

June 5, 2014

To: Adrienne Dorrah, Department of Ecology, Toxics Cleanup Program

From: Susan Saffery, Seattle Public Utilities (SPU), Corporate Policy

Subject: SPU and SCL Comments - Remedial Action Grant Program Draft Rule Chapter 173-322A WAC

We appreciate the opportunity to comment on the draft rule for the Remedial Action Grant Program Chapter 173-322A WAC. These comments reflect the input of professional staff from Seattle Public Utilities and Seattle City Light with scientific, policy and programmatic expertise in this subject matter. We appreciate the hard work of Ecology staff to inform interested parties and discuss changes in State statute and related rule changes. We hope these comments will be useful - and addressed - as you revise and finalize this rule. When reviewing our comments, please feel free to contact me if you need clarification or would like more information.

Comments

1. GENERAL REQUIREMENT - Extended grant agreements

This seems to limit projects to \$20M+, which will not make sense in some instances. For example: the South Park Landfill project grant takes us through the RI/FS/DCAP and this phase of the project is therefore less than \$20M; Ecology would appear to need to write a new grant each biennium or if more funds are added during a biennium rather than simply amend the agreement. This would increase transaction costs and time as the City would have to re-apply for a grant each biennium or any time funds were added in between.

Proposed improvement: Extended grant agreements should be provided for long-term projects, preferably wherever needed, but at least those that are already under an agreement.

2. GENERAL REQUIREMENT - Prioritization

We have concern about the criterion that projects will only be given priority if they can “show substantial progress.” “Substantial progress” is not defined. Does the review take into account delays outside the PLP’s control (e.g. potentially, delays with regulatory review)?

Proposed improvement: Site progress will take into account factors beyond the PLPs’ control that may hinder progress.

3. OVERSIGHT GRANTS - Section (4) Application Process

It is not clear under what circumstances a grant application is required. Do existing grant-funded projects have to reapply? How often? What are the criteria for triggering re-application?

4. OVERSIGHT GRANTS - Funding of Eligible Costs
Section (7)(a) provides general criteria for funding certain projects at over 50% of eligible costs; however, there is no mention of how these determinations will be made. The criteria seem subjective and could lead to a less than clear path for Ecology to make eligibility determinations. This section specifically excises extended grant agreements from higher-than-50% funding. Given that several high profile projects with extended grant agreements are in economically disadvantaged communities, why not include this grant category?
Proposed improvement: include extended grant agreements, at least in economically disadvantaged communities. *(Modified as suggested in comment #6 below.)*
5. GENERAL REQUIREMENT – Reimbursement schedules
We don't fully understand the proposal requiring monthly reimbursement schedules but are concerned it could be unnecessarily cumbersome and burdensome, considering we only bill the grant quarterly.
6. GENERAL REQUIREMENT - Economic disadvantage criteria
The proposed rule will give priority to cities and towns with lower incomes and employment. This is a problem in neighborhoods like South Park, located in a city that has high income overall, but where residents of this community would meet the criteria. Urban areas have economic challenges as well and cleanups in low-income areas could happen sooner with equitable access to grant funding.
Proposed improvement: More accurately define “economically disadvantaged communities” to include economically disadvantaged neighborhoods, cleanup or other areas located in more affluent cities.
7. OVERSIGHT GRANTS – eligible costs timeline
Costs incurred negotiating an order or decree – restricts eligibility to only costs incurred 90 days prior to the effective date of the order or decree. We understand the intent but more flexibility would be useful and appropriate, given the time it takes to negotiate with other PLPs and get city council approval to sign the order or decree.
Proposed improvement: extend to 18 months to compensate for the 3-6 month governance process and PLP negotiations required plus reasonable Ecology negotiation time.
8. OVERSIGHT/GRANTS - Fiscal Controls
Section 7.c. states: *“Requests for reimbursement and adequate documentation of eligible costs incurred after the agreement signature date must be submitted to the department within ninety days of incurring the costs.”*
This is a complicated and potentially problematic when there are incidences when legal settlements may occur before remedial actions are implemented. In the South Park Landfill case, the City paid a settlement to SPPD to cover certain elements of construction of SPPD's remedy but cannot bill the grant until construction is underway because Ecology requires backup invoices in order to reimburse our settlement amount. There may be years between a negotiated settlement of this kind and the actual construction that generates the necessary documentation of costs. And it can actually be desirable to Ecology if PLPs negotiate settlements earlier in the process to avoid delays later.
Proposed improvement: remove or modify this language to support the ability to negotiate legal settlements earlier in the process.

9. OVERSIGHT/GRANTS - Funding Priority

Section 3(h) (this is also applicable to the independent cleanup section) provides specific factors Ecology will consider in determining funding priorities but then adds a catchall in 3(h) that states “Other factors as determined and published by the department.” If new factors are to be considered, will there be the opportunity to comment on these before they are implemented?

10. OVERSIGHT - Remedial Action Grants

- WAC 173-322-070 (2)(c)(iii) – This language appears to imply that a prospective purchaser needs to have signed an order or decree. A prospective purchaser is unlikely to sign up to an order for property he/she does not own.

Proposed improvement: Revise language to state that while the site may be under Order, a prospective purchaser may be conducting a cleanup without having signed the Order.

- WAC 173-322-070(2)(c)(iii). As currently written it is not clear how this criteria works. It seems like an unusual situation where an applicant would sign an order or decree requiring another party to conduct a remedial action?

Proposed improvement: We would like to have the following relationship allow local governments that are PLPs to be eligible for a grant: Where the local government has entered into an agreement with another party, we should be able to reimburse that party for a portion of the remedial action costs incurred under an order or decree signed by the local government, and visa-versa.

11. INDEPENDENT CLEANUPS

Section (10) states Ecology can withhold 20% from reimbursements “as security for the recipient’s performance” but does not specify how performance is defined. This provision seems arbitrary and may invite dispute.

12. INDEPENDENT CLEANUPS - Retroactive cost eligibility

Section 7, on retroactive cost eligibility, states that costs must be incurred within five years of the date of the completed grant application. Is there an eligibility requirement for when cleanup was completed? For example, if the cleanup required 6 years of effort, would the first year of cleanup costs be covered? Or if the cleanup is completed in 2 years and the grant application is submitted within 1 year following (3 yrs total), but Ecology does not issue a No Further Action decision until after the 5 year deadline, are costs still eligible for reimbursement?

13. INDEPENDENT CLEANUPS – Post-cleanup Reimbursement

Section 10, Post-cleanup reimbursement of retroactive costs – same comment as Comment 13, above. What if Ecology does not issue a No Further Action determination until after the 5-year deadline for retroactive costs has passed?

Proposed improvement: The concerns raised in comments #12/13 should be addressed in the final rule.