

August 26, 2015

WAC 173-350-325, Soil and Sediment Criteria and Use - Workgroup Conference Call

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Agenda

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Bulleted items that are not italicized are comments from the meeting. *Italicized wording represent the issues discussed.*

New group additions

Welcome Rob Bonnett, J.R. Hayes, who has replaced Mike Shaw as the group’s Associated General Contractor representative.

Though not on the call, Dale Arnold is the temporary/permanent replacement for Lynn Schmidt, City of Spokane Wastewater Management.

Conditional exemption approach to soils/sediment

Part of the reason we have not had a meeting recently is that Ecology rule staff needed guidance from management on how to handle inconsistent approaches coming out of stakeholder workgroups for soil/sediment, inert waste landfills, inert pile storage, and inert criteria. In short, the soil/sediment section proposes conditional permit-exemption approach to use of impacted soils at limited access properties, while sections associated with a less harmful waste (inert waste) have more oversight with permits required. As long as the soil/sediment workgroup is in agreement, Ecology management prefers the conditional exemption approach for soil/sediment to take to public comment.

Timeline for completion of draft rule

December 1, 2015: Draft due for Ecology internal review.

March 2016: Informal comment period.

May 2016: Economic analysis begins.

August 2016: Formal comment period.

October 2016: Adopt final rule.

Outcome of meeting with Ecology Toxics Cleanup Program (TCP)

Marni met with key TCP staff to discuss the approach we are taking with rule creation. Jodi Gearon (Supervisor, Headquarters), Pete Kmet (Engineer, TCP Policy), Mariann Abbett (Engineer, Tacoma-Smelter Site Manager), and Michael Feldcamp (Planner, TCP Policy) spoke on behalf of the cleanup program. Outcome of that meeting:

Ensuring redevelopment: *For fill sites, requiring placement of at least 15'+ of unrestricted soil screening levels (SSLs) over limited access property SSLs would help ensure future development needs no restrictions. At a cleanup site, soil cleanup levels based on human exposure pathways must be met for soils within 15' of the surface without placing restrictions on property use. Below 15', higher contaminant levels can remain. Marni suggests we require 15' or more at all limited access SSL fill sites to ensure no restrictions on future uses would be necessary. There is worry that the need to place restrictions at closure of a site on future uses could warrant solid waste permit oversight.*

- Meeting MTCA Method A unrestricted limits at a cleanup site would not warrant a 15' cap, so why require it here? MTCA Method A accounts for only human exposure and does not account for ecological impacts, groundwater protection, other standards. Where those potential threats exist at at cleanup site, cleanup levels would need to take more than Method A unrestricted limits into account. Since future uses of limited access properties under this rule are unknown, we should be sure there are no limitations on any future uses. Additionally, cleanup levels are used at sites that are already contaminated, which if different than placing soils with contaminants at otherwise "clean" sites.
- Though not clarified during the meeting, in setting limited access property SSLs, Method A industrial, Method B, and protection of groundwater are being considered, not Method A unrestricted. In deciding on what to consider for SSLs, the group thought use of Method A unrestricted would be too restrictive at these sites.
- The idea to have more than 15' as an extra precaution was discussed. Some felt that if 15' was considered adequate, it should be adequate at limited access property sites. It would difficult to provide justification/rationale for a greater depth.

Environmental covenant: *At a cleanup site, institutional controls are required when contaminants remain in soil within 15' of the surface. These controls are often restrictive covenants that prevent future development that may disturb contaminants and result in exposure or release. If the group decides against requiring placement of 15' of unrestricted SSL, a covenant would need to be placed. In other words, residential or unrestricted uses would not be allowed without potential cleanup taking place first. A solid waste permit is desirable if this level of oversight is needed.*

- Though not all are okay with requiring placement of 15' of soil meeting unrestricted SSLs, it may be more desirable than restricting uses and potentially causing more concern over the lack of solid waste permitting.

List of parameters: Suggested setting SSLs for 700+ parameters should be reduced. Marni has been working on this and keeping parameters found in other rules, as well as those most frequently tested at labs. When looking at draft rule when it gets sent out, the workgroup should be sure contaminants of concern to them are provided.

MTCA references: Would like more references to MTCA (cleanup rule). For example, duty to notify if test results received indicate contaminants are from a site at levels requiring cleanup. Clarify that the allowance for soils/sediments to be placed at sites with similar levels of contaminants can't be cleanup sites.

- About the duty to notify, this placed the burden on receiving sites. Requiring a receiving site to report means staff would have to be knowledgeable about cleanup levels, determining where soils originate, and act as an enforcement entity.

Environmental Group Participation: Cleanup program staff felt our workgroup lacks participation of environmental groups. When Ecology brainstormed the stakeholder group, we could not identify any environmental groups that may have interest. Washington Environmental Council was suggested. What are the group's thoughts on interest levels of environmental groups in our work? Should Marni introduce them to work so far and bring them into the group?

- Environmental groups are not stakeholders that should be at the table since they do not manage soils or operate receiving sites.
- It is too late in this process to involve new participants, and groups will be able to comment during informal and formal comment periods.

Definitions –

due diligence: TCP staff suggested Marni check with the assistant attorney general's (AAG's) office to see if they have a standard definition for this. Also look at federal CERCLA case law, RCW 70.105D (WA cleanup site statute), ASTM Phase I, and EPA's bona fide prospective purchaser language. Current definition comes from PA and VA due diligence definitions in their state's soil policies. The AAG's office does not have a standard definition, but suggested we simply state what would be expected. Marni feels our definition now accomplishes that but will look into other suggestions to see if something else is more suitable.

limited access properties: Prefers we add example list back into definition and remove groundwater depth restriction for applications less than 2' thick.

- The group is fine making these changes, provided the list would not be exclusive.

Groundwater to surface water: TCP wanted us to consider groundwater to surface water impacts in setting SSLs. Marni looked into this and found it would greatly complicate setting SSLs since surface water quality varies between salt/freshwater and from water body to water body. For many parameters, the SSLs now take into account the groundwater quality standards of WAC 173-200. These standards are more protective than the groundwater cleanup levels so Marni hopes this will be sufficiently protective.

Separation from groundwater flexibility: Cleanup staff did not feel a 10' separation from groundwater would be necessary for limited access SSLs used at depths of 2' or less.

- Water Quality Program and the rest of the group felt this change could be made.

Include basic soil screening parameters: *Felt we should include a basic soil screening list, similar to what we have now for street waste, petroleum-contaminated soils, etc. Perhaps include metals, TPH, cPAH, PCB, dioxin.*

- This could be a good addition to the rule, though some of what TCP suggested is excessive.
- Limit parameters to RCRA 8 metals, TPH diesel and heavy oil, perhaps others.
- Perhaps provide a different list for soils coming from residential vs. industrial/commercial areas.

Natural background: *Suggested natural background limits could be adjusted to alleviate concerns that they are too restrictive. Marni has adjusted levels to those found highest in the state. For example, arsenic went from 7 ppm to 9 for the unrestricted SSL, chromium went from 42 to 48. Rule is meant to set “minimum” standards for solid waste handling. When counties adopt the revised rule, they can set more restrictive limits.*

- There is concern that this could lead to inconsistencies between jurisdictions. This is true, though jurisdictions will be able to set limits more protective than what we put in rule regardless of this change.
- As has been expressed many times at other meetings, there is concern that the test results used for determining natural background limits are not realistic.
- Also as expressed at other meetings, worry that one test result over an SSL could jeopardize the ability to receive materials, or cause the receiving site to be out of compliance, even if other tests were below an SSL.

Draft limits: *Cleanup staff was comfortable with the approach our workgroup has taken in setting SSLs. They felt the standards used were appropriate, even if some may change in the near future. They wanted to be sure we include language in the rule acknowledging that the SSLs we set must be adjusted based on the newest information. We are not addressing all exposures, like vapor intrusion, but felt even MTCA A Industrial levels were unlikely to pose a vapor risk if 15’ unrestricted SSLs were placed at fill sites. Suggested we check in with cleanup action plan work on PCBs and cPAHs.*

Other changes to consider

Notification of exemption: *There will be very little oversight from Ecology at limited access properties. Health agencies may inspect in some jurisdictions, but they are not obligated to do so. As such, and is typical with conditionally-exempt sites, a notification of exemption may be appropriate. Ecology staff and health departments are worried about the ability to monitor sites, or ensure operators know what would be expected at their sites, without some notification about the existence of a site. In lieu of a solid waste permit, notification of exemption seems reasonable. Ecology has an existing form we can adapt to add soil/sediment. An owner/operator would be expected to provide information that shows they are aware of standards and will meet them. Submitting the form is a one-time submittal.*

- Rather than notification, the list of sites could be obtained from DNR.
- DNR already oversees reclamation sites, and all operators are duty-bound to comply with all rules.
- There is no guarantee that DNR will adopt standards, educate reclamation pits on the new rule, or enforce the new rule. Current DNR permits do not address standards.
- Limited access properties are not currently limited to DNR reclamation sites and anticipation that more receiving sites will emerge is realistic.
- An implementation plan will be created for this rule revision process and it is possible to educate known facilities via coordination with DNR.

Other permits: *In case DNR, Sand & Gravel, or other permits incorporate the soil/sediment standards in the future, propose we exclude such sites from the rule.*

- There was clarification that Sand & Gravel permits do not cover reclamation activities. That is covered solely by DNR.
- There was no opposition to providing such an exclusion/permit-deferral, though some continue to feel DNR is the only agency that should be involved in reclamation sites.

Changing “suspected of containing...”: *How does the group feel about tying the need to look at a soil/sediment more closely to a “release”? Statutory definitions of release already exist and this change could alleviate concerns about all materials being suspected of exceeding SSLs and therefore subject all to the rule. This could eliminate considering naturally high background levels as an impacted soil.*

- This would be an improvement to current definitions.

Well restriction: *WAC 173-160 restricts placement of new wells to within 1,000’ of landfills. Ecology Water Resources implements this rule and has not differentiated the types of landfill, be they municipal solid waste or inert waste. Permitted landfills require notification of this restriction to property owners within this setback as part of the solid waste permit application. Rules do not require this notification for inert waste fills of 250 cubic yards or less (and this limit will likely go higher with the rule change), so there is precedent for not requiring notification in some circumstances. We have factored in protection of groundwater for some SSLs based on groundwater quality standards, which are more protective than drinking water standards. How would the group feel about notification as a condition of permit-exemption?*

- No one supported notification to property owners.
- Notification to property owners based on the existence of a “landfill” could have ramifications in terms of land use, zoning, etc. that currently are not triggered at existing receiving sites.

Deed notice: *Permitted landfills require notice on the property deed at closure that a landfill exists. Rules do not require this notice for inert waste fills of 250 cubic yards or less (and this limit will likely go higher with the rule change). A deed notice does not restrict uses of the property, just informs future landowners of a fill’s existence. Given the lack of oversight by Ecology to help ensure such a condition would be met at closure, how would the group feel about requiring a notice on the deed as a condition of permit-exemption? Do other permits at fill sites already require such disclosure/notice?*

- DNR permits do not already require a deed notice.
- Wouldn’t disclosure paperwork at the sale of a property cover this? Maybe in some cases, but likely not reliable.
- If we plan to require a 15’ cap that assumes the site is safe for any use, a deed notice isn’t warranted.
- There is concern about redevelopment and the potential for someone to put a well through a fill area. An owner could place a well outside of the fill area if they were aware of its existence.
- Like with placement of a restrictive covenant, this type of condition may warrant better oversight through a solid waste permit.

Protection of groundwater: *Marni has calculated SSLs that would be protective of groundwater for about 50 parameters. This standard ends up being the driver in setting the SSL for many unrestricted and limited access SSLs. Marni will try to point out the driver for each SSL when she sends out the draft rule.*

PQLs: *Given the variability in test methods for PQLs and changing test methods, Marni decided not to consider these in SSLs. We can make exceptions where they would result in key changes to SSLs, so keep that in mind when you review the SSLs.*

Limited access property definition: *Ecology staff have concern that anyone with some acreage and a fence could claim they meet the definition and become a receiving site for impacted soil/sediment. With few resources to oversee permit-exempt sites, it's unlikely Ecology could ensure conditions were followed. Would like the group to consider tying fill sites to only those with permits (be they DNR, landfill, etc.) to ensure there is some oversight. Also consider reuse for road projects to public entities/roads only.*

- There is concern that new operators will crop up once the rule is in place that have no agency oversight, and no expertise in management/risks associated with soil.
 - Some felt that other permits (fill and grade, conditional use permitting) would likely provide the needed oversight/education.
 - There are many exemptions now for unregulated fill and grade. The example given was agriculture.
 - Local permits would be unreliable in ensuring soil/sediment standards were met.
 - Notification of exemptions would help ensure there was some knowledge of sites by agencies, as well as ensure an owner knew what is expected.
 - Overall, the group felt limiting properties to only those with permits or public ownership could be too restrictive.
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Close

- Marni will edit rule language based on input from Ecology staff discussed during this meeting, and input from the workgroup at today's meeting. A complete rule and associated SSLs will be sent out prior to a face-to-face meeting.
- Next meeting will be in Olympia October 7, 2015, 9:30-3:00 PM