

Comments to the 2011, Draft Aquatic Plant and Algae Management National Pollutant Discharge Elimination System State Waste Discharge General Permit and accompanying Draft Documents

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How Will the Washington State Department of Ecology Scrutinize Application documents?

Example: A Comparison of the “original” permit application (2006) and a ‘reissuance” application (2010) under the “draft general permit” regulations. What is actually happening today (October 15, 2010) regarding evaluating “Application Requests for Coverage”.

Attached to these comments to Ecology are two “Application for Coverage” documents for applying herbicides to Haven lake. One is dated September 2010 and one is dated Oct 2006. The actual “application” form for the Oct. 2006 document is located on pages 5, 6, 7, 8 of that entire document attachment.

Here is an excellent example of how Department of Ecology plans to implement “rigorous examination” of applications for coverage. **Either Ecology wants to regulate herbicide applications or it doesn’t.** Will Ecology check facts and compare information on the applications to information within the files on Haven Lake?

Yellow Flag, Class C noxious weed (not mandatory removal)

Please compare the 2006 application form and the 2010 application form in the category titled "Plant and Chemical Information". In the Sept. 2010 application form, glyphosate is listed for targeting "emergent noxious". Ceratophyllum, Brasenia, Nymphae, listed on the 2006 application are no longer listed as "targeted plants". Some specific information in the "targeted plant categories" seems to have been simply whited out. In plant surveys of Haven Lake conducted by Ecology from 1992 through 2009, there has only ever been **one identified noxious weed, yellow flag iris**, (class C, "patchy distribution"). Yellow flag or any noxious weed has **never** been the target for chemical applications to Haven lake.

All supporting documents indicate chemicals targeting native elodea and native pondweed have been the only focus of attention and the target of chemical treatment in Haven Lake. (see "post chemical application" form from July 2008). Everyone knows there is not a noxious weed problem at Haven Lake, whatsoever. Noxious weeds have never been an issue. Nuisance native plants, potamogeton and elodea have been the entire focus of removal efforts.

The difference between stating on an application form that a group is intending to target "emergent noxious", and not saying that you are targeting "emergent noxious" is that you get to fall under the category of treating for noxious weeds which is 100% eradication.

Haven Lake does not have a wide range of "emergent noxious" weeds as suggested under this 2010 "renewal application form". Haven Lake has small patches of yellow flag iris, a class C noxious weed found along the shore in minimal clumps. This class C noxious weed is not required to be removed. The population of that plant has remained relatively constant since being first identified by Ecology.

The department of Ecology also has an extensive amount of information on Haven Lake's "water body information" related to wetlands, outlet stream names which could and should be used to evaluate this 'renewal' application form, in addition to documentation of legal authority of

“sponsoring organization” to treat the lakebed. The map of treatment area includes private lake bed property whose owners have not given permission for treatment.

Overview

In March, 2010, I submitted a detailed paper to the Department of Ecology titled “Analysis and Recommended Changes to the Department of Ecology “General Permit” (2011 Aquatic Plant and Algae Management General Permit) and Permitting Process. That document examines legal problems, permitting concerns, and offers 5 categories of recommended changes to close loopholes and prevent similar legal and environmental issues from occurring in the future. These are:

- 1) Transparency of process; Integrating Appropriate Stakeholders
- 2) Redesigned “SEPA Environmental Checklist” specific to chemical applications in lakes
- 3) Addressing Chemical Drift; Chemical Label Information; Monitoring Responsibilities
- 4) Revoking of Coverage; Beneficial Uses Protected by Law; Unintended Impacts and Effectiveness of Antidegradation Policy
- 5) Oversight and Inspection Issues; “The Honor System”; Three different definitions by three agencies of “legal chemical applications” for the same body of water

Citizens, legislators, county authorities, other agencies and Department of Ecology staff all understand the serious need for “cleaning up “ the legal issues, the compliance and enforcement issues, and environmental issues related to permitting under the rules outlined in the 2006, 5 year, statewide, Aquatic Plant and Algae Management Permit to apply chemicals to the Waters of Washington state. (I will refer to that as “the permit”)

Permitted Sponsors and chemical application activities at Haven Lake, for example, conducted under the 2006 “general permit” with the approval of Ecology, were subsequently found to be unlawful, found to violate health codes for drinking water, violated private property rights,

WDFW regulations concerning % of viable habitat destroyed, violated Shoreline Management Act and Mason County regulations. The overall result of one such permit granted under the 2006 “general permit”, (Haven Lake diquat application for native plants), proved costly and time consuming to Ecology staff, private citizens and agencies, and whose likely environmental impacts related to salmon recovery, are ongoing.

Some of the new regulations added to the 2011 “draft general permit” have the potential to improve oversight, SEPA information, and if properly implemented will clarify to sponsors and permittees (chemical applicators) the need for a properly researched, balanced approach to aquatic plant management. Implementing these corrections to previous permit oversights and following up using mandatory enforcement procedures for all permit violations will be the only way these new regulations can have an effect.

This draft document, however, with vague sanction and enforcement policies, inadequate legal requirements of sponsors, minimal oversight of chemical applicator “management” activities won’t achieve the type of “control/management/oversight” mandated by the legislature and expected of Washington State Citizens.

Omissions, oversights, within this draft permit leave the door open to continuing violations of law. The Department of Ecology steps back and takes no responsibility for the effects of it’s own permitting policies which will yet again, for the next 5 years of the life of the permit, force private citizens, county enforcement and other organizations to reckon legally with so called “permitted activities”. Activities, some already deemed criminal and civil violations and activities which, in my opinion threaten the health of Washington State Lakes, Salmon recovery efforts and the water quality of the Hood Canal, among other waterbodies.

The issues of concern address:

- 1) Legislative Intent
- 2) “Legal Authority” requirements
- 3) Shutting out Legal Stakeholders

- 4) Salmon Recovery and Chemical usage (see chemical persistence)
- 5) Who's in charge, exactly?
- 6) DMP or SEPA Accuracy; Rollover-Reapply Issues; Piggyback Individual Lot Permits
- 7) Dispersion – (Drift); Chemical Persistence and Pollutant Legalities; Wetlands
- 8) Enforcement of Permit Violations
- 9) Specific paragraph changes in the documents

1) Legislative Intent (page 12 Fact Sheet)

RCW 90.48.445 Aquatic Noxious weed control

RCW 90.48.447 Aquatic Plant Management Program

“Environmental, recreational, and aesthetic values can be ‘threatened’ by native plants.”

I believe the intent RCW 90.48.447 is to “allow” an herbicide to be used for native plants **subject to rigorous evaluation by the DOE, and not only through EIS**. In my opinion, the law is not a mandate by the legislature requiring Ecology to issue an aquatic chemical permit to each and every Washington State lake if such a permit is applied for.

Right now, the DOE Water Quality Department will certainly grant a permit to use aquatic herbicides to any “legal sponsor” (and his “chemical applicator”) who moves to any lake within Washington State, procures a boat or wants to swim, if that person also considers the native plants growing in that lake to be a ‘nuisance’.

The presence of a wetland area, threatened species of fish or fowl, coho salmon rearing in the lake, rare plant, exceptional water quality, etc. make little difference to the Water Quality Department as they approved permits for “control of nuisance weeds.”

The language in RCW 90.48.445 (Ecology cannot burden weed control efforts) clearly is aimed at **noxious weed control** which is time

sensitive, and often required by law to be removed, depending on which classification of noxious weed. This language found in RCW 90.48.445 was not intended to be blended together with the language of RCW 90.48.447, which concerns the removal of native plants. Ecology has been intermixing the language of each of the two distinct codes and has repeatedly told property owners and concerned citizens and agencies that the legislature has directed Ecology to “not burden efforts to treat native plants.”

“Environmental” threat, not pleasure boating, is the first category of concern in RCW 90.48.447 where aquatic herbicides may be effective for managing an “invasion of native plants”. It looks like the legislature was concerned for the environment, itself. Ecology should “rigorously evaluate” (per language in RCW 90.48.447) each DMP /SEPA accompanying the application for a five year aquatic herbicide permit and not consider the two related RCW’s to be a mandate for blanket permit approval simply because it was requested.

The law directs Ecology to do what is in the best interest of the public. Aquatic chemicals can destroy or degrade salmon habitat by either dispersion or direct application and therefore, it is not always in the “public’s interest” to use aquatic chemicals to remove native plants when there are alternative methods available. **Recreation**, listed in RCW 90.48.447 can and does apply to salmon restoration, and therefore salmon habitat in lakes, not just to the obvious forms of recreation such as waterskiing, etc.

A good example of the broader use of the term “**Recreation**” within Washington State, is the following article. “\$27.5 million was awarded to the Washington State **Recreation** and Conservation Office for Salmon restoration.” www.thegovmonitor.com

http://www.thegovmonitor.com/world_news/united_states/washington-receives-27-5-million-for-salmon-recovery-efforts-39291.html/print/

2) Legal Authority Requirements

(Pg 59 Fact Sheet Sponsor Definitions) (Draft Permit pg 10 and 11, B 2. a. and b.)

1) Legal authority of an organization to treat a water body must be evaluated by the DOE using real property law, before issuing a permit to apply aquatic chemicals.

One of the Department of Ecology's biggest failure's with respect to the permitting process for aquatic chemicals is the complete avoidance of any process that would adequately consider the authority of an applicant to do any treatment whatsoever on a lake or other body of water.

There are, generally, only two ways that anyone has the right to apply chemicals to a lake for any purposes. One is by statutory grant of right.

The only other way for a non-public entity to have the right to treat is by having a recorded or case-law created interest in the real property in question. If a lake is nonnavigable, then the lake bed is owned by the owners in pie slices to the middle (as an example). They have recorded interests in their ownerships; case law tells us what that means to their relationship to ownership of the lake bed and plants growing on it. Each set of circumstances is different, but the basic rules are the same: if you have the right, you can prove that you have the right. If you can't prove it, you don't have it.

That's it. If a lawyer on behalf of a voluntary nonprofit association with no recorded or case-law rights send you a letter saying that the association has the right to treat, he or she is just plain wrong. **Voluntary groups of people cannot just call themselves an association, incorporated or not, and assert control over something they have no legal right to control.**

Any seasoned real property lawyer will tell you that a voluntary association of people who own property near a lake does not have the right to chemically treat the lake. That would be what a Lake Management District is for.

The Legislature has provided for Lake Management Districts. If an applicant wants to chemically treat a lake, and cannot prove the right to treat otherwise, then the Department needs to tell the applicant to form a Lake Management District.

The proposed definition of what Ecology will accept as “legal association” includes lake management districts, other special purpose districts, some homeowners’ associations, and “others”. This is inadequate, not based on real law, and will lead to lawsuit after lawsuit or real property damage for those affected negatively by “permitted” sponsors.

Lakefront property owners can show proof they own their lake beds, if the lake is non navigable. They have deeds and plat maps to prove that they do. Their applications should include a copy of the same so that the Department knows they are authorized to treat.

2) In this draft permit, “New “sponsors will have three years to obtain legal standing. Is Ecology suggesting that in the interim, while not actually having any legal authority they will be allowed to dispense herbicides? That cannot be legal.

3) Under pg 11 B2a. **This specifically relates to a voluntary non profit group currently holding permit coverage and getting in under the “wire” by the 180 day time limit before the issuance of the new permit.** Sponsors continuing coverage from the previous permit have either **three more years, or one more year** to try to get legal somehow and after that if they can’t Ecology “may” terminate coverage, but may not have to. This would then be 5 years under the 2006 coverage without legal authority over the water body, and then being granted even more years.

I believe that an organization such as the above should not be considered for a five year “re up” with the next permit, again without proving legal authority. It’s unclear how such a group

without legal authority to use chemicals on a lake would have actually received a permit in the first place. I believe any chemical application undertaken by a group with no legal authority to treat would be an illegal act.

On pg 11 B2c. It is indicating that individual lot owners don't have to show ownership of the lake bed to receive a permit to use chemicals on that lake bed. I think they definitely should be required by law to provide proof of ownership and thus authority.

3) Shutting Out Legal Stakeholders

(DMP and SEPA Addendum pg 1) (Draft permit pg 10 B)

The 2011 permitting process, begins with "Sponsor" and the chemical applicator (Permittee) submitting applications (including SEPA or DMP documents) privately on line. Again this 2011 draft permit excludes **every other legal stakeholder** in the lake and watershed.

The commercial applicator and client are the sole entities directed by Ecology to fill out and submit every scientific, legal, environmental, judgemental question concerning treatment areas, on the DMP or SEPA, minus review or fact checking by stakeholders, many of whom are scientists or county authorities on law. Why does Ecology assume a "sponsor" and "chemical applicator" (Permittee) will know all of the correct answers to these important questions? Existing examples of application documents with significant concerns for accuracy, (such as the one for Haven Lake), indicate absolutely not.

Ecology's responsibility to all citizens and to the legislature is to make sure that SEPA or DMP is absolutely accurate in every way, in order to determine mitigation for that specific lake and population of citizens.

How can the Department of Ecology, an agency with close to 1000 employees, many of whom have high level degrees in science, lake and water chemistry expertise, soil and environmental expertise, stand by and not use that collective knowledge to determine appropriate management of aquatic plants in Washington lakes? Does the DOE really think a chemical applicator, and any property owner 'sponsor' are

qualified to answer environmental questions, related to wetlands, soil chemistry, legal questions concerning governing state and county laws for shorelines, wetlands, lakes, etc?.

Questions in a DMP or a SEPA must be examined by experts, and many experts are found right there at the Department of Ecology. The legislature did direct the Department of Ecology to oversee permitting and review, and perhaps Ecology should not leave the entire process to just one department...."Water Quality".

Nothing about chemical coverage and usage on a lake is a "private matter", because applying those chemicals into the common waterway takes place in a very, very public setting. The results of a chemical application to everyone's water way can have the following effects:

- 1) close the lake to all citizen's usage (not just "sponsors")
- 2) cut off domestic water supply to homes (not just "sponsors")
- 3) destroy or degrade salmon habitat and or heron / eagle habitat
- 4) result in aquatic chemicals drifting into waterfront areas and lakebed areas owned by "non sponsors" whose presence is unwanted
- 5) impact wetlands
- 6) impact shorelines governed by county shoreline codes
- 7) impact salmon and lakes bound by treaty rights
- 8) impact (ESA listed) steelhead, endangered Turtle species, salmon rearing

Haven Lake SEPA information and subsequent July 16, 2008 chemical application related issues, overlooked by "sponsors" were subsequently managed by "non sponsor" citizens and lakefront property owners (stakeholders)

Their valuable input as "stakeholders" include the following:

- 1) informing Ecology, Permittee and "sponsors" of historic and current coho salmon usage of the lake (related to impending chemical application)
- 2) informing Ecology of private lakebed ownership and lack of authority of the "sponsor" over the waterbody

- 3) informing Ecology, Permittee and “sponsors” of households with legal water rights, legal water claims who were not prepared for lake closures
- 4) informing Ecology, of entire plant community being affected by chemical application directly and by drift (out of compliance, but anticipated by both Rod Thysell (inspector) and Kathy Hamel (Water Quality Department), as voiced in emails.
- 5) informing Mason Co Health, Ecology and others water testing for Diquat indicated persistence above potable rates 5 days beyond the 3 day label guarantees
- 6) Informing Ecology of the Skokomish Tribe opinion on chemicals in Haven Lake, and supplying a documentation of past communications between the Tribe and both Ecology and either “Sponsors” or Permittee.
- 7) Communicating with Mason County and learning entire chemical application constituted a criminal violation and civil violation.
- 8) Offering information and assistance to out of county and out of state lakefront residents, not in communication with “sponsors”.
- 9) Informing WDFW and other agencies of chemical usage

Lake Tahuyeh citizens (in 1997) informed Ecology of rare wetland peat mats which resulted in the referenced paragraph. (Fact Sheet pg. 40 Trotland et al. v. Ecology and Tahuyeh Lake Community Club.

Had Ecology’s permit required “sponsors” and chemical applicator’s to include all stakeholders in all aspects of the permitting process, perhaps the resulting damage to private property, criminal and civil offenses within the county, damage to wetlands, etc. could have been prevented, and time consumption of Ecology staff (fielding questions) would have been greatly reduced.

One positive change – written notification

Written notification, is the one positive change to the draft 2011 permit (“applying for permit coverage”)

The notification should be:

- 1) in writing before any SEPA, DMP is ever submitted, or before any sponsor signs anything

- 2) the notification needs to be sent to the address of each property owner found on the local county tax parcel website
- 3) to affected county agencies which govern waterbody and shoreline activities (and at Haven Lake actually **own** two lots)
- 4) to WDFW
- 5) to any other stakeholders such as the Skokomish Tribe and other tribes, WRIA managers, etc.
- 6) should include where to download and check the completed SEPA or DMP for details

Sharing the responsibility of fact checking by all stakeholders will make the job of scrutinizing these mitigating documents faster and easier for Ecology. Get it right the first time and everyone saves time and money.

4) Salmon Recovery and Chemical Usage (see Chemical persistence)

State agencies need to work as a team for the good of all and chemicals are not always in the public interest.

Fact sheet pg 26 (Endangered and Sensitive Species) concerns Fish and Wildlife Service and National Marine Fisheries Service and their rights to issuing "Biological Opinions and by consulting with EPA on certain species, or other ways of being involved in EPA's processes to protect listed species and designated critical habitat in several ways, "as necessary".

While Ecology follows chemical manufacturer's label guidelines these studies are conducted in lab situations, and are based on mortality studies. In the case of Diquat used in Haven Lake, diquat did not degrade in the water according to the label guarantee for potability after 3 days. WDFW motivations are for the optimal health of species and their survival in the wild. BMJ (best management judgement) would be to follow WDFW recommendations, in my opinion, such as in the example given at the Oct 4th "workshop by Kathy Hamel. She explained to us, WDFW had requested a specific lake receive no chemical treatment. Adhering to WDFW professional advice would be to the benefit of the public, as required in the legislative directive. Ecology did not accept the "biological opinion" and requested a timing window for chemicals anyway. Why? Does one agency's opinion "trump" the other?

As mentioned earlier in this article, the public benefits from salmon recovery efforts, monetarily. For example, Washington just received \$27.5 million for salmon recovery efforts which went to the Washington State **Recreation** and Conservation Office. It also benefits from the economic impact of the salmon industry and the direct recreational benefit of salmon fishing which cannot exist without lake “nurseries” (such as Haven Lake and Wooten Lake).

Dispersion effects (chemical drift, outside of direct application areas) have the potential to eradicate stands of native plants which provide a food source and habitat for salmon in lakes. Permit language found on Pg. 30 Fact Sheet 4th paragraph does nothing to address the issue, for example:

“Dispersion is the reason why Ecology uses the term “intentionally applied.” Ecology cannot regulate or control the extent of dispersion because it varies depending on environmental conditions. Dispersion means that sometimes the treatment affects more area or less area than anticipated. ...Requiring installation of barriers around treated or untreated areas is extremely expensive and time consuming.” (fact sheet pg 30)

In my opinion, chemical applicators can pass this expense on to the customers (“sponsor”), as explained on pg. 8 Conclusion, Draft Economic Impact Analysis. Certainly loss of habitat, or damage to non target areas such as private property lake bed is quite expensive too. Drift reduction measures should be factored into the cost of doing business applying chemicals to lakes, as well as to the decision making process which should include available aquatic plant removal alternatives to chemicals.

Valuable habitat (which benefits all state citizens) can be degraded in a day, without the use of barriers to control the chemical movement in water, leaving expensive salmon recovery efforts worthless if fish are killed by predation. WDFW is the agency assigned to oversee fish such as salmon and **it is** their BPJ to leave salmon bearing lakes in their natural condition, or avoid the usage of chemicals if possible and use alternative measures for plant removal (if necessary). This is one area

of management Ecology **can change** - limiting chemical usage dramatically in salmon bearing lakes. This would be good for the general public which benefits from the recreation associated with salmon fishing.

Also extremely valuable for the entire population of the state, is the entire \$904.8 million yearly economic input to Washington State, from salmon and fisheries related expenditures (boats, equipment, hotels, transportation, etc). Ecology is mandated by the legislation (RCW 90.48.447) to “rigorously evaluate” all relevant information in issuing permits for Washington State Lakes, (based on individual criteria) Certainly salmon habitat is a highly important criteria, and the use of chemicals to remove plants is not always in the public interest.

*“In terms of economic impacts, commercial and recreational fishing conducted in Washington fisheries directly and indirectly supported an estimated **16,374 jobs and \$540 million in personal income in 2006**. Recreational fishing generates **12,850 jobs** and state residents accounted for 90% of spending to support those jobs on fishing goods and services.” **An estimated 286,000 anglers sport fished in Marine Waters of Washington State and spent \$904.8 million in 2006 on fishing-related equipment and trip-related items.***

“Final Report Economic Analysis of the Non-Treaty Commercial and Recreational Fisheries in Washington State” prepared for the Washington Department of Fish and Wildlife

5) Who’s in charge, exactly?

Chemical Applicator and Sponsor alone determine:

- 1) all answers to the DMP / SEPA.
- 2) all applicable county laws (such as Mason County, Kitsap County permitting requirements, Shoreline Master Plans) (General Conditions G9 (General Permit))
- 3) all applicable Federal Laws (General Conditions G9 (General Permit))
- 4) all wetland delineation information

- 5) all WDFW concerns such as migrating species, threatened species, nesting heron, eagle, other species
- 6) Plant surveys identifying species, density, distribution
- 7) all property rights issues related to lake bed ownership
- 8) all legal authority over waterbody issues as “certified” by sponsor
- 9) soils, sediment and bathymetric considerations (affecting dispersal)
- 10) sensitive areas considerations
- 11) legal water rights documentation and research
- 12) necessity for chemical usage v/s non chemical usage to manage native plants or noxious weeds
- 13) which chemical, which adjuvant to use on each water body, based on usage closure times, impacts to salmon and other species, household replacement water requirements, persistence and it’s effect on wildlife or anadromous fish
- 14) removal of decaying plants or not
- 15) buffers or no buffers for individual lot treatments
- 16) level and amounts of chemicals used, acreage treated (within approved maximum)
- 17) number of times per season chemicals are applied
- 18) monitoring of application results for dissolved oxygen levels, persistence around domestic water supply intakes, aesthetics of decaying plants underwater,
- 19) determination of where the “untreated” aquatic plants will remain (in compliance with WDFW and Ecology requirements)

DOE, WDFW and the Legislature are all three in charge:

1) DOE

July, 2008, WDFW William Freymond (Region 6 Fish Manager) made this statement: “As we all know, however, there is state law that allows the activity of native plant removal within specific guidelines. And **DOE** is responsible for reviewing applications and granting permits for such activities that fall within those guidelines.”

2) WDFW

Bulletins and Biological Opinion are enforceable under FIFRA Rules (pg 26, Fact Sheet), so **WDFW** must be in charge of some aspect of fish management as it concerns chemical usage.

3) The legislature

The Department of Ecology is directed by the **Legislature** (RCW 90.48.445 and RCW 90.48.447) to oversee issuing or approving water quality permits for applications of pesticides to control both native aquatic plants and noxious aquatic weeds, and “subject to rigorous evaluation”.

Ecology is responsible for :

1) **Enforcement:** The Department of Ecology has the authority to revoke coverage for failure to comply with regulations set out in the “General Permit”. WAC173-226-240) Ecology also has the authority to determine which areas within lakes are the areas where chemicals may be applied or whether or not chemicals should be utilized at all to remove aquatic plants. These decisions should be based on staff BPJ, (drawing on the professional talent pool of the entire DOE, not just the “water quality” division, which is highly focused on noxious weed eradication and algae concerns.)

2) **writing** and **issuance** of aquatic chemical permits, based on governing legal codes (found in the permit) Technology based standards (WAC173-226-070) AKART, and staff BPJ Pg. 26. Fact Sheet explains:

“Before issuing coverage, Ecology reviews the information in the permit coverage application and the DMP. The DMP identifies specific information about project and site conditions including information about threatened or endangered plants and animals, water usage and sensitive habitats. ...The DMP and NOI provide site specific project information to Ecology that is supplemental to Ecology’s programmatic SEIS”

**The question is who fills out the information Ecology is reviewing?
Who is truly qualified to do this?**

3) **Administering** decisions allowing or denying chemical usage to control native aquatic plant growth (in areas) in each and every lake in Washington State . Tier II Antidegradation requirements must be met (pg 23 Fact Sheet) Ecology has stated this permit does not cover discharges to Tier III waters, however, Lake Tahuya in Kitsap County, and Haven Lake in Mason County each have at least one characteristic consistent with Tier III requirements. (see WAC 173-201A-330 Tier III-Protection of Outstanding Resource Waters.)

Furthermore, both lakes lie within the Lower Hood Canal watershed, emptying into the Tahuya River and into the Hood Canal. (Hood Canal has been designated a Shoreline of Statewide Significance in WAC 173-16-030(13) and WAC 173-16-040(5))

Ecology would be obligated to consider all of the following findings from the Kitsap County Code “**Chapter 22.24 SHORELINES OF STATEWIDE SIGNIFICANCE – MANAGEMENT PRINCIPLES AND DEVELOPMENT GUIDELINES**” (H 2. 3, 4, I, J1, 2, K. 2, for example, to comply with requirements for chemical permitting decisions for these two lakes. Both of these lakes currently **are permitted** for chemical usage, however. Is that truly in the “best interest of the public”, or is this a result of “best professional judgement”?

BPJ and Wetland areas

“Sometimes recreational activities and navigation occur in identified high quality emergent wetlands. Ecology allows limited treatment within these wetlands...”(pg 40 fact sheet)

Ecology’s directive for aquatic plant removal to accommodate recreational activity in rare wetland areas, should instead require using available manual methods of aquatic plant removal, such as divers, etc. This is a “win/win” situation. Ecology’s interpretation of RCW 90.48.445 and 447 doesn’t support the EPA directive of using “Best Professional Judgement” based on known risks to wetland plant communities, and BPJ of wetland experts.

Is Ecology willing to “**rigorously evaluate**” DMPs submitted as intended by RCW 90.48.447? I don’t think so based on comments Oct. 4th at a workshop by Kathy Hamel ECY. It was suggested only new applicants for 2011 permit coverage would have the DMP documents checked by Jon Jennings. Existing “permitees” reapplying or ‘rolling over” coverage would need to update SEPA to match the DMP information but these would “just be put into a drawer”.

It is my opinion that this draft permit, if administered by the Department of Ecology in such a fashion, will continue to put the chemical applicator in the control seat for the health of all Washington State lakes. I do not believe this was the intent of the legislation, and I do not believe any lake organization should get a “free pass”.

My suggestions are:

1) Every existing permit coverage for every lake starting April 1, 2011 is bound by the new EPA requirements and existing DMP and SEPA checklist information undergoes “rigorous evaluation” as **expected** by the Legislature, by local county governments, by State organizations such as WDFW, the Puget Sound Partnership, and by the citizens of Washington State, and as required by EPA shortly (pg 11, fact sheet).

2) All information required in DMP or SEPA type of documents is farmed out to the respective departments within the Department of Ecology. Example:

a) replies to wetland questions are referred to the wetland experts within the department, as these experts have written many of the standards for delineation. These are the people to accurately determine wetland information for each waterbody.

b) replies to plant density, plant surveys, plant distribution would be checked by lake specialists such as Jenifer Parsons, Tricia Shoblum.

3) All legal information pertaining to shoreline codes, county and local laws and restrictions should be passed over to the appropriate agency at the local county.

Special Categories

The draft General Permit makes special detailed allowances for certain category of lake conditions. (Permit Coverage S1a , Discharge limits S3e, for example)

a) noxious weed infestations - chemical applications have no littoral zone limitations – or 100% coverage (draft permit pg. 6, 7)

b) impaired water bodies - have numerous requirements for water testing and other requirements such as removal of decaying plants which add to oxygen depletion, etc. (draft permit pg. 13)

I believe a new category for exceptionally clean clear lakes with native plants, no, or few, noxious weeds and wetlands, need to also be a unique category given special consideration in this permit, as these are relatively rare in Washington State. Why is this logical?

1) plant removal of (nuisance) native plants is a choice, not a requirement by the noxious weed board

2) time is not of the essence

3) alternatives such as hand pulling or boat mounted cutters can and must be given priority under certain conditions such as:

a) existence of wetlands

b) presence of households using lake water for domestic usage

c) exceptional water clarity and water quality maintenance

d) coho salmon rearing

e) local codes precluding the usage of chemicals

Using guidelines for this new category of lake:

1) all recreational needs will still be met without the necessary usage of chemicals to do so

2) 'drift' or dispersion onto neighboring property and lakebeds will be avoided.

3) the food chain cycle will not be broken unnecessarily driving away native birds and stressing fish requirements(mortality of invertebrates, etc.)

4) additional habitat loss or wetland damage by drifting chemicals will be avoided

5) the potential bioaccumulation of chemicals will be avoided

6) aesthetic values will be ensured and pregnant women or sensitive children won't need to be worried about swimming for the 10 day minimum of chemical persistence.

6) DMP or SEPA Accuracy; Rollover-Reapply Issues; Piggyback Individual Lot Permits

1) DMP information and SEPA checklists (if used in lieu of actual DMP) should be open for examination by all stakeholders of a waterbody at any time (online at Ecology's website when one clicks on the lake)

2) the new required updates to the DMP, such as plant surveys, change of chemicals, etc should be immediately sent to Ecology and added to the original on file. Only an updated DMP will fulfill the legal requirement that a "current" DMP is a public document and has to be available to the public, and if it is sitting in the chemical applicator's office it is not available to the public. ("general permit" S.8)

3) Any "sponsor and permittee" reapplying for coverage under the 2006 Permit (and using the 2006 SEPA information) **should be denied continuing permit coverage if any part of the original permit application and SEPA checklist is out of compliance whatsoever with any of the requirements of the permit, itself.**

This includes

a) legal authority of sponsor to use the permit on said body of water,

b) insufficient information, or incorrect information on the SEPA document under which the permit was first granted. Sponsors and permittees may apply as "new applicants" following the new regulations and certification required.

4) Any "Permittee or Sponsor" reapplying for coverage 180 days before the expiration of the 2006 permit must submit the exact application requirements as a new permittee. All conditions related to DMP or SEPA information must be equally applied to all lake sponsors and permittees.

5) Under no condition should the Department of Ecology allow “piggy back” or spinoff individual lot permits to lakefront owners whose original permit was granted based upon a permit application with insufficient information in the SEPA or whose sponsor is not a legal entity under RCW codes and holding legal authority to manage a lake.

6) If Ecology grants permits to individual lot owners to apply chemicals to individual lots, each individual lot owner must follow the exact procedural pathway as a “sponsor” and chemical applicator, as it concerns DMP plans or SEPA information and written notification requirements, as well as responsibility for water testing if required.

7) Permits given to an individual lot owner to apply chemicals to his or her waterfront area should be rigorously scrutinized for compliance. The distance of 10’ either side of a dock or no more than 20’ is not accurate enough due to obvious, known “drift or dispersion” issues.

a) the distance of 10’ either side of an 8’ dock should apply to 100’ lots only. Lots less than 100’, such as 50’ or 75’ must have the exact ratio of lot size to treatment area as a 100’ lot. The goal is to keep the chemical where the treatment is intended, not on the neighbor’s lakebed or plants. Example:

1) 100’ lot allows for 10’ either side of 8’ dock

2) 75’ lot allows for 7.5’ either side of 8’ dock

3) 50’ lot allows for 5’ either side of 8’ dock

4) adjust ratios to reflect location of dock with respect to property lines

7) Dispersion -(Drift), Chemical Persistence and Pollutant Legalities and Wetlands

1) When does a pesticide become a pollutant? Ecology has addressed “drift, persistence, and dispersion” issues only a few times in the 5 documents associated with the permit.

Pg 18, Fact Sheet explains : “The Headwater, Inc. v. Talent ruling established that **Aquatic Pesticides become waste in the water after the pesticide has performed its intended action and the target**

organisms are controlled or if excess pesticide is present during treatment.” Technically speaking, any drift of chemicals beyond the targeted application site which remains in the water or settles on neighboring lake beds, and or negatively affects healthy plant growth on those lake beds is clearly a pollutant.

“Permits must incorporate requirements to implement reasonable prevention and control of pollutants. Ecology acknowledges that applicators could treat the pollutants addressed in this permit only with great difficulty due to the diffuse nature and low concentrations that exist after the pesticides have become waste. “ (Pg. 18, Fact Sheet)

On Pg 7, (Draft permit) it is stated, “minimal impact on non target plants is acceptable”. I believe impact to non target plants is covered under the definition of a Pollutant....unintended impact, and residue persisting outside of targeted area. A chemical applicator is supposed to understand dispersion, and seems required to control it.

2) FIFRA, EPA and the Washington State Department of Agriculture requires chemical applicators “demonstrate practical knowledge of the principles and practices of pest control and safe use of pesticides”. This would include knowledge of:

- a) expected dispersion – (drift from targeted areas)
- b) dissipation and persistence rates of chemicals in water
- c) comprehending label instructions as to maximum gallons per surface acre per depth allowed
- d) expected movement of chemicals within a cove or unusual water body characteristic

3) Kathy Hamel, ECY is author/coordinator of the draft 2011 Permit for aquatic chemical coverage, and also co-author of the following publication: Parsons, Jenifer K.; Hamel, K. S.; Wierenga, R.; J. Aquat. Plant Manage 45: 2007 “The Impact of Diquat on Macrophytes and Water Quality in Battle Ground Lake, Washington.

Although Ms. Hamel is not a licensed chemical applicator she has shown knowledge of the persistence beyond label rates of diquat in water (mentioned in the above study) as well as the “expected drift” or “dispersion” throughout an entire cove (Haven Lake, 2008), although

aquatic chemicals were only directly applied to a portion of the cove area.

One example of BPJ (best professional judgement) being used in the 2011 draft permit, is the new restrictions for potable water usage from 3 to at least 10 days following diquat and other specific types of chemicals. While that addresses health concerns regarding measured persistence, it does nothing to address the sensitivity of the environment and aquatic animals found in the Haven Lake cove, a rare lacustrine wetland. ((NWI Lake Wooten Quadrangle – LIUBH)

Chemical applications to Lacustrine wetlands can potentially kill all of the emergent vegetation. CARO regulations define buffer requirements, and Ecology is obligated to weigh all the above information using BPJ. Pg 14, (General Permit) should clarify BPJ may preclude the usage of chemicals in wetland areas.

The impact of prolonged exposure to chemicals beyond label dispersion rates is not addressed on the manufacturer's label (guaranteeing safety). Aquatic chemicals persisting beyond a guaranteed dissipation rate of 3 days may be sublethal to aquatic species such as salmon, amphibian While not being outright mortal, the prolonged exposure of up to 10 days, in the example of diquat, (7 days beyond the 3 day guaranteed exposure listed on the manufacturer's label) could potentially impair the survival ability of salmon smolt, or "young of the year" for example.

These were concerns raised by the Skokomish Tribe habitat biologists, Confederated Tribes of the Chehalis Reservation Fish Biologists, as well as WDFW fish biologists and the Hood Canal Salmon Enhancement Group among other groups. Ecology also indicated "White Paper" findings addressing the unknown impacts of 'adjuvants' on salmon. There are also significant health concerns to humans with persistence, as well, if "sponsors" are not actually sampling the drinking water beyond the 10 day maximum waiting period now required by Ecology.

4) Permit language **should require** the usage of barriers, curtains or other means to protect property rights of "non sponsor" citizens, and to protect sensitive areas from chemical dispersion.

5) “Boating restrictions for powerboats” should be implemented in lake communities when chemical applications occur in “individual lot aquatic applications”, and /or partial lake or cove aquatic applications.

Kathy Hamel indicated at an Ecology workshop Oct. 4th that motorboat activity in areas of chemical applications will have an impact on dispersion (or drift) to other areas because of the action of the prop. Imposing a boating restriction which coincides with “dispersion rates” associated with drinking water, would be a logical way to contain excessive chemical movement outside of targeted areas, where it becomes a “pollutant” (pg 18 Fact Sheet).

Additional Specific Recommended Changes

A) Draft Economic Analysis recommendations:

Pg 6 III Overview; bottom paragraph:

“When developing an economic impact statement Ecology does not to include the following....” is an unclear sentence.

B) Draft Fact Sheet Recommendations:

Pg 42, paragraph #1, S4 Application of Products:

“It is the responsibility of the Permittee, to determine if there are any other applicable laws, requirements...”

Haven Lake’s chemical application violated **Mason County Codes**....again, in this permit coverage, it is the “honor system”. Shared responsibility of filling out the DMP and SEPA information with the appropriate county authority will ensure the Permittee understands all applicable laws, CAROS, etc.

100% of Haven Lake property owners have (legally binding) **CCNR’s** on title prohibiting interfering with the usage of the lake in any way. Only

a portion of Haven Lake property owners belong to the voluntary “sponsor” organization without authority over the water body, other than individuals. This information is appropriate for a SEPA or DMP to determine type of method to control native plants, one which will not violate these protections.

Pg 54, Appendix A: “Action Threshold: Densities that determine control action.

This permit is allowing the chemical applicator and the sponsor to determine plant densities, rather than professional plant botanists or wetland specialists who use a numerical system based in scientific methods, not “feelings”.

Pg ____ “The littoral zone is the part of the lake that supports plant growth”. This definition should be written the exact same way as the definition in the “Fact Sheet” which explains the Littoral zone as the part of the lake where plant growth occurs. On October 4, 2010 Kathy Hamel stated the definition of littoral zone specifically means where the plants are actually growing, not where they “might grow”. In 2008 Kelly McLain stated the littoral zone is the area plants could potentially grow, in other words the entire lake bed, substantially changing the treatment areas calculated which did not historically support plant life.

C) Draft Permit recommendations:

Pg 7, ii (3) Aquatic Nuisance Plant Control: What exactly constitutes High Usage?

The Haven Lake Cove was defined as “high use” in the permittee’s documents, although it is a lacustrine wetland, 5 mph speed limit, has no power boat traffic from October to April, and zero to little boat traffic in summer months except for very hot days and happy hour cruise times on weekends. The term is subjective but a “high use” label allows for 100% of eradication of plants in that area, according to permit language. Who decides and what specific criteria determine this?

Pg 7, ii(3), Aquatic Nuisance Plant Control:

Chemical applicators want to now be able to treat 100% of lakes between 50 and 500 acres over a 10 year period of two, 5 year permits – each permit being allowed up to 50% treatment.

This was never allowed and should not be allowed now. Lakes need some area “set aside” which always remains chemical free in order to preserve natural flora, fauna and ecosystems.

Pg. 18, D 4 General Application Restrictions:

This paragraph requiring Permittee’s to follow WDFW treatment windows to protect salmon, steelhead, etc....should also contain the following sentence: *WDFW reserves the right to deny chemical treatment in lakes when and if it deems necessary to protect species using BMJ and science, according to EPA regulations.* Similar “hunting and fishing closures” are mandated by WDFW.

“WDFW and NMFS are involved in EPA processes to protect listed species and designated critical habitat by consulting with EPA, issuing Biological Opinions or other ways, as necessary” (Fact Sheet Pg. 26 Endangered and Sensitive Species)

Pg. 31 B1, 2, 3, Records Retention:

Permittee’s should be required to continually update the Public Record at Ecology (of the DMP which includes wetland reports, surveys, plans, etc) as this will fulfill the requirement that it be available by “freedom of information act”.

Permittee’s who “roll over” or reapply for a second 5 year coverage using the original SEPA information should be required to retain all records associated with the original 2006 permit application form and materials. Any and all materials which were used as the basis for the initial and all subsequent permits should be retained for reference for the life of all subsequent permits based upon that original information submitted to Ecology.

Pg. 32 G4. Permit Coverage Revocation

“Cases where revocation of coverage may be required include....”
Remove the word ‘**may**’ and replace with “must”.

Pg. 38, G12. Requests to be Excluded from Coverage under a General Permit. This should not apply to “individual lot “spinoff” permits.

Pg. 39, G13. Transfer of Permit Coverage
This should include a requirement that the new permittee sign and certify he or she has read and understands all of the information in the SEPA or DMA. The “sponsor” must also agree to transfer.

Pg. 49 Appendix A Wetland:

Wetland Identification can be conducted by Professional Wetland Experts in Delineation using the all the standards required (including Ecology’s). If the current wetland delineation conducted by a professional using all the standards is the most recent and detailed available, these apply. CARO’s protect Wetland Resources not necessarily recognized by Ecology’s permitting process.

D) Draft DMP and SEPA recommendations:

II. Water Body Information:

Include the question following #22. List homes which have septic systems and whose domestic water source on legal documents names the lake. (such as is legally recognized in Mason County (per Mason Co. Environmental Health)

IX. Public Involvement:

DMP’s submitted by existing permittees must also undergo public review. Everyone should be completely equal and up to speed with each subsequent permit coverage (April 1, 2011)

E) Draft NOI recommendations:

VI Waterbody Information:

There should be more questions regarding river, lake wetlands. Haven Lake, for example is a lake, has wetlands and has WRIA 15.461 flowing into the lake, through the deep channel in the cove and through the main basin and out of the lake, eventually into the Tahuya River . The permittee, in 2008 treated all three, the lake, the river and three wetland areas.

XI. Sponsor Certification:

Individual lot “sponsor” must provide legal basis for “certification” of legal authority, such as real estate documentation of lakebed ownership, or legal research and documentation of such.

“Sponsors” must provide clear legal basis and documentation for “certification” of authority to treat lake areas.

Any group not currently a “legal entity” at all, or a “legal entity with authority to carry out the permitted activity”, cannot apply chemicals to that waterbody until legal status and authority is actually achieved. (and clearly documented, not “claimed”.)

F) “Neighbor Disputes” (Ecology’s term)

The Department of Ecology has adopted the stance of not wanting to become involved in “neighbor disputes”. (Oct. 4th workshop, Kathy Hamel) Ecology, must initially “rigorously evaluate”, legal qualifications of proposed “sponsors”, and “rigorously administer” logical legal matters which may arise due to the usage of aquatic chemicals which it is permitting, such as expected drift of chemicals onto private property. Ecology actually can create “neighbor disputes” by ignoring matters of legal authorization and by allowing drifting chemicals to damage private property. A permit to apply aquatic chemicals can be a permit to create disputes within a community without absolute legal certainty of authority of “sponsors”, and

agreement of citizens to be affected by drifting chemicals put into lake resources by others.

Thank you,
Monica Harle
October 15, 2010

Included are:

One comment document from Monica Harle and
Three attached documents titled:

- a) Haven Lake Original Ecology Order and revised SEPA 2006
- b) Haven Lake Renewal Application (2010)
- c) Dept. of Ecology Plant survey 2009