City of Seattle
Seattle Public Utilities

October 26, 2012
(*via email to* RuleUpdate@ecy.wa.gov)

Chance Asher
Toxics Cleanup Program
Washington State Department of Ecology

RE: City of Seattle Comments on the Draft Sediment Management Standards Rule Proposed Amendments

Dear Chance:

This letter transmits City of Seattle comments on the August 15, 2012 Draft Sediment Management Standards Rule (SMS; Chapter 173-204 WAC) Proposed Amendments. As you know, the City participated in the Sediment Work Group and Sediment Cleanup Advisory Committee, which were assembled by the Department of Ecology to assist them and enlist feedback and suggestions from the regulated community and stakeholders on the issues and options under consideration. The City thanks Ecology for the opportunity to participate in development of the proposed amendments to the SMS. The proposed revisions and where they appear to lead are an ambitious undertaking that will significantly reshape the SMS and the way sediment cleanup gets done in the State over the next few decades. Although the City does have questions and concerns about the proposed amendments, we commend the Ecology team for their work on the amendments and efforts to involve the regulated community and stakeholders.

On January 12, 2012, the City submitted to Ecology sixty-three comments on the November 2011 draft of the proposed SMS rule amendments. In addition to comments questioning how the proposed new framework will work at an actual site and suggesting clarification to parts of the rule, we suggested changes to Ecology's proposed approach to managing liability for recontamination of cleanup sites. Although some of our January 12 comments are addressed in the current draft of the SMS Rule and significant rewriting occurred, a number of our comments were not addressed including our comments about managing liability and recontamination.

The City's comments on the proposed amendments are attached to this letter. Some of the comments that were included in our January 12 submittal, including our suggestions regarding managing liability and recontamination, are submitted again within the context of this more formal process. One of our new comments addresses the City's general interest in the opportunity for meaningful input on Ecology's development of written guidance for implementing portions of the rule and Regional Background characterization activities that we understand Ecology is pursuing.

Overall, many uncertainties remain about how the framework will be implemented at a real site. Many of our comments on the proposed new framework suggest improvements are needed to clarify and expedite the sediment cleanup process. Details need to be resolved regarding how to establish Regional Background so it actually helps expedite cleanups in the near-term, implement source control,

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and manage liability at Sediment Cleanup Units. Streamlining the human health and ecological risk assessment steps could substantially accelerate decision making while ensuring protectiveness. It also seems much more difficult to establish an effective site-specific cleanup level given the revised factors that need to be considered including technical possibility and adverse environmental impacts and other cleanup action process requirements. We also comment on the ten year restoration time frame restrictions and sediment recovery zone requirements, which don't, as written, seem to help in expediting sediment cleanups. Finally, implementation of the framework that Ecology has established, even with the changes the City recommends, will require intense technical work and challenging policy decision-making to be useful.

Given the substantial changes that were made subsequent to the last meeting of the Sediment Cleanup Advisory Committee, our significant comments and suggestions on the proposed amendment, and the other comments Ecology is likely to receive from other members of the regulated community and stakeholders, we request that revised draft rule language be released for review and comment before the rule revision process proceeds any further.

Overall, the City supports Ecology's continued efforts to improve the SMS and looks forward to responses to our comments. If you have any questions about our comments, please contact me at 206-733-9179 (pete.rude@seattle.gov).

Sincerely,

Peter D. Rude, Ph.D., L.G.
Strategic Advisor
Seattle Public Utilities

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

Name of Commenter:	Pete Rude and David Schuchardt, City of Seattle, Seattle Public Utilities (submitted *via* email to RuleUpdate@ecy.wa.gov October 26, 2012)
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General Comment #1		The City of Seattle requests that Ecology provide the regulated community and stakeholders with the opportunity for meaningful involvement in the development of guidance associated with the proposed amended rule. This suggestion includes involvement in developing the approach for characterizing Regional Background for specific areas.
General Comment #2		The City of Seattle continues to be concerned that the new framework in the amended rule, particularly the significant changes made since the Sediment Cleanup Advisory Committee involvement ended, is not workable. It is not clear that the framework will adequately address the issues that are unique to sediment cleanup including ubiquitous low-level background contamination in urban bays, multiple party liability, and recontamination.
General Comment #3		Given the substantial changes that were made subsequent to the last meeting of the Sediment Cleanup Advisory Committee, our significant comments and suggestions on the proposed amendment, and the other comments Ecology is likely to receive from other members of the regulated community and stakeholders, we request that revised draft rule language be released for review and comment before the rule revision process proceeds any further.
33	369	Suggest clarifying that the POC applies to "surface sediments" as defined in line 451; also that the POC may apply at discrete locations or as an area-based average (surface-weighted average concentration) depending on the exposure pathway used for setting the cleanup level.
34	389	Given Ecology's near-term goal of expediting sediment site or site unit cleanup, the methods used to establish Regional Background need to be selected carefully. Establishing Regional Background at too low (stringent) of a level such that it differs little from natural background will not help expedite cleanups and instead will facilitate continued stagnation. We suggest that Ecology keep this firmly in mind as they interpret the definition of Regional Background and continue their efforts to establish Regional Background at the site(s) they are evaluating.
49-50	655-656	Low salinity sediment quality standards (WAC 173-204-330) seem to have been dropped from this draft. Should it be included?
xcv	1494-1499	Recontamination of sediment at remediated sites or sediment cleanup units may also occur from disturbance, redistribution, and re-deposition of contaminated sediment from adjacent areas within a water body. It would be helpful to state that potential occurrence in this context.
xcv	1494-1499	Proposed section -500(4)(b) places an unfair burden on PLPs who have <u>not</u> created a "hot spot" of contamination. It is unfair because the PLP that settles its liability for the hot spot (or sediment cleanup unit) will be released from liability if that unit becomes recontaminated by sources outside the settling PLP's control. <u>The other PLPs would continue to be liable even if *they also have no control* over the sources of the recontamination</u>. The release of liability for <u>future</u> contamination is a paradigm shift from joint and several liability based on status

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		(owners or operators) to liability that appears to be based on fault, but actually shifts the burden from some PLPs that cannot control the recontamination to other PLPs that also cannot control the recontamination. A hypothetical example illustrating the problem was included in our January 12, 2012 comments. We suggest that section -500(4)(b) be revised to indicate that it is the department's expectation that an additional cleanup in the sediment cleanup unit is not expected unless the sources of the recontamination are controllable. Sources that are currently ubiquitous and not controllable may become controllable over time through product bans, advances in treatment technology, and other actions. Based on the above, we suggest a proposed revised subsection -500(4)(b): ALTERNATE APPROACH: b) Recontamination. Recontamination of sediment at remediated sites or sediment cleanup units may occur via point and/or non-point sources and numerous pathways including stormwater discharges, atmospheric deposition, and the dispersal of contaminants from other contaminated sediments in the bay or watershed. In many cases, such sources of sediment recontamination are ubiquitous and/or uncontrollable within the current regulatory framework. It is the department's expectation that further cleanup of this recontamination will not be required unless the recontamination leads to sediment contaminant levels above a department-identified threshold indicating unacceptable and controllable recontamination. In situations where this threshold is exceeded, at the department's discretion, additional action may be required. Liability for any such additional cleanup activities required by the department would remain joint and several as described (reference the existing MTCA language on this). In addition, identifying a threshold for site cleanup unit recontamination that requires additional action and performing the technical work required to establish that a PLP has controlled their sources (or is still a significant source of recontamination) are complex, time-consuming, and costly. But, assuming such technical work is successful, our suggested revisions to this subsection would provide a liability and decision framework that is more fair, consistent with existing liability principles, and still maintains an incentive for PLPs to move forward on sediment cleanup.
xcviii	1569	Stating that the cleanup action will usually include source control measures

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		implies that the source control measures are subject to the SMS/MTCA RI/FS and decision making process, and that a CAP would specify which source control measures are required as part of the action. Yet there is no regulation or guidance regarding how to evaluate source control alternatives. Suggest rewording to state that "…cleanup actions will usually be accompanied by source control measures." Suggest somewhere in the regulation, expectations are described for source control as a separate set of activities outside the RI/FS process.
ciii	1638	This definition will result in vast areas of Puget Sound and other waterways as being "station clusters of potential concern." Even in the areas used to statistically define "regional background" there will likely be clusters of three or more individual stations with chemical concentrations above the statistically-derived regional background value. This definition also does not specify how multiple chemicals are treated.
cxxxi	2196	The concept of being "technically possible" regardless of cost [WAC 173-204-200(49); line 457 on page 37 of proposed amendment] will be a difficult threshold to use to justify upward adjustments to cleanup levels and provides little flexibility. This could lead to feasibility study requirements to evaluate absurdly large, long-term, expensive, and comprehensive alternatives. It is a valid goal to "harmonize" the SMS and MTCA to the extent it makes sense, but the fundamental differences between upland and sediment cleanups make it difficult to match up the two regulations in every way. The City recommends that the rule allow for consideration of cost at the cleanup level identification point in the framework as is established in the current SMS.
cxxxi	2196-2201	What is Ecology's expectation on when in the RI/FS process technical possibility and adverse environmental impacts will be evaluated in the context of establishing the site-specific cleanup level? As written, it is not clear where that evaluation takes place.
cxxxix	2344	At the 10^{-5} and 10^{-6} risk levels, seafood tissue concentrations can be strongly affected by water concentrations of chemicals, and further lowering sediment concentrations may have little effect on tissue concentrations or risk. It may not be possible to define sediment cleanup levels corresponding to these risks, since water alone contributes risks above 10^{-5} or 10^{-6} via the seafood pathway. Consider streamlined screening approaches to allow rapid default to background-based approaches, and avoiding unnecessary risk assessment efforts.
cxlii	2396-2397	The title of this section mentions low salinity sediment but the section only covers marine sediment. Doesn't something need to be said about low salinity sediment within this section even if it is a brief narrative statement?
clxix	2792	Suggest first occurrence of the word "not" should be deleted.
cxxxviii and clxix	2324 and 2785	WAC 173-204-561 and -564 set forth heavy process-laden requirements for expensive and time-consuming risk assessment procedures that are unlikely to affect project outcomes. For bioaccumulative chemicals, consider streamlined screening approaches to allow rapid default to background-based approaches, and

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		avoiding unnecessary risk assessment efforts. For non-bioaccumulative chemicals, consider the extensive efforts already accomplished at other sites with full-blown HHRA, ERA, and food-web models, that show most of these chemicals are not of concern for human health or higher trophic level ecological receptors. Absent such streamlining, expect study phases for all projects to extend ten years or longer.
clxxv	2906-2908	Having a minimum requirement for sediment cleanup actions stating 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" significantly limits the range of cleanup alternatives that can be developed and unnecessarily restricts the use of monitored natural recovery. We suggest this restriction on the use of monitored natural recovery not be included the amended rule.
clxxvi	2927	1) Source control measures will have equal importance regardless of the remedy – for example, incomplete source control will equally affect sediment quality in a "dredged to clean" area and an ENR area. 2) Including source control measures implies that the source control measures are subject to the SMS/MTCA RI/FS and decision making process, and that a CAP would specify which source control measures are required as part of the action. Yet there is no regulation or guidance regarding how to evaluate source control alternatives. 3) Ranking source control measures higher than sediment remediation measures suggests an alternative with "heavy" source control and MNR may rank higher than an alternative with "light" source control and dredging. 4) SMS is not the appropriate regulatory mechanism to define source control actions. 5) Suggest eliminating line 2927, and somewhere in the regulation, expectations should be described for source control as a separate set of activities outside the RI/FS process.
clxxvi	2928	Beneficial re-use is not a permanence criterion and should be eliminated. Materials dredged pursuant to cleanups will not be suitable for beneficial re-use, absent treatment. All treatment technologies will result in some residual concentrations of contaminants remaining on the treated sediments. Beneficial re-use, even of treated sediment fractions (e.g., "clean" gravel fractions) would likely introduce residual contaminants back into the environment, and have greater risks than landfill disposal. If an ex-situ treatment/beneficial reuse alternative is evaluated in an FS, these considerations should be evaluated in the FS, but there should not be a default hierarchy of preference for beneficial reuse.

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clxxviii	2957-2962	Requiring a restoration time frame of ten years after the "start" of the cleanup action poses several problems: 1. What if the cleanup action itself takes more than ten years? 2. What if it is a large site with several cleanup actions over a period greater than ten years? 3. If source control is not in place at a portion of the site, does the ten-year requirement create incentive for delay of start of cleanup in portions of the site where source control is in place? 4. What if some of the cleanup actions are conducted under Federal authority? In addition, establishing a sediment recovery zone in accordance with WAC 173-204-590 is an unproven process that could easily slow down the progress of cleanup. It is the City's understanding that very few if any sediment recovery zones have ever been established to date and linking such zones to the restoration time frame as is proposed seems to provide little incentive for PLPs to pursue cleanup and run counter to the goal of expediting sediment cleanups.
		END OF COMMENTS