

Addendum to Fact Sheet

STATE PERMIT VS. NPDES PERMIT – LEGAL BACKGROUND

As a result of significant comments on what type of permit to issue, Ecology has revised this permit and is issuing the final permit as a joint National Pollutant Discharge Elimination System (NPDES) General Permit and State Waste Discharge General Permit, rather than solely under state authority. The legal background for issuing this permit as an NPDES permit is detailed below.

The Federal Water Pollution Control Act (FWPCA, 1972) and later modifications (1977, 1981, and 1987), established water quality goals for the navigable (surface) waters of the United States. One of the mechanisms for achieving the goals of the Clean Water Act is the NPDES permit. These permits are administered by the Environmental Protection Agency (EPA) (40 CFR 122). The EPA has delegated responsibility to administer the NPDES permit program to the state of Washington on the basis of Chapter 90.48 Revised Code of Washington, which defines Ecology's authority and obligations in administering the wastewater discharge permit program.

In *Headwaters, Inc. v. Talent Irrigation District*, the Ninth Circuit Court held that applying an herbicide to navigable waters of the United States did not exempt the irrigation district from having to obtain an NPDES permit regardless of whether or not the irrigation district had applied the herbicide in accordance with the labeling requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

The EPA opened a public comment period in January 2005 on a proposed rule that would exempt the application of pesticides in aquatic settings from the Clean Water Act NPDES permitting requirements. However, the proposed rule has not been adopted. In September 2005, the Ninth Circuit Court issued its decision in *Fairhurst vs. Hagerer*. The Fairhurst decision did not reverse the Talent decision, but did conclude that an NPDES permit is not required if a pesticide is intentionally applied to waters of the United States in accordance with a FIFRA label and with no residue or unintended effect. Neither the Court nor EPA has offered any guidance regarding what applications will result in no residue or unintended effect. Given the rulings from the Ninth Circuit Court and EPA's failure to finalize its proposed rule, most, if not all, aquatic applications of pesticides within the jurisdiction of the Ninth Circuit Court require NPDES permits.

In February 2006, the Pollution Control Hearings Board (PCHB) issued a final order in case #05-101, *Northwest Aquatic Ecosystems vs. Ecology, WTC*. This case focused on a number of issues, one of which was whether or not an NPDES permit is required for the use of federally registered pesticides since the Ninth Circuit Court ruled in *Fairhurst vs. Hagerer*. The Board ruled that:

“Northwest Aquatic also renewed its summary judgment argument that the Board should rule NPDES permit coverage is not needed for the application of aquatic

pesticides, when they are applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Northwest Aquatic bases this argument on the recent federal court decision in *Fairhurst v. Hagener*, 422 F.3d 1146 (9th Cir. 2005). The Board ruled on summary judgment that the *Fairhurst* decision does not provide a blanket exemption for the application of aquatic pesticides. Identified conditions must be met before a pesticide can be considered outside the category of a pollutant under the Clean Water Act. The pesticide must: (1) be applied for a beneficial purpose, (2) be applied in compliance with FIFRA, (3) produce no pesticide residue, and (4) produce no unintended effects. *Fairhurst*, 422 F.3d at 1150.

Northwest Aquatic failed to provide any evidence specifically addressing how the use of diquat and endothall on the proposed sites would meet the four factors identified in *Fairhurst*. In the absence of such evidence, *Fairhurst* provides no basis for the Board to conclude a NPDES permit is not required for the proposed pesticide applications.”

Several commenters on the draft state waste discharge permit requested that the permit be issued as an NPDES permit. In light of the legal developments discussed above, and in response to comments on the draft state waste discharge permit, Ecology has decided to issue this permit as an NPDES permit. Pursuant to RCW 90.48.465(6), Ecology will not require NPDES permits for the application of aquatic pesticides, if EPA finalizes a rule that exempts the application of aquatic pesticides from NPDES requirements.

CHANGE FROM 40 PERCENT TREATMENT TO TIERED TREATMENT APPROACH

Ecology received an overwhelming number of comments about the requirement in the draft permit that only 40 percent of each individual water front lot could be treated. Many commenters pointed out that treating 40 percent of a small lot would not be possible given the propensity of aquatic herbicides to drift. If more than 40 percent of the plants in a water front lot were removed by the treatment, this would put the applicator out of compliance with the permit, and he or she could be potentially liable. The draft requirement could also have resulted in some interesting situations. If all the water front lots on a lake were treated and the herbicide didn't drift, the littoral zone would end up a checkerboard of vegetated and non-vegetated areas, which may or may not provide good habitat. At worst, if all the lots were treated and the herbicide did drift, 100 percent of the vegetation could have been removed, resulting in an undesirable situation for habitat. Based on these comments, Ecology decided that treating on a lot by lot basis in situations where the lake group was coordinating applications lake-wide was not workable for the applicators, the lake residents, and Ecology. Ecology determined that it was better to leave a portion of each lake littoral zone intact and provide the lake group with the option to decide where treatment should occur.

Ecology has adopted a tiered approach to treatment in the final permit in which the portion of littoral zone allowed to be treated in a lake decreases as the size of the lake

increases. In smaller water bodies the ratio of shoreline to open water is greater and the littoral zone provides potentially less critical habitat than in larger water bodies where aquatic vegetation helps provide important structure to the water. Ecology also considered that the smaller lakes that have traditionally been treated in the past, are 100 percent urbanized. Designating areas to leave untreated may pose a greater hardship for smaller lakes. Larger lakes often have wetlands, undeveloped areas, parks, islands, etc. that form natural refuge areas that can be "set aside" from the residential treated areas. Smaller lakes may often be artificial lakes created in residential neighborhoods, and may not have these sort of areas.

Ecology used best professional judgment in establishing the amount of littoral zone allowed to be treated in these tiered categories. This judgment was based on discussion with wetland biologists, and wildlife and fisheries biologists. Estimates in the scientific literature of how much littoral vegetation should remain for habitat ideal range from zero to 100 percent. This percentage is a function of the species for which the lake is managed (warm water fish, waterfowl, trout, etc.). Therefore, Ecology tried to balance the needs for aquatic vegetation as food and refuge for fish, waterfowl, aquatic mammals, amphibians, and invertebrates with the needs of the lake residents for safety, navigation, recreation, and aesthetics. Ecology does allow individual residents (who are not part of a lake-wide effort) to treat an area on their lake front property of 20 feet in width along the shoreline or ten feet either side of a dock. Ecology acknowledges that some drift will occur of herbicides placed into those areas.