpdate@ecy.wa.gov)

**SUBJECT: PROPOSED AMENDMENTS TO CHAPTER 173-204 WAC, SEDIMENT
MANAGEMENT STANDARDS (SMS)**

Dear Ms. Dorrah:

The Port of Port Angeles (Port) appreciates the opportunity to submit comments on the Washington State Department of Ecology's (Ecology's) *Draft Sediment Management Standards (SMS) Rule Proposed Amendments* dated August 15, 2012. The Port recognizes the substantial work performed by Ecology in preparing and proposing draft rule language, and we value the opportunity to review and comment on this work.

The Port appreciates the addition of many of the important concepts in the SMS rule amendments, as discussed in the public venues over the past few years. However, there are a number of important modifications that need to be made to the rule language prior to finalization. As currently written, the Rule is not implementable and actually undermines several of the most important tools that Ecology and the public have worked on over the last several years. It is imperative that cost, feasibility, and net environmental benefits are included in the derivation of sediment cleanup standards and in the development and selection of alternatives.

We have been working cooperatively with Ecology on the cleanup of Port Angeles Harbor and look forward to this continuing and resulting in a harbor that fully supports ecological communities and the community of Port Angeles. However, the language of the current draft of SMS threatens this by eliminating, or overly constraining, the very tools we have been discussing in our meetings with you.

We have attached your review form on the rule with several of our key concerns highlighted. This does not represent all of our concerns, but gives a solid starting point for finding a path forward in the Rule revision that will meet the goals of defining a practicable cleanup approach for sediments in the State.

The Port remains committed to working with Ecology and other stakeholders on these significant issues.

Sincerely,
PORT OF PORT ANGELES


Jeffery K. Robb
Executive Director
Attachment

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

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General Comment	N/A	The Port of Port Angeles (“Port”) has been following the revision process of SMS for a number of years, during which time numerous other sediment programs around the country have been struggling with similar issues. While we believe that it was Ecology’s intent to improve the functioning and strength of SMS in order to facilitate the cleanup of sediments in Washington state, we find that several of the proposed SMS changes have the opposite affect: they will delay cleanup, which will result in much higher costs than Ecology presented in their Cost Analysis and they will result in unnecessary cleanup, which will either not benefit the environment or whose benefit will be marginal and disproportionate to the cost. We believe that Ecology needs to make additional major revisions after they have the receipt of current comments.
General Comment	N/A	The current draft of the SMS rule demonstrates that Ecology is trying to address many of the technical issues, policy issues, and comments received previously in ways that meet the over-riding goal of making the SMS protective and implementable, including the following: <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 bay-wide areas of sediment impact • Consideration of practical incentives to encourage potentially liable parties (PLPs) to take action regarding problems they can control and potential cash-out settlements for larger bay-wide 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.)
General Comment	NA	Ecology undertook a great deal of outreach and involvement with knowledgeable professionals and other stakeholders leading up to the proposed SMS amendments, including several advisory committees. From our perspective, it appeared that both Ecology and the committee members put a great deal of time and energy into reaching workable solutions to problems that have posed a genuine impediment to moving forward with sediment cleanups. Based on sample rule language distributed in October 2011 and other materials Ecology presented at the last meeting held with advisory committee members in December 2011, Ecology appeared to have charted a course for focused rule amendments that would create a workable path through some very thorny MTCA/SMS issues and help in expediting needed sediment cleanups. However, while the proposed rule amendments include some aspects of the pragmatic approach that resulted from the advisory committee process, other portions of the amendments represent very significant changes to the current rule that we believe were either never discussed, or were discussed and quickly put aside by the advisory committee as unworkable. The changes needed to align these rule amendments with a more practicable approach are fundamental enough that new draft language needs to be proposed.
17	65–69	The new requirement to establish sediment recovery zones at sites and cleanup units where cleanup levels cannot be met within 10 years of the start of the cleanup is highly problematic. We understand that the final advisory committee made clear to Ecology that including the sediment recovery zone standards of WAC 173-204-590 in the new SMS rule revisions would stymie cleanup, as this element of the existing SMS regulations has proved totally unworkable in the real world because of “technical impracticability” and other similarly difficult criteria that need to be achieved to use this element of the SMS rule. Given that the highly conservative background or practical quantitation limit (PQL)-based sediment cleanup levels for bioaccumulative chemicals (i.e., PCBs, dioxins/furans, and PAHs) are anticipated to be exceeded at nearly every sediment cleanup site, in part because of uncontrollable and diffuse non-point source inputs of these regional contaminants, the entirety of subsection (4), which discusses sediment recovery zones, needs to be deleted. As clearly discussed in numerous forums, these non-point source inputs cannot be effectively regulated through toxics cleanup programs regulations and do not belong here because the party being regulated does not, in general, have the legal authority or technically practical

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		solution necessary to affect the underlying problem.
26	223–227	The proposed language of WAC 173-204-200(1) is problematic WHEN combined with the provisions of WAC 173-204-570(3)(h), which establishes “active” cleanup as the presumptive remedy at all sites. Please see our comment on the revised language of WAC 173-204-570(3)(h) below. The problem is not in the definition but in the use of the presumptive approach to require “active cleanup” at all sites <u>at the same time that other revisions of SMS have driven the cleanup levels for key bioaccumulatives to less than background; thus, Ecology is effectively saying that ACTIVE cleanup will be required for most of the sediments in the state.</u> The whole approach to requiring active cleanup as the presumptive approach irrespective of net environmental benefit, bioavailability, and commiserate source control must be completely rethought and reformulated. As written it is not implementable.
27	254	The new definition of BMP requires departmental approval. The addition of “as approved by the department” is likely to severely limit the use of new and improved BMPs, especially in storm water, dredge return water, and other operational areas due to a lack of available time and staff at Ecology. This added language is of no benefit. Please remove it.
28	261	The biologically active zone definition has been written to include everything from plant roots to groundwater upwelling; most of which have nothing to do with the pathways controlling exposure. An excellent example is the use of 45 cm for Human Health Exposure during beach play. This exposure point was developed for several sites in Puget Sound, but only along beaches and tideflats people could walk at low tide. Yet nowhere in the guidance or the regulation does it make this clear. The definition is so broad, and the implication of BAZ on cleanup decisions so direct, that the new language introduces major confusion in the very heart of compliance—the definition of the point of compliance. At the very least this needs to be fixed in guidance.
29	283–285	The definition of “contaminant” needs to be expanded to explicitly recognize that the bioavailability of sediment contaminants may vary significantly both within and between sites based on site-specific geochemistry and other factors. Subsection (15), and other related sections and subsections, need to be re-written to clarify that site-specific bioavailability considerations should be incorporated into the development of site-specific cleanup levels using approaches developed by the Interstate Technology & Regulatory Council (ITRC) and discussed in other relevant Agency guidance documents. Note that the ITRC’s February 2011 Technical/Regulatory Guidance (which Ecology helped co-author): <i>“Incorporating Bioavailability Considerations into the Evaluation of Contaminated Sediment Sites”</i> states: <i>“Overall, this guidance establishes that bioavailability considerations should be incorporated in the exposure assessment process to obtain a clearer understanding of contaminant toxicity and exposure pathways such that remedy selection decisions can be focused and resources efficiently used. By incorporating bioavailability considerations into the early stages of site characterization, the risk assessment process, and remedy selection, a more effective remediation may be accomplished, which may well optimize overall cost. This web-based technical and regulatory guidance can help the user understand the proper application of these tools to assess bioavailability and more effectively protect human health and the environment.”</i>
31	330–340	The concept here is good, but it should acknowledge that the “determination of natural background may need to consider geographic regions, sediment morphology, grain size, and the present of naturally occurring organic matter.”
34	389–393	While the general definition of “regional background” in subsection (38) is workable with revisions (see below), the utility of this approach will be entirely dependent on how regional background is ultimately calculated, which presumably will be described in detail in the Sediment Cleanup User Manual. We understand that Ecology is developing a pilot study to examine this issue in greater detail, but we have significant concerns that the regional background calculation approaches that Ecology is currently considering are all too stringent to be practical. Previous case study applications using approaches similar to what Ecology is now considering do not allow sufficient differentiation between existing or prospective SMS site units and bay-wide contamination

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		<p>problems. This creates gridlock in the processing of the current backlog of sediment sites.</p> <p>Regional background should include contaminants contributed to the region from multiple urban stormwater sources, in order to distinguish those pollution problems from more discrete sediment sites that can be linked to a more specific, and likely historical, past practice.</p> <p>Regional background problems should be addressed under the appropriate regulatory tool (e.g., Phase II municipal permits) and not site-specific MTCA/SMS enforcement. Calculation of regional background should allow for inclusion of certain contaminants if they are due to the influence of <u>multiple</u> urban sources. The concept of regional background should be specifically used to determine discrete SMS sites or site units.</p>
34-35	400-405	<p>The definition of "Sediment" was completely changed from its earlier 2011 definition. The current definition would appear to include ditches, swales, and retention ponds including those that are part of engineered storm water conveyance systems. In combination with the addition of the freshwater standards, it appears that the freshwater standards would now be applicable to the majority of stormwater system features throughout the state. Many of these are specifically designed to trap/collect contaminants from stormwater before it enters waters of the state; therefore, the previous definition of "sediments" used in the 2011 revision, specifically excluded stormwater systems. The operation of these stormwater swales, ditches, basins, and ponds are critical to the approaches being used and considered for use throughout Washington State as stormwater controls. The exclusion of engineered stormwater features is critical to the stormwater program and to the application of freshwater sediments.</p>
36	435-442	<p>The proposed revisions significantly and unrealistically shorten the maximum restoration timeframe for a cleanup. Informed by the committee members' collective experience with how long many cleanup projects take to implement, the Port understands that the final advisory committee considered and rejected the option of changing the rules from the current requirement that cleanup standards must be met with 10 years following completion of cleanup, to requiring that cleanup standard must be met within 10 years of <i>initiating</i> cleanup. However, the August 2012 proposal ignores the committee's recommendation. Thus, the next to last sentence of subsection (46) needs to be revised to read: "<i>within ten years after the completion of the cleanup construction.</i>" The last sentence of this subsection referring to sediment recovery zones needs to be deleted, consistent with the comment above regarding page 17.</p>
37	457-458	<p>MTCA contains a clear definition of "practicable" that has been used for cleanup throughout the state in all other environmental media for almost 2 decades. It states: "'Practicable' means capable of being designed, constructed and implemented in a reliable and effective manner including consideration of cost. When considering cost under this analysis, an alternative shall not be considered practicable if the incremental costs of the alternative are disproportionate to the incremental degree of benefits provided by the alternative over other lower cost alternatives." This definition sets up the concept for Disproportionate Cost Analysis, which is one of the most important tools available in assessing sediment cleanups.</p> <p>Is it Ecology's intent by the definition of "Technically possible," and its use throughout the regulations, to eliminate cost from consideration in sediment cleanups and to eliminate the Disproportionate Cost Analysis tool?</p> <p>The Port understood that Ecology was moving toward an understanding of sediment cleanups that included considerations of net environmental benefit, bioavailability of contaminants, and DCA analysis showing the relationships between costs of the cleanups and risk reduction. The current draft appears to have abandoned this in favor of "technically possible."</p>
xcv	1500-1507	<p>Given the complexities of permitting and coordinating beneficial reuse opportunities at sediment cleanup sites it is unrealistic for Ecology to expect that sediment cleanup construction within sediment cleanup units (let alone entire sites) can be completed within a single construction season. This subsection needs to be rewritten to more simply state that: "<i>restoration will be completed as soon as practicable, consistent with the general requirements of WAC 173-204-570.</i>"</p>

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xcvi	1508–1511	Similar to the comment on page 36 above, the entirety of this sub-section either needs to be deleted or the text of subsection (d) revised to read: “... <i>within ten years after the startcompletion of the cleanup actionconstruction, ...</i> ”.
cxxxi	2190–2203	<p>Ecology’s October 2011 sample rule language specified that, in determining where to set cleanup levels between the sediment cleanup objective (“SCO”) and regional background, three factors should be considered: technical feasibility, cost, and net environmental benefit. The document distributed in late 2011 to the final advisory committee titled “<i>Framework for Sediment Cleanup Decisions</i>” stated at page 7 “<i>The current SMS framework allows consideration of cost, technical feasibility and net environmental effects both when setting cleanup standards in a range between the upper and lower bounds and during remedy selection. This has been successful because the system provides needed flexibility... In the revised rule, this paradigm will remain.</i>” Yet, despite this, the cost criterion has been dropped in the proposed amendments. This change is difficult to understand given that, by Ecology’s own admission, the current rule’s consideration of cost in setting cleanup standards is one of the parts of the rule that works well because of the flexibility it provides. Furthermore, the inclusion by reference disproportionate cost analysis (“DCA”) in selecting cleanup actions does not take the place of cost consideration in setting cleanup standards because the threshold requirement that cleanup standards must be attained within a reasonable restoration timeframe dictates which potential cleanup actions can be considered in the DCA. To be clear, the way the current rule is written eliminates ACTUAL the use of DCA and cost.</p> <p>In order to preserve the flexibility that Ecology admits is afforded by the current rule, cost should be restored as a criteria for setting site specific cleanup levels under WAC 173-204-560.</p>
clxxv	2906–2910	The August 2012 proposal appears to have ignored the Committee’s advice and includes the requirement in WAC 173-204-570(3)(h) that “ <i>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.</i> ” The proposed language is problematic because it establishes “active” cleanup as the presumptive remedy at all sites, despite years of collective experience demonstrating that the unique challenges posed by sediment sites often make “active” remedies impracticable. This opinion is not confined to Washington; USEPA’s current sediment guidance states there is no presumptive remedy for sediment contamination. Consistent with this widely held position, the Port understands that the final advisory committee that addressed this issue held the consensus view 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. With lower and lower cleanup levels for constituents like dioxins/furans and PCBs, leading to very large sites, exchanging the site-specific evaluation for a presumptive remedy can and will lead to impracticably broad mandates for active cleanup—for instance, under the proposed rule language, for a 1,000 acre site an active remedy may have to be implemented on more than 500 acres, regardless of how great or small the exceedances of cleanup levels might be. Because the proposed language both ignores real-world nature of sediment cleanups and partially discards the MTCA process by mandating an active cleanup in advance of compiling and evaluating all available options and data, the Port believes this portion of the proposed amendments is substantially flawed. The presumptive approach to require “active cleanup” will only further stymie cleanup progress. Thus, the entirety of WAC 173-204-200(1) needs to be deleted. Similar edits need to be made to related parts of the SMS rule.
clxxviii	2957–2962	Refer to comments regarding pages 17 and 36. The entirety of sub-section (b) needs to be deleted.
clxxxix to clxxxvii	3007–3136	Refer to comment regarding page 17. The entirety of WAC 173-204-590 sediment recovery zones needs to be deleted.