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October 14, 2010

Department of Ecology

Re: Comments to Proposed Amendments to Aquatic Permit

Greetings. The purpose of this letter is to provide comments about the proposed new permit scheme. I have represented a private individual in related matters for some time, and am familiar with the issues that have faced her and the lake where she lives. I have spent hundreds of hours investigating, researching and analyzing those issues, including the actions and positions of the Department. The following constitutes my opinions based on that work.

My primary conclusion is that the current proposals change past practices by addressing some of the concerns that have been raised by my client and others, but **essentially, they continue a system that is an abdication of the responsibilities of the Department to protect the environment, in many, many ways.**

Generally, the scheme is to have applicants fill out a new version of the application form. Then, without any concern for the answers to the questions of the form, except a brief check, the application is approved and then, as your staffer recently announced in a public meeting, it is stuffed in a drawer.

The application that I have been dealing with for my client is an excellent example. We have already provided the Department with a list of mistakes on the form, ranging from the misstatement that there are no other local laws that apply, to failing to identify critical plant and fish species correctly. The new application form will not prevent such mistakes if it is not carefully reviewed.

The process that is proposed fails to take into account such things as drift, which is well-known to the Department; wetlands issues; county codes; Tribal interests; and so on and on. Perhaps the biggest failure 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.

As I understand it, the Department will process applications from lake management districts, other special purpose districts, some homeowners' associations, and "others." This displays, in my opinion, an appalling ignorance of real property law as it applies. This is particularly unfortunate because the Department has been provided a detailed analysis of related concerns, and has chosen to ignore it. It has not only not provided any rebuttal, it has just failed to respond at all.

There are, generally, only two sources of the right to apply chemicals to a lake for any purpose. One is by statutory grant of right. An example is Lake Management Districts. The Department also identifies other special use districts, and I suppose those might be such things as irrigation districts. So we know that if there is a statutory right for an individual or other entity to apply chemicals, then that should suffice for the Department's purposes. It is, of course, very simple to prove that right; the permit application should come with a discussion of the source of the right to treat.

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 sends the Department 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 otherwise no legal right to control.**

I have several association clients that do in fact own their lake beds. 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.

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. I have never understood why the Department is so committed to avoiding that statutory scheme. 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.

Part of the application asks if there are any other codes or regulations that apply. **The Department knows, based on a formal opinion from the Mason County Prosecuting Attorney's Office, that yes, indeed, the Shoreline Management Plan, and Critical Area Resource Ordinances, do apply, and a permit process is required. The Department's process will not even question an applicant if the answer to the question on the application is that no, there are no such codes or regulations that apply.** Every county has Shoreline Management Plans and Critical Area Resource Ordinances; this should be a primary concern in the review of the application.

It might take two days of staff time to call all County prosecutors and ask if there are any codes or regulations in that County that would apply, perhaps referring them to the opinion from Mason County for clarification of the context. It might take another couple of days to collect them in a computer folder. Then it would be a matter of about 15 seconds for Department staff to check, for each application.

Almost as egregious is the complete failure of the Department to provide for a system to enforce application permit conditions, or enforce against applications that were procured through either outright fraud or perhaps negligent misrepresentations. The information we have previously provided the Department takes apart a particular permit application item by item, showing a shocking lack of correct information, and no apparent authority for the applicant to treat. The Department's response was that it would take no action.

The net result of the Department's new proposal is the same as the net result of the Department's old system, with very few exceptions. Applications will be submitted by commercial applicators on behalf of their clients. The applications will not be reviewed except cursorily. They will be put in a drawer. No thought will ever be given to the possibility of revoking an approved application, no matter how egregious the issues.

As a general proposition, this is nothing but the farmer letting the fox guard the chicken house.

Problem aquatic plants can be noxious, invasive, native, non-native, and/or nuisance plants. Each presents a different challenge, which has to be considered within a context. That context needs to start with an evaluation of, who wants to treat, and do they have a right to do so? Many other aspects need to be considered: scope of the problem; alternates to chemical treatment; what kinds of plants are targeted; wetlands; County codes and regulations; consequences to other plant, bird, fish and animal life, including in particular salmon; drift; and so on. There is no reason to think that this approach would unduly burden the process; rather, abdicating responsibility for undertaking this process is a direct and dangerous departure from the mission of the Department.

An area of my client's lake that was treated chemically two years ago was, before treatment, part of one of the healthiest lakes in the state within populated areas. It had healthy, co-existing and co-dependent plant, animal, fish and bird species. **It is now a dead zone.** If you don't believe me, go take a look.

Sincerely,

Robert D. Wilson-Hoss
C: client