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ECOLOGY
State of Washington

Draft Economic Impact Analysis

Aquatic Plant and Algae Management General Permit

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Aquatic Plant and Algae Management General Permit

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I. Executive Summary

The purpose of the economic impact analysis is to compare the cost of permit compliance for small businesses versus large businesses, and to reduce the economic impact of a general permit on small businesses by reducing compliance costs, where legal with the Clean Water Act and Washington Water Pollution Control act (chapter 90.48 RCW). The Aquatic Plant and Algae Management General National Pollutant Discharge Elimination System (NPDES) Permit (permit) only covers pesticide applicators that are small businesses and governments. Therefore, there is no need to evaluate the costs incurred by large businesses versus those incurred by small businesses.

There are two alternatives to regulating aquatic herbicide discharges under a general NPDES permit: administrative orders or individual NPDES permits for each proposed treatment area. Drafting individual permits would take an estimated 12 months from Washington State Department of Ecology (Ecology) staff to complete. This would severely hamper small businesses ability to work with new clients. The administrative order process of granting a short-term modification of water quality standards was challenged in court and is not currently a viable regulatory option. The only authorized method for implementing a short-term water quality modification is a discharge permit. Regardless of the possible impact on small businesses, Ecology's course of action is the least burdensome regulatory option, for both businesses and for Ecology.

Discharge of aquatic pesticide is significantly different from a traditional discharge (e.g. end of pipe) where the business owner must comply with permit requirements and implement discharge treatment or control methods at their own cost. For aquatic herbicide treatment, the business owner intentionally discharges a chemical for a specific purpose, the control of aquatic plants and algae. Therefore implementing traditional discharge treatment and control methods to comply with a permit is not necessary, and not a cost that the small business bears. In addition, because the small business is contracted to perform a service, the costs (including the costs for complying with the permit) associated with the service are typically not borne by the small business, but passed on to its client.

II. Compliance Requirements

Statutory Requirements

Ecology considers compliance with the standards to be compliance with technology-based standards (173-226-070 WAC) and all known, available, and reasonable methods of treatment (AKART). By implementing the permit requirements, the permittee will comply with standards. The permit requires compliance with

- Chapter 173-201A WAC: Water Quality Standards for Surface Waters of the State of Washington;
- Chapter 173-200 WAC: Water Quality Standards for Ground Waters of the State of Washington; Chapter 173-204 WAC: Sediment Management Standards;

- Chapter 173-205 WAC: Whole Effluent Toxicity Testing and Limits; and
- Human health-based criteria in the National Toxics Rule (40 CRF 131.36).

The application of aquatic herbicides is regulated under several rules in addition to Ecology permits. By obtaining the appropriate licenses through WSDA and by following the Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) label, permittees comply with additional regulatory requirements. State and federal law requires permittees who are also pesticide applicators to comply with

- Chapter 15.58 RCW: Washington Pesticide Control Act,
- Chapter 17.21 RCW: Washington Pesticide Application Act, and
- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) pesticide laws and labels.

Ecology Permit Requirements

1. Application for Permit Coverage

Applicants must apply for and receive permit coverage prior to any aquatic herbicide discharge (treatment). Applying for permit coverage requires logging into an online system (Secure Access Washington: https://secureaccess.wa.gov/), filling out a Notice of Intent Permit Application (NOI), then printing and signing the NOI. The NOI includes filling out sections on permittee information; sponsor information; discharge location; aquatic plants targeted; herbicides that will be used; pesticide applicator licensing; and a Discharge Management Plan. After submitting the NOI to Ecology, the applicator must publish public notice in a local newspaper that they are applying for coverage. The draft permit also requires the distribution of the public notice to any potentially affected water front residents and businesses. The public notice is required in WAC 173-226-130(5) and also includes a 30 day public comment period starting on the second date of publication. The total time from the date the applicant submits a completed application to the date permit coverage is issued may not be less than 60 days (RCW 90.48.170).

Inclusion of the Discharge Management Plan as part of the NOI template is in response to the draft Environmental Protection Agency (EPA) Pesticides General Permit. EPA's permit requires that a subset of permittees develop a discharge management plan that will detail how the plants or algae will be managed, and provides alternatives to the use of chemicals to manage these pests. This is a new requirement under the proposed permit.

The Discharge Management Plan is also an addendum to SEPA and provides detailed site-specific project information. The applicant no longer fills out a SEPA checklist.

2. Public Notice (business and residential)

Once the applicant has permit coverage for a specific site, they must send one notice to all waterfront businesses and residences within one-quarter mile of any proposed treatment areas prior to the first treatment of the year. The notice is required every year that treatment occurs and must go out least 10 days and at most 42 days before the first

treatment of the season. It may also contain a schedule of other possible treatment dates throughout the season. No deviation from this schedule is allowed unless the permittee sends an updated business and residential notice or unless a cyanobacteria-bloom is being treated. Businesses or residents in the treatment area may request additional notice. The proposed permit gives the business greater flexibility by providing an additional two weeks window to deliver these notices. .

3. Postings at the Treatment Site

Permittees are required to sign post the treatment site prior to beginning the application of herbicides. Posting notifies the public that treatment occurred, treatment date, identifies any water use restrictions, identifies the chemical used, and provides contact information. Signs templates are included as appendices in the permit and available as electronic copies.

Signs must be on 8.5”x11” paper, must face the water and shore (requiring two signs for every posting), be placed every 100 feet, be about 25 feet from shore, and be posted in such a way that does not damage property. In addition, a 2 by 3 foot sign must be posted at public access boat launches. Posting must occur no earlier than 48 hours prior to treatment and up to 400 feet from the treated area.

Postings must also occur in the commonly spoken language of the area, which in some areas of Washington means that two sets of signs are required for each chemical used. In one instance, two herbicides were used in one area, requiring the posting of eight signs (two for each chemical, in two languages, facing shore and water) every 100 feet, instead of the usual two signs. To reduce this burden, Ecology changed the permit to allow the permittee to include multiple chemicals on a single sign. However, the permittee must use the template with the most stringent restrictions for the chemicals being used at that site. The permittee must still post in both languages, if appropriate.

4. Pre and post treatment notification to Ecology

Permittees are required to email pre-and post-treatment notifications to Ecology no later than 8 am on Monday each week. Pre-treatment is work that is planned for the coming week, post treatment is work that occurred the previous week. Permittees report which waterbody was treated, what product was used, how much was used, how many acres were treated, and the date that treatment occurred. Ecology used to require this notice on the Friday before the treatment week, but revised this requirement so that permittees may submit this information on Monday morning of each week of treatment. Often, permittees are out on job sites without access to email on Friday afternoons and this requirement was a hardship.

5. Monitoring

Permittees are required to monitor in some situations, such as in waterbodies listed as impaired (303d list category 5) for dissolved oxygen. Permittees must monitor pre-and post-treatment for dissolved oxygen in these waterbodies when treating with a contact

herbicide. When the permittee is using alum or calcium hydroxide for nutrient inactivation, they must monitor pH twice daily for the duration of the treatment. For continuous injection systems for alum and calcium hydroxide, pH must be monitored once every two weeks during the first month of continuous injection and thereafter once a month for the duration of the injection process.

Waterbodies throughout Washington contain plants that are considered rare. Rare plants are listed in the Washington State Department of Natural Resources (DNR) Natural Heritage Program (NHP) database. When treatment occurs in a waterbody with a rare plant, mitigation depends whether the treatment is for eradication or control of aquatic plants.

For aquatic plant eradication (noxious weeds and quarantine listed weeds) projects, Ecology will consult with NHP to determine mitigation. Ecology conditions the permit coverage based on the consultation with NHP.

For aquatic plant control projects, Ecology included mitigation measures in the permit that the permittee must follow if a rare plant is present. Up to three months before the first treatment of the season occurs, the permittee must contract with a professional aquatic botanist or wetland specialist to survey the proposed treatment area for the rare plant. A survey must occur yearly for submersed or floating-leaved aquatic plants, every five years for shoreline/emergent plants. Data from the plant survey must be submitted to Ecology 30 days before the first treatment occurs. Ecology may require that the vitality of the rare plant population be monitored before and after treatment. Ecology requires that mitigation for rare plants in the treatment areas. This requirement remains the same in the proposed permit.

6. Annual Reporting

Permittees must submit an annual report of permit activities online through Secure Access Washington. This report captures the total amount of herbicide (pounds or gallons) used for each treatment site over the course of the season, acreage treated, monitoring results (if required), plant species targeted, and dates treatment occurred. Submitting an annual report is necessary even if no treatment occurred that season. Permittees must print and sign the annual report and submit it to Ecology in order to satisfy submittal requirements (the online system does not satisfy EPA security requirements without an original signature). This requirement remains the same in the proposed permit.

7. Additional compliance requirements

Permittees have other requirements that affect the application of aquatic chemicals. There are lakes from which drinking water, livestock water, or irrigation water is withdrawn under a legal water right. In these cases, if a legal water right holder affected by a treatment notifies the permittee beforehand, the applicator must provide an alternate water supply. The water supply must be provided for the length of time that the water right holder cannot use the water due to use restrictions.

While developing the permit, Ecology worked with Washington State Department of Fish and Wildlife (WDFW) to update the treatment windows. Treatment windows are specific each Washington lake and provide dates during which treatment may occur. Treatment outside those dates may not be allowed due to presence of organisms or life-stages that are sensitive to herbicides, habitat alterations, or disturbance of nesting areas. WDFW determined the presence of species; Ecology determined which chemicals fall under the fish timing windows.

Depending on lake size, permittees may only treat a certain portion of the littoral zone. The littoral zone is the part of the lake that supports plant growth. Ecology limits the littoral zone treatment to help preserve habitat while allowing removal of aquatic plants and algae to support other beneficial uses of the water body.

Ecology has also limited the areas that may be treated under permit coverage. Once an area has been treated it counts toward the total amount of littoral zone that may be treated for a lake. The treated area must remain the same for the entire permit life cycle. For example, 50% of a lake may be treated one year, but the 50% must remain the same for the next four years of the permit life cycle.

III. Overview of Analysis

Chapter 173-226 WAC establishes a waste discharge general permit program for pollutant discharge to waters of the state in Washington based on the authority given to the Ecology in chapters 43.21A RCW and 90.48 RCW. WAC 173-226-120 requires that Ecology prepare an economic impact analysis on all draft general permits that directly cover small businesses. The purpose of the economic impact analysis is to compare the cost of permit compliance to small businesses versus large businesses, and to reduce the economic impact of a general permit on small businesses by reducing compliance costs, where legal with the Clean Water Act and Washington Water Pollution Control act (chapter 90.48 RCW).

A small business in chapter 173-226 WAC has the same meaning as defined in RCW 43.31.025(4). RCW 43.31.025(4) was repealed in 1994. Instead, Ecology uses the definition of small business provided in RCW 19.85.020(4). This definition is “any business entity, including sole proprietorship, corporation, partnership, or other legal entity, that is owned and operated independently from all other businesses, and that has fifty or fewer employees.”

Reductions in compliance costs for small businesses may be achieved by (1) establishing different compliance and reporting requirements for small businesses, (2) clarifying, consolidation or simplifying compliance and reporting requirements, (3) establishing performance rather than design standards, and (4) exempting small businesses from parts of the general permit.

When developing an economic impact statement Ecology does not to include the following costs related to a permit: (1) the costs necessary for compliance with chapters 173-200, 173-

201A, 173-204, and 173-224 WAC, and (2) costs associated with requirements of the general permit that result from conformity or compliance, or both, with federal law or regulations.

Conformity with federal regulations includes permit requirements that are necessary to be as stringent as any permit EPA issues. Ecology's permit must be at least as stringent as the general permit EPA is going to issue in 2011.

IV. Estimated Costs

Administration Costs

- Public Notice in newspaper, costs range from approximately $384 to $1152 depending on the newspaper (e.g., The Olympian and The Seattle Times, assuming 40 lines of text)
- Annual permit fee (approximately $400)
- Business and residential Notice, $54 assuming 100 notices ($0.10 for each copy, $0.44 postage)
- Submittal of NOI and Annual Report ($0.44 postage)

Equipment/Supplies Costs

- Dissolved oxygen meter, approx. $400 (onetime cost)
- pH meter approx. $100 (onetime cost)
- Drinking, livestock, or irrigation water supply for water rights holder, if requested
    - 2000 gallon water truck rental rate through Hertz: Daily $411, Weekly $1,420
    - 2000 gallon water truck rental rate through Sunbelt: Daily $330, Weekly $915
- Treatment area posting, $1 per 100 feet (two 8.5"x11" signs $0.10 each, and a grading stake 1"x2"x24" bundle of 12, $5)
- Other aquatic herbicide application equipment is necessary for business to run (even without permit) and is not included.

Extra Labor Costs

- NOI and reporting, extra staff time;
- Treatment area posting, extra staff time;
- Monitoring, extra staff time

V. Mitigation of Disproportionate Impacts

Comparison of Compliance Costs for Large and Small Business

The purpose of the economic impact analysis is to provide a comparison of the cost of compliance for small businesses and large businesses. This permit only covers aquatic plant management or pesticide application companies that fall under the definition of a small business. Therefore, there is no need to evaluate the costs incurred by large businesses versus those incurred by small businesses.

Alternatives

There are two alternatives to regulating aquatic herbicide discharges under a general NPDES permit: administrative orders or individual NPDES permits for each proposed treatment area. Drafting individual permits would take an estimated time of 12 months from Ecology staff to complete for each permit. This would severely hamper a small businesses ability to work with new clients. The administrative order process of granting a short-term modification of water quality standards was challenged in court and is currently not a viable regulatory option. The only authorized method for implementing a short-term water quality modification is a discharge permit. Regardless of the possible impact on small businesses, the Ecology's course of action is the least burdensome regulatory option, for both businesses and for Ecology.

Conclusion

It is possible that small businesses could incur significant costs from complying with the requirements of a permit. However, the discharge of aquatic pesticides is significantly different from a traditional discharge (e.g., industrial stormwater, wastewater treatment plant) where the business owner must comply with permit requirements and implement discharge treatment or control methods at their own cost. For aquatic herbicide treatment, the business owner is intentionally discharging a chemical for a specific purpose, the control of aquatic plants and algae. Therefore implementing traditional discharge treatment and control methods to comply with a permit is not necessary, and not a cost that the small business bears. In addition, because the small business is contracted to perform a service, the costs (including the costs for complying with the permit) associated with the service will not be borne by the small business. The costs of permit compliance are going to be passed on to the client.

VI. Appendices

Appendix A: Legal Background

The Federal Clean Water Act (CWA)

The Federal Clean Water Act (FCWA, 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 National Pollutant Discharge Elimination System of permits (NPDES permits), which is administered by the Environmental Protection Agency (EPA). The EPA has delegated responsibility to administer the NPDES permit program to the State of Washington based on Chapter 90.48 RCW that defines Ecology's authority and obligations in administering the discharge permit program.

The Federal Insecticide, Rodenticide and Fungicide Act (FIFRA)

The Federal Insecticide, Fungicide, and Rodenticide Act of 1979 (FIFRA), as administered by the United States Environmental Protection Agency (EPA) and the Washington State Department of Agriculture, requires that all persons who apply pesticides classified as restricted use be certified according to the provisions of the act or that they work under the supervision of a certified applicator. In Washington, the aquatic herbicides allowed for use under coverage of the Aquatic Plant and Algae Management General Permit (permit) are restricted use pesticides. Commercial and public applicators must demonstrate a practical knowledge of the principles and practices of pest control and safe use of pesticides, which they accomplish by means of a "core" examination. In addition, applicators using or supervising the use of any restricted use pesticides purposefully applied to standing or running water (excluding applicators engaged in public health related activities) must pass an additional exam to demonstrate competency as described in the code of federal regulations (40 CFR 171.4). Any person wishing to apply pesticides to waters of the state must obtain an aquatic pesticide applicator license from the Washington State Department of Agriculture, or operate under the supervision of a licensed applicator.

Headwaters, Inc. v. Talent Irrigation District (March 2001)

Headwaters, Inc. and Oregon Natural Resources Council filed a Clean Water Act citizen suit against the Talent Irrigation District (TID) for applying aquatic herbicide (Magnacide H) into a system of irrigation canals. These canals discharged water into a creek causing a fish kill.

Reversing a district court’s opinion, the Ninth Circuit held that application of the pesticide in compliance with the labeling requirements of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) did not exempt TID from having to obtain a NPDES permit, and that the irrigation ditches were "waters of the United States" under the Clean Water Act.

The Ninth Circuit Court in *Headwaters, Inc. v. Talent Irrigation District* found that the applicator (TID) should have obtained coverage under a National Pollutant Discharge Elimination System (NPDES) permit prior to application of aquatic pesticides to an irrigation canal in Oregon. The decision addressed residues and other products of aquatic pesticides.

League of Wildlife Defenders et al. v. Forsgren (November 2002)

In the 1970's, the Douglas Fir Tussock Moth defoliated approximately 700,000 acres of Douglas fir forest in Idaho, Oregon and Washington. In response to this outbreak, the United State Forest Service (USFS) developed a system to predict tussock moth outbreaks and control them via aerial spraying of insecticides.

The League of Wildlife Defenders filed suit against the USFS for failing to obtain a NPDES permit under the CWA for the application of insecticides directly above surface waters. The USFS argued that any discharge of insecticides was nonpoint pollution, and that the discharges fell under federal exemptions (40 CFR 122.3) for silviculture activities.

The Ninth Circuit Court reversed a district court's opinion upon appeal. It held that aerial spraying (from an aircraft fitted with tanks) directly to, and over, surface water is a point source of pollution, and requires an NPDES permit.

Fairhurst v. Hagener (September 2005)

The Montana Department of Fish, Wildlife, and Parks (Department) instituted a ten-year program to re-introduce threatened native westslope cutthroat trout into Cherry Creek. This project used antimycin to remove non-native rainbow and Yellowstone cutthroat trout from Cherry Creek over several years, after which it would reintroduce native trout.
The Department was sued under the citizen suit provision of the CWA for failing to obtain a NPDES permit before applying antimycin to surface waters. During summary judgment, the district court decided in favor of the Department. On appeal, the Ninth Circuit court affirmed the district court's opinion. The Ninth Circuit opined that: "A chemical pesticide applied intentionally, in accordance with a FIFRA label, and with no residue or unintended effect is not "waste, and thus not a "pollutant" for the purposes of the Clean Water Act. Because the Department's application of antimycin to Cherry Creek was intentional, FIFRA compliant, and without residue or unintended effect, the discharged chemical was not a "pollutant" and the Department was not required to obtain a NPDES permit."

EPA Final Rule: Application of Pesticides to Waters of the U.S. in Accordance with FIFRA (November 2006)

Environmental Protection Agency (EPA) issued a final rule in 2006 entitled "Application of Pesticides to Waters of the United States in Accordance with FIFRA." This rule replaced a draft interpretive statement issued by EPA in 2003 concerning the use of pesticides in or around waters of the United States. The rule states that any pesticide meant for use in or near water that is applied in accordance with the EPA-issued FIFRA label, is not a pollutant under the Clean Water Act. Therefore, such applications are not subject to NPDES permitting.

After EPA issued the rule, Ecology met with stakeholders to seek input on how Ecology should regulate use of aquatic pesticides. Ecology also provided the public with a three-week comment period. Stakeholders affiliated with each of the seven affected permits (mosquito, noxious

weeds, aquatic plants, irrigation, oyster growers, fish management, and invasive moth) sent comments to Ecology. The majority of comments requested that Ecology continue to issue joint NPDES/State Waste permits to regulate aquatic pesticide applications.

Northwest Aquatic Eco-Systems v. Ecology, WA Toxics Coalitions (WTC) (June 2007)

The Pollution Control Hearings Board (PCHB) issued a final order in case #05-101, *Northwest Aquatic Ecosystems vs. Ecology, WTC* in February 2006. This case focused on a number of issues, one of which was whether an NPDES permit is required for the use of federally registered pesticides since the Ninth Circuit Court ruled in *Fairhurst vs. Hagener*.

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."

National Cotton Council et al. v. EPA (January 2009)

In November 2006, EPA issued a final rule under the CWA that determined that pesticides applied in accordance with the FIFRA label are exempt from NPDES permitting requirements. Petitioners filed for review of EPA's final rule in 11 of the 12 federal circuit courts that are able to hear regulatory arguments. The federal courts combined the petitions into one case within the Sixth Circuit Court.

The Sixth Circuit Court made several findings. First, it agreed with the Ninth Circuit (*Fairhurst v. Hagener*) that if a chemical pesticide is intentionally applied to water for a beneficial purpose, and leaves no waste or residue after performing its intended purpose; the discharge would not require a NPDES permit.

Second, the Court found excess pesticides and residues that make their way into waters during and after any pesticide application constitute wastes under the CWA and must have NPDES permit coverage before the discharge occurs.

Finally, the Sixth Circuit determined that because EPA's final rule exempted discharges that the plain reading of the CWA includes as requiring a NPDES permit, the rule cannot stand. After a

later motion, the Sixth Circuit granted EPA a stay on the effective date of this ruling for 24 months to allow EPA to develop NPDES permits for pesticide discharges. EPA is developing a general permit for the discharge of pesticides including aquatic plant, larval and aerial mosquito, invasive aquatic species and forestry pest control and intends to issue the permit in 2011.

Department of Ecology Permits

The state's Water Pollution Control Act (Chapter 90.48.465 RCW) requires that any commercial or industrial operation which results in the disposal of solid or liquid waste material into waters of the state must obtain a permit (90.48.160 RCW). A pesticide applied to the water according to state law is a form of pollution. This law further directs Ecology to "issue water quality permits for the purpose of using herbicides or surfactants ___ to control aquatic noxious weeds…" (90.48.445). Application of pesticides to water, state law requires that the applicator obtain a short-term modification (173-201A-410 WAC) of the water quality standards from Ecology.

Prior to 2002, Ecology had used a short-term modification of the water quality standards issued through an administrative order as a vehicle to regulate the use of aquatic pesticides. This process was challenged in court and is currently not a viable regulatory option. The only legal vehicle for implementing a short-term water quality modification is a discharge permit. In response to *Headwaters, Inc. v. Talent Irrigation District*, Ecology began issuing combined NPDES/State Waste general permits for the application of aquatic pesticides.

In a September 2005 decision, the U.S. Ninth Circuit Court ruled that a pesticide applied according to the label that did not have any unintended impacts was not a waste and therefore did not require an NPDES permit (*Fairhurst v. Hagener*). This ruling was supported by USEPA guidance and rulemaking in November 2006 that if a pesticide is applied in accordance with the FIFRA label, it does not require and NPDES permit (see "EPA Final Rule: Application of Pesticides to Waters of the U.S. in Accordance with FIFRA" above). A state permit would still be required, even if a NPDES permit were not. Ecology continued to issue combined NPDES State Waste general permits while waiting on the outcome of *National Cotton Council et. al. v. EPA*. Because the Sixth Circuit Court found that a NPDES permit is required for the discharge of pesticides, Ecology will continue to issue NPDES permits for aquatic pesticide discharges.