

**Concerns for Misrepresentations and/or Failures to Disclose in
Permit Application,
Aquatic Pesticide General Permit #4140, dated October 9, 2006**

**Applicant, Northwest Aquatic Eco-Systems on behalf of Haven Lake
Property Owners' Association**

The following are concerns of certain Haven Lake residents about the permit that was granted to the Haven Lake Property Owners' Association as referenced above. It is a request to investigate these as concerns for what appear to be facts and the controlling law, and not a series of allegations. The Department of Ecology has the expertise and experience to weigh these concerns in light of the rules and regulations that apply. The Department is requested to do so in light of WAC 173-226-240(1)(b).

WAC 173-226-240 (Revocation of coverage under a general permit) provides that the director may terminate coverage under a general permit for cause, which can include, at (1)(b), obtaining coverage under a general permit by misrepresentation or failure to disclose fully all relevant facts. The general permit referenced above contains several misstatements that potentially constitute cause for revocation. The issues raised in this summary have all been previously addressed to Department of Ecology staff. DOE staff has directly rejected the possibility of revocation of the permit.

1. Permit Application

By reference to the numbered section of the Environmental checklist, attached to the permit application itself, these concerns include:

A. Background

10. List any governmental approvals or permits that will be needed for your proposal, if known.

Answer: NPDES permit.

Concern: In addition to the NPDES permit, the proposal should have sought required Mason County permits, including a Substantial Development Permit and a Shorelines Conditional Use Permit, and a Habitat Management

Plan and Mason Environmental Permit that address the Fish & Wildlife and Wetlands Resource Ordinance concerns. It has been reported that a representative of DOE said that she “researched with Mason County whether there is a requirement to have permits(s) from the County for chemical application and they found nothing.” It is suggested that this is perhaps a misunderstanding, as this would not be the response from the Mason County Planning Department. The existence of the prohibitions in the Fish & Wildlife and Wetlands critical area resource ordinances can be discovered quickly by typing “chemical” into their search boxes. All of the Mason County requirements were in place at the time of the application in 2008.

B. Environmental Elements

3. Water, a. Surface

1. Is there any surface water body on or in the immediate vicinity of the site...? If yes, describe type and provide names. If appropriate, state what stream or river it flows into.

Answer: Haven Lake, inlet waters from Wooten Lake unnamed outlet to the Tahuya River.

Concern: the site is also ringed with wetlands around Haven Lake, which require particular protection, and which contain surface water. In addition, there is an inlet stream and an outlet stream, both WRIA 15.461.

2. Will the project require any work over, in, or adjacent to (within 200 feet) the described waters? If yes, please describe and attach available plans.

Answer: Work will consist of aquatic weed and algae control activities taking place within the lake proper.

Concern: This ignores the wetlands; diquat was sprayed right up to the streams and into wetland areas.

4. Plants, a, Check or circle types of vegetation found on the site:

Wet soil plants: shoreline emergents, cattails, iris, Nymphaea, brasenia.

Concern: Nymphaea and brasenia are noxious aquatic plants, but they are not present at Haven Lake or in the wetlands around it.

Plants, c, List threatened or endangered species know to be on or near the site.

Answer: Salmonids are present in the Tahuya River. There are no salmonids in Haven Lake, outset structure does not allow entry into the lake.

Concern: Existing DOE files clearly showed presence of salmonids; the applicator received this information as well in 2001. DOE staff actually amended the application to include one species. It is now known that ESA steelhead, chum, coho, and sea run cutthroat trout are present in the lake.

5. Animals, a. Birds and animals which have been observed on or near the site or are known to be on or near the site:

Concern: should also list waterfowl, turtles, anadonta.

Animals, b, List any threatened or endangered species known to be on or near the site.

Concern: should list ESA steelhead, chum, coho, sea run cutthroat trout.

Animals, c, Is the site part of a migration route?

Answer: No.

Concern: should list waterfowl.

Animals, d, Proposed measures to preserve or enhance wildlife, if any:

Answer: State agencies have been contacted. Selective plant control will be utilized.

Concern: Diquat dibromide is a nonselective contact pesticide that presents an absolute danger to non-target plant species. Contacts with state agencies are not specified.

7. Environmental Health, a, Are there any environmental health hazards... that could occur as a result of this proposal? If so, describe.

Answer: Registered aquatic herbicides will be used. Exposure to chemicals may pose a health hazard to individuals that may be allergic to them.

Concern: First, swimming is prohibited for a specified time period after application. Second, several homes on the lake have permits to withdraw water from the lake for drinking water and other household uses. They were not allowed to do so for a specified period of time after application. This concern was nowhere addressed in the application, and the affected owners were not given a reasonable opportunity to have either notice, or an alternate supply arranged for.

8. Land and Shoreline Use, a, What is the current use of the site and adjacent properties?

Answer: Recreational lake with residential shoreline homes.

Concern: Current uses include salmon migration and rearing; surface water household and irrigation usage; recreation; waterfowl migration; wetlands.

Land and Shoreline Use, g, If applicable, what is the current Master Shoreline Program designation of this site?

Answer: N/A.

Concern: The current Master Shoreline Program designation for this site is found in the Mason County Shorelines Master Program Use Classifications, at MCC 17.50; it is rural residential. It is very easy to locate on the County's website.

Land and Shoreline Use, h, has any part of the site been classified as an "environmentally sensitive" area? If so, specify.

Answer: No.

Concern: Haven Lake is subject to the Mason County Shoreline Master Program; the wetlands themselves are, in addition, sensitive. There are two Mason County Critical Area Resource Ordinances that also apply, Fish & Wildlife and Wetlands. These all identify Haven Lake and the surrounding wetlands as sensitive areas.

12. Recreation, b, Would the proposed project displace any existing recreational uses? If so, describe.

Answer: No, recreational opportunities would be increased.

Concern: Any use of the lake involving contact with the lake water was subject to restrictions after application. No swimming, for example, was allowed.

3. Discussion

Generally, these concerns fall into several categories:

1. No attempt was made to comply with Mason County regulations, derived from three separate regulatory schemes. The very existence of these regulations was denied on the application form.
2. No attempt was made to address the wetlands that have been described by Wiltermood and Associates.
3. No attempt was made to address the interference with drinking water and

household use water withdrawal rights.

4. Several species of salmonids are present, which are of very serious concern to the Washington State Department of Fish and Wildlife and private groups such as the Hood Canal Salmon Enhancement Group.

5. Two noxious plant species are claimed to be present when in fact they are not.

6. The Environmental Checklist appears to contain a number of minimizations and other inaccuracies that tend to make the application appear more benign. It also appears to provide cursory responses where proper investigation would produce more substantive information.

The Application itself concludes with two certifications. First is that of the applicator:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision. The information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

This is signed by the applicator.

Next is the certification of the property owner:

I certify that I have hired the contractor listed above to perform product applications.

This is signed by Matthew Finnegan, President, Haven Lake Property Owners Association.

4. Other Issues

a. Authority of Haven Lake Property Owners' Association.

First, Haven Lake is non-navigable. This is the only possible conclusion based on Washington case law as it applies to the history of the uses of the lake. The Department of Ecology repeatedly referred to the lake as non-navigable, and not under the ownership of the State, until an issue arose, when it took a position deferring to a possible future ruling from a court with jurisdiction. A theory was explored that one of the mesne conveyances included the reservation of the lake bed, but it appears that such was not the case; therefore, the bed of the lake is owned by the adjacent uplands owners in generally pie-shaped slices to the middle of the lake (or, at least in some places, to a common thread). The aquatic vegetation that was treated was growing on these privately owned lake beds. Professor Stoebuck agrees that these were private property, and subject to private property rights, much like weeds on lawns that grow into the air are private property.

And if Haven Lake is navigable, and the State owns the bed of the lake, the State's interests in protecting the lake and wetlands environment are necessarily enhanced.

As the supporting documentation shows, Haven Lake Property Owners Association has no legal property right in Haven Lake, or any part of it, except as the owner of one lot. In the beginning, DOE staff will confirm, the Department was told that this association had the support of the majority of the "owners." It is not known if this meant the lake front owners, or all of the owners in the plat, who have riparian rights through the covenant language that applies. Regardless, it is plain now that there never was any majority or anything close to it, or even any process to determine a majority.

With no support in law, the property owners' association simply applied for a permit. What happened, essentially, was that a relatively few property owners decided they wanted to treat the lake chemically, and they were guided through the process by the applicator they hired. In fact, they did not even notify most of the owners with rights to the lake. DOE, through Kathy Hamel, said: "We have assumed when issuing coverages that homeowners associations represent the entire lake group, or in some instances, they may represent a portion of a larger lake (Lake Washington for example.) We have never had an instance, until now, where some of the homeowners claim that the homeowners association does not represent the majority. Based on information that I received from Rod Thysell, our regional inspector who observed the treatment yesterday, we believe that the Haven Lake

Homeowners Association does represent the majority of the homeowners.” Kathy Hamel, email to Jay Manning, July 17, 2008.

Rod Thysell spent part of the previous day inspecting in the company of one of the strongest proponents of chemical treatment. No one has reported that he sought or received any information from any other sources about the authority of the association.

Also, Kelly Susewind, Water Quality Program Manager, said in a letter of August 18, 2008 to Robin and Michael Birkland, “At this time we have no legal basis to require lake sponsors such as the Haven Lake HOA to prove that they represent the majority of the lake front residents or other affected parties to a lake treatment before we issue permit coverage. However, it is our understanding that the majority of the Haven Lake front residents support the lake treatment. Although it is not a permit requirement, because of the controversy over the lake treatment, the Haven Lake HOA is in the process of collecting signatures to document that the majority of lake residents are in support of the herbicide treatment.”

The Haven Lake Property Owners Association did try to collect signatures. The final total is unknown, but believed to be fewer than 70. This is from 330 polling mailings that were sent out. The actual number of owners with riparian rights is about 425. Approval of the diquat application therefore is at about 16%. It should be noted that the polling took place before the Monica Harle draft IAVMP was sent to the owners with rights; many were favorably impressed with the research and tentative conclusions in that draft, to the effect that there were other far more satisfactory responses to the minor vegetation issues than diquat.

The story of the actual votes taken by the Haven Lake Property Owners association is instructive. In September of 2006, when the application was submitted, no one knew to vote on it, there was no notice, and the vote was held among whoever happened to be motivated to attend the meeting, usually about 40 people. This was the vote authorizing the application. Then in May, 2008, prior to that summer’s application of diquat, people who attended a meeting of the “HOA” were told that chemicals would be applied within 10 days. Objections were raised that members were told that they would be able to vote on the application of the chemicals; the board then just held a vote at that time without notice of any kind. This was the vote authorizing spraying.

It is surprising that there is no process within the permitting scheme to determine if the signature on the permit application has anything to do with anyone with any right to treat an entire lake or sections of it.

All of this could easily be avoided. There is a Washington State statutory scheme that provides for the formation of a Lake Management District, and a Lake Management Plan, that appears to be directly intended to avoid the issues around authority to treat. If the process is followed, then by operation of law, the Lake Management Plan controls. A satisfactory response to this argument has not been provided. There are at least two such lake management districts in Mason County already, which were formed in part at least because of these issues about authority.

b. Wetlands.

Wiltermood Associations, Inc. has prepared a Wetland Analysis Report for Haven Lake, dated August 12, 2009. This is a comprehensive, balanced evaluation of the wetlands in and around Haven Lake. “The focus of this report is to identify and categorize the largest three wetlands in order to provide documentation about the wetlands so that they can be assessed correctly prior to any further herbicide applications to the aquatic vegetation in the lake.”

The wetlands were categorized according to the EOE Washington State Wetlands Identification and Delineation Manual. Also, the National Wetlands Inventory identifies Haven and Wooten Lakes as a lacustrine limnetic unconsolidated bottom permanently flooded wetlands; according to the author, all of the Haven Lake wetlands should be considered to be classified as “lacustrine limnetic palustrine forested scrub shrub emergent aquatic bed unconsolidated bed permanently flooded saturated and seasonally flooded wetlands.”

Conclusions include:

The proposed application of herbicide could potentially kill all of the emergent vegetation found within the lacustrine wetland areas. If the vegetation is destroyed then the decaying vegetation could cause dissolved oxygen levels in the lake to drop and potentially suffocate fish within the lake. The application of the herbicide is also known to be toxic to invertebrates which are a significant food source for salmonids within the lake and the stream outlet that flows into the Tahuya River.

c. Permit conditions.

If the position of the Department is true, then there are almost no substantive permit conditions whatsoever, except for the revocation causes set out at WAC 173-226-240. This does not seem consistent with the mission of the Department as expressed by law. In fact, past and current Haven Lake issues demonstrate what some might conclude are lost opportunities within the DOE permitting process to fulfill its mission.

The only permit conditions that would seem to be practically useful at this time to protect the lake environment are the three Mason County Codes that restrict the use of diquat in lakes and other wetlands. Of course, the Haven Lake DOE permit is conditioned on compliance with these regulations.

d. Future chemical spraying.

The Haven Lake Property Owners' Association has undergone a change of leadership. This year, to date, it apparently plans to not spray chemicals for aquatic vegetation control, but to use other means, such as hand-pulling. Already a neighborhood event has resulted in many weeds pulled, and much good-spirited community-building. However, it is believed that a handful of owners committed to the use of chemicals is attempting to use the current permit to, outside of the authority of the owners' association, continue to spray diquat on Haven Lake. It is not known whether they intend to just treat the waters in front of their own properties, or if they intend to treat the entire lake, or at least some portion of it that extends beyond their ownerships.

The Department of Ecology has been consulted about this possibility, and responded as follows:

Both the applicator and the HOA sign the application for permit coverage. But the signature from the home owners association representative is only to certify that the association hired the applicator. The signature block states "I certify that I have hired the contractor listed above to perform product applications."

The Haven Lake permit coverage is only issued to the applicator, not to the applicator and the home owners association. Therefore, the applicator may

operate under the permit coverage for multiple groups on the same lake as long as permit conditions are followed. If a new homeowners association on Haven Lake wanted to hire the applicator (who currently has coverage), at most Ecology would have the new association sign the permit application to certify that they have also hired the applicator to do work.

Even more surprising to ordinary citizens is the position now taken by DOE. The question has been asked, what will happen if someone other than the Haven Lake Property Owners' Association wants to spray diquat under the current permit? This could take two forms: a request to spray just around one property; or a request to spray a general area. DOE says that it is the applicator who holds the permit: "the applicator may operate under the permit coverage for multiple groups on the same lake as long as permit conditions are followed. If a new homeowners association on Haven Lake wanted to hire the applicator (who currently has coverage), at most Ecology would have the new association sign the permit application to certify that they have also hired the applicator to do work." Email, August 5, 2009, Jon Jennings to Monica Harle.

In another email, August 14, 2009, to Monica Harle, Jennings says, "Since the applicator holds the permit coverage, they may, but do not have to terminate permit coverage at the request of the sponsor.... It is not a permit requirement that a homeowners association be a sponsor. Individual homeowners may also be sponsors. When an application is received the sponsor only certifies... that he or she has hired the applicator to apply the product. Ecology does not have any role in determining what is or is not legally considered a homeowners association."

Please note that, first, there is no suggestion that a majority, or any other indication of authority, is any longer a matter of any concern to the Department. Also, at this time, there is apparently no recognition by the Department that any group of owners must have any authority whatsoever to do anything permissible under the permit, even if the current association, that hired the applicator, does not want to continue to apply diquat.

We do not know if the individuals intend to just treat the water in front of their properties, or a larger area. Either way, Mason County codes apply.

From Jon Jennings, then, we learn:

- DOE will not consider whether an original or subsequent applicant has any authority over any lake. It just needs someone to sign, saying he, she or an association, has hired an approved applicator; and
- Once a permit is issued, to an applicator, then that applicator can ignore the first signer, and proceed with any other signer.

e. Information available to DOE and applicator at time of permit.

DOE had available to it information that was apparently not considered when it approved the initial permit, and was not provided to it by the applicator. First, the entire area is a wetlands, as clearly shown on the National Wetland Inventory Map, which was the same at the time of the application as it is now, as to Haven Lake. On March 1, 2006, in its “Aquatic Plant and Algae Management General Permit Fact Sheet,” in response to questions and public comment about the general permit, the Department said, “As part of the application process, Ecology will identify whether or not a wetland site (identified by a state, local or federal authority) is included in a treatment area for control projects.” Response, comment 134. Further, “Ecology will search a variety of databases while processing the applications, and there will be no changes to coverages after they are issued.” Response, comment 137.

Apparently, no attempt was made by DOE to determine if wetlands were implicated.

Haven Lake was also identified clearly at that time as a wetland by Mason County.

The Department, and the applicator, should also have been aware of the presence of salmon in the lake. On April 12, 2009, Marty Ereth, Skokomish tribal Fisheries Biologist, told Rod Thompson of the Department’s Water Quality Programs by letter of the presence of coho and sea-run cutthroat trout. On May 2, 2001, the Hood Canal Salmon Enhancement Group also informed the Department by letter of the presence of coho and cutthroat, including 2,185 cohos caught in their traps.

The Department also had been informed of the existence of two primary streams, which are one inlet and one outlet, both WRIA 15.461, from the Ereth letter.

Both letters were submitted in response to Allied Aquatics' 2001 permit application, and were, assumedly, given to the applicator at that time (see cc list at bottom of Ereth letter).

f. Drift. Another fact that was known to the Department and the applicator at the time of the application was that the diquat would drift away from areas where it was applied. Prior to the application, a request was made to Mason County Superior Court to prevent the planned spraying. Both the Department and the applicator explained to the Petitioner that there was an "opt out" program that allowed an owner to opt out of application in front of his or her lot; this is the argument, made by the applicator, that convinced the Superior Court to not grant the preliminary injunction: there was no danger of immediate harm to the owners who opted out because their ownership would not be affected.

Subsequently, it became clear that there was no formal "opt out" program, and not only that, such an attempt to protect a particular part of the lake would be completely useless due to the tendency of the chemical diquat to drift with currents. In fact, the highest concentration of diquat was discovered directly within one of the "opt out" areas, eight days after application, a concentration far in excess of what it was supposed to be anywhere.

Kathy Hamel of the Department published an article in 2007 in a professional journal, "The Impact of Diquat on Macrophytes and Water Quality in Battle Ground Lake, Washington," that specifically recognizes drift, reporting that the highest concentration of diquat were shown in non-treatment areas of that lake, and this is consistent with her experience. At no time during the discussions about opting out did she ever mention this phenomenon.

g. Other.

There are many other concerns. For example, there was an initial SEPA checklist, and then the Department told the applicant/applicator to "update the SEPA checklist for Haven Lake ASAP. In needs to reflect timing of July 1, 2008-April 2011. It should also be updated to reflect the coho timing window of July

16th-September 30th for diquat.” A second checklist was filed, but it is unknown whether there was a public comment period for that version. It is not clear to the layperson whether there is actually a valid permit in place now, or not. The original checklist only said, May 1, 2007 through October, 2007. And as to the general approach of the Department, please refer to an email from Kathy Hamel to the applicator on July 7, 2007, that begins with, “Hi Doug. You are correct in that the general public really doesn’t have a clue about what a general permit is all about.”

The attention of the Department of Ecology to these concerns is appreciated.