UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
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Seattle, WA 98101-3140

DEC 18 2015

OFFICE OF
WATER AND WATERSHEDS

Maia Bellon, Director
Department of Ecology
P.O. Box 47600
Olympia, Washington 98504-7600

Re: EPA's Approval and Decision on Revisions to Washington's Sediment Management Standards, Chapter 173-204 WAC

Dear Ms. Bellon:

The U.S. Environmental Protection Agency (EPA) has completed its Clean Water Act (CWA) review of Washington's revised Sediment Management Standards (SMS) found in Chapter 173-204 of the Washington Administrative Code (WAC) and submitted to the EPA on May 14, 2013. The revised SMS in Parts I-IV, which the EPA considers to be water quality standards (WQS), are hereby approved as consistent with Section 303 of the CWA, 33 U.S.C § 1313, and its implementing regulations. Additionally, the EPA agrees that the provisions in revised Part V of the SMS (sediment cleanup standards) do not constitute WQS that require or authorize EPA's review or action under Section 303(c) of the CWA and, as such, EPA is not taking CWA Section 303(c) action on Part V.

BACKGROUND

In 1991, the EPA approved the initial version of the SMS in its entirety under the CWA and the implementing regulations at 40 C.F.R. 131. The EPA also approved revisions to new and revised portions of the SMS on September 18, 2008. The current revisions to the SMS were adopted by Ecology under State law on February 22, 2013, published in the Washington State Register on March 20, 2013, and became effective under State law on September 1, 2013. Ecology submitted these revisions to EPA for review and approval on May 14, 2013. Ecology's submittal included a letter dated May 7, 2013, from Ivy Anderson, Assistant Attorney General, certifying that the revisions were adopted in accordance with Washington State law. According to Ecology's May 14, 2013 letter, the State requested EPA's review and approval under the CWA of revisions to the following sections of the SMS:

- Part I: General Information
- Part II: Definitions
- Part III: Sediment Quality Standards
- Part IV: Sediment Source Control

Ecology did not formally submit any of the revisions to Part V (sediment cleanup standards) of the SMS to EPA for review under the CWA, because Ecology does not believe that Part V constitutes revised or new WQS subject to EPA review and approval or disapproval under CWA Section 303(c). However, due to the history of EPA's CWA approval of Part V, EPA comprehensively evaluated both the previously EPA approved Part V and Ecology's recently updated Part V, to ensure that this section of the SMS does not constitute new or revised WQS subject to EPA's CWA review and action.

EPA'S DECISION
In accordance with its CWA authority, 33 U.S.C § 1313(c)(3) and 40 C.F.R. Part 131, the EPA has approved the following:

- Revisions to Parts I-IV of the SMS as non-substantive revisions to WQS, the majority of which were originally approved in 1991. The grammatical or minor editorial changes in these provisions do not alter the substance of the underlying provisions that EPA previously approved, and, thus, EPA is not acting on the underlying provisions.

The EPA does not consider the following revisions to be WQS under Section 303(c) of the CWA; therefore, the EPA is taking no action on:

- New and revised portions of Part V of the SMS.
- For consistency, EPA is also rescinding its 1991 approval of Part V (and its previous 2008 action on WAC 173-204-520(3)(d)(iv)) as WQS, because EPA had no authority or obligation to act on the provisions in Part V of the SMS in previous CWA reviews. EPA is also taking no action and rescinding its 1991 approval of two provisions in Part I -- WAC 173-204-100(6) and WAC 173-204-110(4) -- since these provisions only pertain to Part V of the SMS.

A detailed discussion of the rationale supporting today's actions is included in the enclosed Technical Support Document.

ADDITIONAL CONSIDERATIONS
Ecology is working across multiple programs to update its requirements for sediment cleanups, source control, and permitting programs to achieve meaningful improvements in water and sediment quality in the near term, with longer-term comprehensive reductions to protect Washington fish and shellfish consumers.

The SMS rule revisions are one part of the broader strategy. Over the next several years, Ecology will also be taking steps to update requirements that will produce longer-term reductions. These steps include:

- WQS (Implementation tools and adoption of Human Health Criteria)
- Revisions to Parts III and IV of the SMS rule
- Toxics Reduction Strategy
- Monitoring and Assessment

On May 5, 2015, EPA received a letter from Ecology that addressed several related key issues, which are also described in more detail below and in the enclosed Technical Support Document. These include the following:

1. Revisions to Water Quality Assessment Policy 1-11
2. Future SMS rule revisions to Parts III and IV
3. Clarification to WAC 173-204-110(5)(e)

Part III

Ecology's newly adopted revisions to the SMS highlight the narrative criteria in Part III for protection of freshwater benthic species and human health. Ecology did not substantively revise Part III in their May 14, 2013 submittal. Part III also has numeric criteria for benthic marine protection. Ecology will continue to implement the current requirements in Parts III and IV as WQS. Under Part III, Ecology makes case-by-case interpretations of the narrative criteria for human health protection and freshwater sediment.

Consistent with the May 5, 2015 letter from Ecology Director Maia Bellon to EPA Region 10 Regional Administrator Dennis McLerran, Ecology agreed that revising Parts III and IV is a necessary step for Ecology to take in the future in order to harmonize implementation of Parts I-VI of the SMS rule. These revisions will include addressing human health standards and numeric benthic freshwater criteria. EPA agrees that Ecology should consider revisions (i.e., adoption of numeric criteria) to the narrative standards for human health protection and freshwater sediment. In general, the EPA recommends establishing numeric values wherever possible. This is consistent with the federal WQS regulation at 40 C.F.R. § 131.11(b)(2), which says that states should, "*Establish narrative criteria or criteria based upon biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria.*"

CWA Section 303(d) Assessment/Listing

With respect to CWA Section 303(d) assessment/listing, Ecology should revise its policies and procedures for preparing Washington's 303(d) list; specifically, Water Quality Program Policy 1-11. By the next listing cycle, Ecology has committed to revise portions of Policy 1-11 to ensure the Policy no longer includes references to Part V as a WQS to determine category 1-5 sediment listings. EPA also expects that Ecology will clarify how sediment listing decisions will be evaluated under Parts III and IV. This is consistent with the clarification letter EPA received from Ecology on May 5, 2015.

SCUM II Guidance

Finally, EPA recognizes that the Sediment Cleanup Users Manual II (SCUM II) is important in supporting the implementation of the revised SMS. Ecology accepted public comments on the SCUM II and held three technical workshops in July and August 2014. EPA submitted public comments as part of this review. Ecology considered the latest input received during this process and issued a final version of the SCUM II in March 2015.

In closing, we appreciate working with Ecology to update the SMS and look forward to future timely updates to support the priorities identified above.

If you have any questions concerning this letter please contact me at (206) 553-1855 or Angela Chung, Water Quality Standards Unit Manager, at (206) 553-6511.

Sincerely,

Daniel D. Opalski, Director
Office of Water and Watersheds

Enclosure

cc: Jim Pendowski, Ecology
Jeff Johnston, Ecology
Chance Asher, Ecology
Heather Bartlett, Ecology
Melissa Gildersleeve, Ecology
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ENCLOSURE

TECHNICAL JUSTIFICATION

EPA'S ACTION ON WASHINGTON'S REVISED SEDIMENT MANAGEMENT STANDARDS
December 18, 2015

Introduction

On May 14, 2013, the Washington Department of Ecology ("Ecology") submitted revised Sediment Management Standards ("SMS") to the EPA, which were adopted under State law on February 22, 2013. The revisions to the SMS became effective under State law on September 1, 2013. This technical justification provides the U.S. Environmental Protection Agency's ("EPA's") decisions under the federal water quality standards ("WQS") regulations at 40 CFR 131.11 and section 303(c) of the Clean Water Act ("CWA").

According to Ecology's May 14, 2013 letter, the State is seeking EPA review and approval under the CWA of revisions to the following sections of the SMS:

- Part I: General Information
- Part II: Definitions
- Part III: Sediment Quality Standards
- Part IV: Sediment Source Control

In addition, Ecology did not formally submit any of the revisions to Part V (sediment cleanup standards) of the SMS to EPA for review under the CWA because Ecology does not believe that Part V constitutes revised or new WQS subject to EPA review and approval or disapproval under CWA Section 303(c). Part VI of the SMS was not revised.

Background

Ecology began working on its 2013 revisions to the SMS rule and the Model Toxics Control Act ("MTCA") Cleanup Regulation in 2009. Ecology decided that rule revisions were needed to provide clear requirements for establishing sediment cleanup standards based on protecting human health and freshwater benthic communities. Given these rulemaking goals, Ecology elected to focus on revisions to Part V (sediment cleanup standards). Ecology decided to defer major changes to Parts III (sediment quality standards) and IV (sediment source control) to a future date.

Ecology has only submitted some, not all, of the SMS rule revisions to EPA for review under the CWA. Specifically, Ecology has not submitted any of the revisions to Part V to EPA for review under the CWA because, as discussed below, Ecology does not believe that Part V constitutes revised or new WQS subject to EPA review and approval or disapproval under CWA Section 303(c).

Ecology first adopted the SMS in 1991 and submitted the rule in its entirety to EPA for review under the CWA at that time. EPA approved the rule in its entirety as part of the federally

approved WQS for the State of Washington in November 1991. The 2013 SMS rule revisions include minor modifications to several Part I, III and IV provisions that were previously approved by EPA. Those minor modifications are intended to ensure that Parts I, III and IV no longer include references to Part V. Ecology is seeking EPA's review and approval of those changes as well as minor revisions to several definitions in Part II.

Part V (sediment cleanup standards) contains the majority of the revisions and Ecology adopted Part V solely under the authority of the MTCA (RCW 70.105D). Previously, in 1991, Ecology adopted Part V under the authority of the Water Pollution Control Act ("WPCA") (RCW 70.105D and 90.48 RCW).

Ecology has also amended Part V to state that this part of the SMS rule should not be used for federal CWA purposes. Ecology has stated that Part V is only to be used as a sediment cleanup decision framework that governs the cleanup of contaminated sediment sites, including how sites are identified, investigated, cleaned up, and monitored under the authority of the MTCA law. Therefore, as amended, Ecology does not believe that Part V establishes or revises any WQS.

EPA Review

WQS typically describe the desired condition of a waterbody and consist of three principle elements: (1) the "designated uses" of the state's waters, such as public water supply, recreation, propagation of fish, or navigation; (2) "criteria" specifying the amounts of various pollutants, in either numeric or narrative form, that may be present in those waters without impairing the designated uses; and (3) "antidegradation requirements," providing for protection of existing water uses and limitations on degradation of high quality waters.

Pursuant to Section 303(c)(2) of the CWA, states and authorized tribes must submit new or revised WQS to EPA for review and approval or disapproval. The EPA's WQS regulations at 40 CFR Part 131 establishes the requirements for states and authorized tribes to review, revise, and adopt WQS. It also establishes the procedures for EPA to review, approve, disapprove, and, as appropriate, promulgate WQS pursuant to Section 303(c) of the CWA.

EPA reviews WQS to ensure the adopted designated water uses are consistent with the CWA, the adopted criteria are based on sound scientific rationale and protect the designated water uses, antidegradation requirements are consistent with federal law, and the state has followed applicable legal procedures for adopting such standards.

EPA's Action

EPA's action is divided into two categories:

- EPA's review and decision on provisions in Parts I-IV
- EPA's review and decision on Part V related to sediment cleanup standards

Parts I-IV

In accordance with its CWA authority, 33 U.S.C § 1313(c)(3) and 40 C.F.R. part 131, EPA approves the following minor editorial changes as non-substantive revisions to WQS, the majority of which were originally approved in 1991:

- WAC 173-204-110(1) and (2)
- WAC 173-204-110(5)
- WAC 173-204-130(1)
- WAC 173-204-130(3)
- WAC 173-204-130(4)
- WAC 173-204-130(9)
- WAC 173-204-200
- WAC 173-204-200(2)
- WAC 173-204-200(8)
- WAC 173-204-200(9)
- WAC 173-204-200(13)
- WAC 173-204-200(15)
- WAC 173-204-200(16)
- WAC 173-204-200(17)
- WAC 173-204-200(19)
- WAC 173-204-200(22)
- WAC 173-204-200(24) and (25)
- WAC 173-204-200(26)[1]
- WAC 173-204-200(27)[2]
- WAC 173-204-310(3)
- WAC 173-204-320(1)(b)
- WAC 173-204-350(2)
- WAC 173-204-410(1)(c)

The grammatical or editorial changes in these provisions do not alter the substance of the underlying provisions that EPA previously approved, and EPA is not acting on the underlying provisions. The revisions to each provision are explained in the table below as well as EPA's approval action and basis.

Regarding EPA's approval of revisions to WAC 173-204-110(5), Ecology's May 5, 2015 letter from Ecology Director Maia Bellon to EPA Region 10 Regional Administrator Dennis McLerran explained that the revisions to this provision do not affect the requirement that cleanup sites must take into account applicable laws such as those in the WPCA, CWA, and Part III of the SMS rule when making cleanup decisions under Part V of the SMS rule. Ecology also stated that they may clarify this intent in a future SMS rulemaking. Please see additional details in the Table 1 below.

[1] Renumbered to WAC 173-204-200(24) in the 2013 submission.

[2] Renumbered to WAC 173-204-200(25) in the 2013 submission.

EPA acknowledges that the changed language contained in certain provisions only pertains to Part V of the SMS. In general, these provisions describe State sediment cleanup activities and are not WQS; i.e., they are not provisions of State or Federal law consisting of a designated use or uses for waters of the United States, water quality criteria sufficient to protect the uses, or antidegradation requirements. Therefore, these provisions are not considered WQS subject to EPA review and approval under CWA Section 303(c), and EPA is taking no action to approve or disapprove the following provisions:

- WAC 173-204-100(6)
- WAC 173-204-110(4)

Table 1: SMS Revisions in Parts I-IV
The table below lists the revised provisions in numeric order with the corresponding EPA action.

WAC Section	Adopted Language for Parts I - IV *(Crossed out text is original language and underlined text is new language)*	EPA Action
173-204-100	(6) Part V, Sediment cleanup standards of this chapter establishes administrative procedural requirements and criteria to identify, screen, ((~~rank~~)) evaluate and prioritize, and cleanup contaminated surface sediment sites. The sediment cleanup standards of WAC 173-204-500 through 173-204-590 shall be used pursuant to ((~~authorities~~)) authority established under chapter ((~~s 90.48 and~~)) 70.105D RCW.	**EPA acknowledges** the changed language contained in this provision. However, this provision is not considered a WQS subject to EPA review and approval and EPA is taking no action to approve or disapprove this provision under CWA Section 303(c). As explained in this document, EPA does not consider Part V or provisions solely related to Part V to be WQS. For consistency, EPA is also rescinding the 1991 approval of this provision. See below for more detail.
173-204-110	(1) The sediment quality standards of WAC 173-204-300 through 173-204-315, and 173-204-350, and the sediment cleanup standards of WAC 173-204-500 through ((~~173-204-580~~)) 173-204-575 shall apply to all surface sediments. (2) The sediment quality standards of WAC 173-204-320, 173-204-330, and 173-204-340 and the applicable sediment cleanup standards of WAC 173-204-560 shall apply to marine, low salinity and freshwater surface sediments, respectively.	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved, and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.

WAC Section	Adopted Language for Parts I - IV *(Crossed out text is original language and underlined text is new language)*	EPA Action
173-204-110	(4) The sediment recovery zone standards of WAC 173-204-590 shall apply to each person's cleanup action decision made pursuant to WAC ((~~173-204-580~~)) 173-204-570 and 173-204-575 where the selected cleanup action leaves in place marine, low salinity, or freshwater sediments that exceed the applicable sediment ((~~quality~~)) cleanup standards of WAC ((~~173-204-320 through 173-204-340~~)) 173-204-560.	**EPA acknowledges** the changed language contained in this provision. However, this provision is not considered a WQS subject to EPA review and approval and EPA is taking no action to approve or disapprove this provision under CWA Section 303(c). As explained in this document, EPA does not consider Part V or provisions solely related to Part V to be WQS. For consistency, EPA is also rescinding the 1991 approval of this provision. See below for more detail.
173-204-110	(5) The sediment quality standards of WAC 173-204-320 through 173-204-340 shall not apply: (a) Within a sediment impact zone as authorized by the department under WAC 173-204-415; or (b) Within a sediment recovery zone as authorized by the department under WAC 173-204-590; or (c) To particulates suspended in the water column; or (d) To particulates suspended in a permitted effluent discharge; or (e) To Part V of this chapter.	**EPA is approving** the revisions to this provision as a WQS. Ecology revised this provision to include Part V of this chapter since the sediment quality standards are no longer cross-referenced in Part V as marine sediment cleanup objectives as in the previous version of the SMS. Since the revised version of Part V now contains the sediment quality objectives directly in that Part, there is no longer a need to cross-reference those values (which continue to remain identical). Ecology's intent is to state that the sediment quality standards in Part III are not included in Part V of the SMS rule. Thus EPA approves these revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131. In addition, Ecology has clarified that Part III of the SMS, just like all applicable rules and regulations, must be considered during a State cleanup under the MTCA. In Ecology's May 5, 2015 clarification letter to EPA, the State stated that cleanup sites must take into account applicable laws such as those in the WPCA, CWA, and Part III of the SMS rule when making cleanup decisions under Part V of the SMS rule. This letter confirms that Part III, sediment quality standards, continue to apply to all waterbodies where cleanups are occurring. Ecology's clarification letter mentions revising this language in the next SMS rulemaking to avoid confusion.

WAC Section	Adopted Language for Parts I - IV *(Crossed out text is original language and underlined text is new language)*	EPA Action
173-204-130	(1) The department shall seek to implement, and as necessary modify this chapter to protect biological resources and human health consistent with WAC 173-204-100(2). To implement the intent of this subsection, the department shall use methods that accurately reflect the latest scientific knowledge consistent with the definitions contained in WAC 173-204-200 (((~~(14) and (15)~~))) <u>and 173-204-505</u>, as applicable.	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-130	(3) It shall be the goal of the department to modify this chapter so that methods such as confirmatory biological tests, sediment impact zone models, use of contaminated sediment site ((~~ranking~~)) models, etc., continue to accurately reflect the latest scientific knowledge as established through ongoing validation and refinement.	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-130	(4) Any person or the department may propose an alternate technical method to replace or enhance the application of a specific technical method required under this chapter. Using best professional judgment, the department shall provide advance review and approval of any alternate technical method proposed prior to its application. Application and use of alternate technical methods shall be allowed when the department determines that the technical merit of the resulting decisions will improve the department's ability to implement and meet the intent of this chapter as described in WAC 173-204-100(2), and will remain consistent with the scientific intent of definitions contained in WAC 173-204-200 (((~~(14) and (15)~~))) <u>and 173-204-505</u>. The department shall maintain a record of the department's decisions concerning application for use of alternate technical	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.

WAC Section	Adopted Language for Parts I - IV *(Crossed out text is original language and underlined text is new language)*	EPA Action
	methods pursuant to this subsection. The record shall be made available to the public on request.	
173-204-130	(9) Test sediments evaluated for compliance with the sediment quality standards of WAC 173-204-320 through 173-204-340 and/or the sediment impact zone maximum criteria of WAC 173-204-420 and/or the sediment cleanup ((~~screening levels criteria~~)) standards of WAC ((~~173-204-520~~)) 173-204-560 shall be sampled and analyzed using the Puget Sound Protocols or other methods approved by the department. Determinations made pursuant to this chapter shall be based on sediment chemical and/or biological data that were developed using an appropriate quality assurance/quality control program, as determined by the department.	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-200	WAC 173-204-200 Definitions. For the purpose of this chapter, the following definitions shall apply unless the context indicates otherwise:	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-200	(2) "Amphipod" means crustacean of the Class Amphipoda, e.g., Rhepoxynius abronius, Ampelisca abdita, ((~~or~~)) Eohaustorius estuarius, or Hyalella azteca.	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-200	(8) "Contaminated sediment" means surface sediments ((~~designated under the procedures of WAC 173-204-310 as~~)) exceeding the applicable sediment quality standards ((~~of~~)) in WAC 173-204-320 through 173-204-340 or the	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these

WAC Section	Adopted Language for Parts I - IV *(Crossed out text is original language and underlined text is new language)*	EPA Action
	applicable sediment cleanup standards in WAC 173-204-560.	non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-200	(9) "Control sediment sample" means a surface sediment sample which is relatively free of contamination and is physically and chemically characteristic of the area from which bioassay test animals are collected. Control sediment sample bioassays provide information concerning a test animal's tolerance for stress due to transportation, laboratory handling, and bioassay procedures. Control sediment samples cannot exceed the applicable sediment quality standards of WAC 173-204-320 through 173-204-340 or the applicable criteria in WAC 173-204-562 and 173-204-563.	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-200	(13) "Marine finfish rearing facilities" ((~~shall~~)) means those private and public facilities located within state waters where finfish are fed, nurtured, held, maintained, or reared to reach the size of release or for market sale.	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-200	(15) "Minor adverse effects" means a level of effects that: (a) Has been determined by rule by the department, except in cases subject to WAC 173-204-110(6); and (b) Meets the following criteria: (i) An acute or chronic adverse effect to biological resources as measured by a statistically and biologically significant response relative to reference or control, as appropriate, in no more than one appropriate biological test as defined in WAC 173-204-200(3); or (ii) A statistically and biologically significant response that is significantly elevated relative to reference or	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.

WAC Section	Adopted Language for Parts I - IV *(Crossed out text is original language and underlined text is new language)*	EPA Action
	control, as appropriate, in any appropriate biological test as defined in WAC 173-204-200(3); or	
173-204-200	(16) "No adverse effects" means a level of effects that: (a) Has been determined by rule by the department, except in cases subject to WAC 173-204-110(6); and (b) Meets the following biological criteria: (i) No acute or chronic adverse effects to biological resources as measured by a statistically and biologically significant response relative to reference or control, as appropriate, in any appropriate biological test as defined in WAC 173-204-200(3); and	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-200	(17) "Other toxic, radioactive, biological, or deleterious substances" means, except for purposes of Part V of this chapter, contaminants which are not specifically identified in the sediment quality standards chemical criteria of WAC 173-204-320 through 173-204-340 (e.g., organic debris, tributyltin, DDT, etc.).	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-200	(19) "Practicable" means, except for purposes of Part V of this chapter, able to be completed in consideration of environmental effects, technical feasibility and cost.	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-200	(22) "Reference sediment sample" means a surface sediment sample which serves as a laboratory indicator of a test animal's tolerance to important natural physical and chemical characteristics of the sediment, e.g., grain size, organic content. Reference sediment samples represent the	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these

WAC Section	Adopted Language for Parts I - IV *(Crossed out text is original language and underlined text is new language)*	EPA Action
	nonanthropogenically affected background surface sediment quality of the sediment sample. Reference sediment samples cannot exceed the applicable sediment quality standards of WAC 173-204-320 through 173-204-340 <u>or the applicable criteria of WAC 173-204-562 and 173-204-563</u>.	non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-200	(24) ((~~"Sediment recovery zone" means an area where the applicable sediment quality standards of WAC 173-204-320 through 173-204-340 are exceeded as a result of historical discharge activities, and authorized by the department as a result of a cleanup decision made pursuant to WAC 173-204-580, Cleanup action decision.~~ ~~(25) "Siteunits" means discrete subdivisions of an individual contaminated sediment site that are being evaluated for the purpose of establishing cleanup standards. Site units are based on consideration of unique locational, environmental, spatial, or other conditions determined appropriate by the department, e.g., cleanup under piers, cleanup in eelgrass beds, cleanup in navigational lanes.~~	**EPA is approving** the deletion of these provisions in Part II. The language contained in these provisions is now located in Section 505 of Part V. As explained in this document, EPA does not consider Part V or provisions solely related to Part V to be WQS. See below for more detail. These provisions are not considered WQS subject to EPA review and approval and EPA is taking no action to approve or disapprove these provisions in there new location in Part V under CWA Section 303(c).
173-204-200	(24)~~(26)~~)) "Surface sediments" or "sediment(s)" means, <u>except for purposes of Part V of this chapter,</u> settled particulate matter located in the predominant biologically active aquatic zone, or exposed to the water column. Sediment(s) also includes settled particulate matter exposed by human activity (e.g., dredging) to the biologically active aquatic zone or to the water column.	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-200	((~~(27)~~)) <u>(25)</u> "Test sediment" means a sediment sample that is evaluated for compliance with the sediment quality standards of WAC 173-204-320 through 173-204-340 ((~~and/or~~)), the	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved

WAC Section	Adopted Language for Parts I - IV *(Crossed out text is original language and underlined text is new language)*	EPA Action
	sediment impact zone maximum criteria of WAC 173-240-420, ((~~and/~~))or the ((~~cleanup screening levels~~)) applicable criteria of WAC ((~~173-204-520~~)) 173-204-560.	and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-310	(3) Initial and confirmatory designation of sediments which contain other toxic, radioactive, biological, or deleterious substances. Sediments which contain other toxic, radioactive, biological, or deleterious substances, as defined in WAC 173-204-200((~~(16)~~)) (17), shall be designated by the department using the following procedures.	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-320	(1)(b) The marine sediment quality standards of this section shall apply to marine sediments located within Puget Sound as defined in WAC 173-204-200((~~(19)~~)) (20).	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-350	(2) Sources of data. Sediment biological and chemical data shall be gathered by the department for review to produce and update the sediment quality inventory on a biennial basis. Data sources include, but are not limited to: (c) Sediment data collected to identify problem areas and needed source controls in Puget Sound as defined in WAC 173-204-200((~~(19)~~)) (20), other marine waters, and all low salinity and freshwater areas in Washington state.	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.
173-204-410	(1)(c) The department shall implement the standards of WAC 173-204-400 through 173-204-420 so as to prevent the creation of new contaminated sediment cleanup sites identified under WAC ((~~173-204-530(4)~~)) 173-204-520.	**EPA is approving** these minor editorial changes as non-substantive revisions to WQS. The editorial changes in this provision do not alter the substance of the underlying provision that EPA previously approved and EPA is not acting on the underlying provision. EPA approves these non-substantive revisions to WQS under Section 303(c) of the CWA and EPA's implementing regulations at 40 CFR Part 131.

Part V

Ecology's SMS Part V provides a range of cleanup levels from a less stringent *sediment cleanup screening level* to more stringent *sediment cleanup objectives,* accounting for background levels, risk-based policy decisions, and practical quantitation limits. Ecology's Part V rule revisions added numeric cleanup standards for freshwater and a more detailed narrative, site-specific approach for human health at sediment cleanup sites using reasonable maximum exposure (RME). Ecology did not revise existing Part V numeric cleanup standards for marine water.

Due to the history of EPA's CWA approval of Part V, EPA evaluated Ecology's Part V revisions to determine whether the revisions constitute new or revised WQS. For consistency, EPA evaluated both the Ecology's revisions to Part V of the 2013 SMS as well as Ecology's previously approved Part V of the 1991 SMS. As detailed below, EPA determined that both the 2013 Part V revisions and the 1991 Part V are not WQS subject to EPA review and approval under CWA Section 303(c). EPA also analyzed the effects that its decision that Part V does not constitute WQS will have on CWA implementation, which is detailed below.

Whether Ecology's Revisions to Part V of the 2013 SMS constitute new or revised WQS

In October 2012, EPA developed a national framework for evaluating whether a state provision constitutes a new or revised WQS requiring EPA CWA Section 303(c) review and approval or disapproval.[3] EPA's understanding of what constitutes a new or revised WQS under CWA Section 303(c)(3) derives from the CWA itself, EPA's implementing regulations at 40 CFR part 131, and case law. The framework involves an evaluation of four questions, otherwise referred to as the four-part test. If **ALL** four questions are answered "yes," then the provision likely constitutes a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA Section 303(c)(3). If any of the four questions are answered "no," then the provision likely is not a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA Section 303(c)(3). EPA used the four-part test in its evaluation of Part V of Washington's SMS, which is summarized below.

1. Is it a legally binding provision adopted or established pursuant to state or tribal law?[4]

Yes. The State adopted the revisions to Part V on February 22, 2013 under the authority of RCW 70.105D (MTCA). The previous Part V was adopted in 1991 under the State's MTCA and WPCA.

2. Does the provision address designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters of the United States?[5]

No. Part V does not address designated uses, water quality criteria, or antidegradation requirements. Instead, Part V establishes requirements for identifying, investigating, and

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[3] EPA. What is a New or Revised Water Quality Standard Under CWA 303(c)(3)? – Frequently Asked Questions, *available at* http://www2.epa.gov/sites/production/files/2014-11/documents/cwa303faq.pdf.

[4] This consideration stems from the use of the terms "adopt," "law," "regulations", and "promulgate" in CWA Section 303(a)-(c), and from EPA's regulations at 40 CFR 131.3(i), which specify that WQS "are provisions of state or federal law." EPA considers documents incorporated by reference into state or tribal law to be legally binding provisions adopted or established pursuant to state or tribal law.

[5] The CWA, EPA's implementing regulation, and case law have established three core components of WQS - designated uses, water quality criteria, and antidegradation requirements. Therefore, this consideration explicitly specifies that for a provision to be a WQS, it must include or address at least one of these three core components.

cleaning up a release or threatened release of a contaminant to sediment that may pose a threat to human health or the environment. Part V is only to be used as a sediment cleanup decision framework that governs the cleanup of contaminated sites under the authority of the MTCA.

In fact, the revised Part V regulation explicitly prohibits implementation of the rule language for use under the CWA. Part III, which contains the sediment quality standards, is the binding regulatory language that must be used to implement the CWA requirements to ensure the protection of designated uses. Part V is only to be used for sediment cleanups on a site-specific basis and it does not alter the underlying sediment quality standards in Part III or the sediment impact zone maximum criteria in Part IV. As a result, Part V does not replace or alter the CWA requirements for Ecology to ensure the protection of designated uses in State waters, including those waters within which sediment cleanups may occur.

3. Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established for such waters in the future?[6]
No. Part V does not express or establish the desired condition of a waterbody nor an instream level of protection; instead, Part V establishes a sediment cleanup decision framework for a MTCA site. Ecology's revised regulatory language states that Part V is not to be used for CWA purposes. Similar to the answer to question #2, Part III and Part IV set the desired condition of the waterbody and establish the sediment quality standards applicable under the CWA. Therefore, Parts III and IV must be used for CWA purposes (e.g., 303(d) impaired waters listing, NPDES permits, and TMDLs). Implementation of Part V for cleanup purposes does not exempt a waterbody from needing to meet the criteria established in Parts III and IV to protect designated uses.

4. Does the provision establish a new WQS or revise an existing WQS?[7]
No. The revised Part V does not establish a new WQS or revise an existing WQS. As noted above, EPA approved the previous version of Part V under the CWA as a WQS in 1991. However, EPA's position on determining what is considered a new or revised WQS has become more refined since 1991; in part, as a result of litigation in Florida and the U.S. Court of Appeals for the Eleventh Circuit.[8] Therefore, when using the four-part test to evaluate Part V of Ecology's 2013 SMS revisions, EPA determined that it was appropriate to also use the four-part test to evaluate the previously approved Part V of Ecology's 1991 SMS. As described further below, EPA has similarly concluded that the 1991 version of Part V does not constitute a new or

[6] This consideration recognizes that if a provision meets the above two considerations and expresses the desired condition or level of protection for waters of the United States, it may be a new or revised WQS that EPA has the authority and duty to approve or disapprove under CWA Section 303(c)(3), regardless of whether that expression applies immediately or will be applied in the future. EPA action on provisions that may not apply immediately will ensure that EPA is able to provide input as early as possible in the state's or tribe's WQS development process, thus enabling the states, tribes, and EPA to carry out their functions under the CWA in the most efficient, expedient manner possible.

[7] While a provision may meet the first three considerations, the EPA's authority and duty to review and approve or disapprove such provisions under Section 303(c)(3) are limited to those WQS that are new or revised. A provision that establishes a new WQS or has the effect of changing an existing WQS would meet this consideration. In contrast, a provision that simply implements a WQS without revising it would not constitute a new or revised standard.

[8] See: *Florida Public Interest Research Group Citizen Lobby, Inc., et al. v. EPA*, 386 F.3d 1070 (11th Cir. 2004).

revised WQS that EPA has the authority and duty to approve or disapprove under CWA Section 303(c)(3). Thus, Ecology's Part V revisions of the 2013 SMS cannot be considered a revision to an existing WQS.

EPA Conclusion from four-part test for Part V of the 2013 SMS
As explained above, the answers to questions 2, 3 and 4 of the four-part test are "no" with respect to Part V of the SMS. As a result, pursuant to the CWA, EPA's WQS regulation at 40 CFR part 131, and the four-part test, EPA determined that Part V of the 2013 SMS does not constitute a new or revised WQS.

Whether Ecology's Previously Approved Part V of the 1991 SMS constitute new or revised WQS
As indicated above, EPA determined it was appropriate to reconsider its previous CWA approval of Part V of the 1991 SMS and use the four-part test for the previously approved provision as well. EPA's 1991 approval of Part V as a WQS did not include a technical justification explaining how the provisions in Part V constituted WQSs or protected designated uses. In addition, since that time, EPA has evolved in its analysis of what constitutes a revised or new WQS that EPA has the authority and duty to approve or disapprove under CWA Section 303(c), due in part to the litigation mentioned above. EPA's four-part test regarding what constitutes a revised or new WQS consolidates EPA's plain language interpretation (informed by the CWA, EPA's implementing regulations at 40 CFR part 131, and relevant case law) of what constitutes a new or revised WQS that EPA has the CWA Section 303(c)(3) authority and duty to approve or disapprove. EPA's four-part-test analysis, as applied to EPA's previously approved Part V of the 1991 SMS, is described below.

1. Is it a legally binding provision adopted or established pursuant to state or tribal law?
Yes. The State adopted the 1991 Part V under the State's MTCA, RCW 70.105D, and WPCA, 90.48 RCW.

2. Does the provision address designated uses, water quality criteria (narrative or numeric) to protect designated uses, and/or antidegradation requirements for waters of the United States?
No. The 1991 Part V did not address designated uses, water quality criteria, or antidegradation requirements. Part III of the SMS is the section of the SMS that addresses designated uses and criteria. The purpose of Part III is stated as: "The sediment quality standards of WAC 173-204-320 through 173-204-340 include chemical concentration criteria, biological effects criteria, human health criteria, other toxic, radioactive, biological, or deleterious substances criteria, and nonanthropogenically affected sediment quality criteria which are used to identify sediments that have no adverse effects on biological resources, and correspond to no significant health risk to humans." (WAC 173-204-300).

In contrast to Part III, the 1991 Part V was not designed to protect designated uses or require sediment cleanup decisions to achieve the Part III sediment quality standards. It states: "...the department will pursue sediment cleanup decisions and cleanup standards that are as close as practicable to the sediment quality standards of WAC 173-204-320 through 173-204-340, including the consideration of net environmental effects, cost and technical feasibility." WAC 173-204-500(4). This is the same construct as the 2013 version of the SMS regarding different

levels of protection between the sediment quality standards (Part III) and the sediment cleanup standards (Part V). Part III of the SMS has always set the CWA requirements to protect designated uses, whereas Part V has not.

3. Does the provision express or establish the desired condition (e.g., uses, criteria) or instream level of protection (e.g., antidegradation requirements) for waters of the United States immediately or mandate how it will be expressed or established for such waters in the future?
No. The 1991 Part V did not express or establish the desired condition of a waterbody nor an instream level of protection. Instead, similar to the 2013 version of Part V, the 1991 Part V established "...procedures which specify a cleanup decision process for managing contaminated sediments." (WAC 173-204-500). Although the 1991 Part V cross-referenced Part III sediment quality standards as being the water quality goal, Part V was to be used for sediment cleanups on a site-specific basis and did not alter the underlying sediment quality standards which are the desired condition of the waterbody. In addition, sediment cleanups under the 1991 Part V did not exempt a waterbody from meeting the sediment quality standards established in Parts III or the sediment impact zone maximum criteria in Part IV, which express the desired condition of a waterbody or the criteria protective of designated uses.

4. Does the provision establish a new WQS or revise an existing WQS?
No. The 1991 Part V did not establish new WQS or revise an existing WQS. The 1991 Part V was used as a cleanup decision making process for managing contaminated sediments, and did not address designated uses, water quality criteria, or antidegradation requirements, nor did it express or establish a desired ambient condition of or level of protection for a water body, and thus it did not establish a new or revise an existing WQS. As discussed above, other sections of the SMS (including Parts III and IV) address designated uses and criteria under the CWA.

EPA Conclusion from four-part test for Part V of the 1991 SMS
As explained above, the answers to questions 2, 3 and 4 are "no" with respect to the 1991 Part V. As a result, pursuant to the CWA, EPA's WQS regulation at 40 CFR part 131, and the four-part test, EPA determined that the 1991 Part V did not constitute a new or revised WQS and EPA had no authority or obligation to act on the provisions in Part V of the SMS in previous actions. Therefore, EPA rescinds its November 8, 1991 CWA Section 303(c) action to approve Part V of the 1991 SMS. In addition to its 1991 action, on September 18, 2008 EPA approved revisions to WAC 173-204-520(3)(d)(iv): *Juvenile polychaete Puget Sound marine sediment cleanup screening levels and minimum cleanup level biological criteria.* EPA also rescinds its 2008 action on this provision.

In addition, EPA acknowledges that the 2013 submittal revises certain provisions in Part I (WAC 173-204-100(6) and WAC 173-204-110(4)) that only pertain to Part V of the SMS. EPA does not consider Part V or provisions solely related to Part V to be WQS subject to EPA review and approval under CWA Section 303(c). Therefore, for consistency, EPA is also rescinding the 1991 approval of these two provisions.

EPA is rescinding its prior CWA approval of Part V because the Agency believes such a rescission is needed and appropriate to clarify what is and is not part of Washington's CWA-effective WQS. If EPA does not act on Ecology's 2013 Part V revisions as WQS and, at the

same time, does not rescind its previous approval of Part V, the previous EPA-approved version of Part V would remain in effect as a WQS under the CWA. This would be erroneous and confusing because the 1991 Part V no longer exists under State law and EPA does not believe it meets EPA's test for what is a new or revised WQS under CWA Section 303(c)(3).

Effects of EPA decision on implementation

EPA recognizes that, since its CWA approval of Ecology's 1991 and 2008 SMS provisions, Ecology has used Part V on occasion in certain CWA actions, consistent with EPA's previous approval actions (e.g., CWA Section 303(d) assessment and listing).

303(d) Listing and TMDLs

Implementation of the 1991 Part V in CWA actions has been written into Ecology's Water Quality Program Policy 1-11. Ecology's Policy 1-11 is the guiding policy that is used to assess water quality data, determine if waterbodies are polluted, and decide if further action is needed. The policy also explains data submittal and the data quality necessary for inclusion in the water quality assessment.[9]

To the extent that Ecology has existing policies and procedures that identify Part V as a WQS, they need to revise those policies to be consistent with their 2013 SMS revisions, EPA's conclusion that Part V is not a new or revised WQS under the CWA, and EPA's rescission of its 1991 approval of Part V. Acknowledging the above, in the May 5, 2015 letter from Ecology Director Maia Bellon to EPA Region 10 Regional Administrator Dennis McLerran, Ecology stated that it is committed to updating Policy 1-11 to reflect the 2013 SMS rule by the next listing cycle. This will include recognizing that Part V of the SMS rule is no longer applicable to determine Category 1-5 sediment listings and addressing how future sediment listing decisions will be evaluated under Parts III and IV of the SMS rule.

Because the revised rule language prohibits using Part V for CWA purposes, it is now inappropriate to base listing decisions for impaired waters on Part V. In the past, Ecology has used the Part V Cleanup Screening Levels to identify impaired waterbodies under Policy 1-11. In the future, Ecology will need to use only Parts III and IV, and not Part V, of the SMS rule to support Category 4 and 5 assessment/listing determinations. By the next listing cycle, Ecology has committed to revise portions of Policy 1-11 to ensure the policy no longer includes references to Part V as a WQS. This includes a review of listing decisions for waterbodies that were placed in Category 4B based on Part V sediment cleanup values. Ecology recognizes that, based on their 2013 SMS revisions, those listing decisions should be reviewed using applicable Parts III and IV of the SMS rule. Ecology has agreed to work with stakeholders and tribes during this policy update.

NPDES Permitting

With respect to permitting, the Part V rule revisions and EPA's related actions are not expected to have a meaningful impact on the past permit conditions established under the previous SMS rule. Ecology's permit conditions are currently based on requirements in Parts III and IV of the

[9] Ecology's Water Quality Policy 1-11, *available at* http://www.ecy.wa.gov/programs/wq/303d/policy1-11.html.

SMS rule.[10] Ecology has authorized sediment monitoring for all of the major municipal wastewater discharge permits under the authority of Part IV and a select number of minor municipal wastewater and individual industrial discharge permits. This will likely continue under the authority of Part IV.

[10] Parts III and IV establish requirements for NPDES permitting and other source control actions. Ecology did not make substantive changes to Parts III and IV. Part IV contains a provision that requires Ecology to implement the Part IV requirements "so as to prevent the creation of new contaminated sediment sites identified under Part V...." This has not been a major issue in the past and is not expected to be in the future because the current sediment site listing criteria are identical to the SIZmax numeric criteria used in the permitting process.