

AQUATIC NOXIOUS WEED CONTROL GENERAL PERMIT

**FACT SHEET
APPENDIX A – RESPONSE TO COMMENTS**

National Pollutant Discharge Elimination System (NPDES) and
State Waste Discharge General Permit

January 16, 2008

Introduction

The Department of Ecology (Ecology) published the draft Aquatic Noxious Weed Control General Permit on October 3, 2007 for public comment. The public comment period ended at 5:00pm on Wednesday, November 14, 2007. During the comment period, Ecology conducted two public hearings to provide background on the permit and take oral testimony. Ecology also took public comment via letter and email.

Ecology considered all the comments in preparing the final permit. This Response to Comments documents Ecology's response to each commenter. The document is divided into two sections: Written Comments, and Testimony Comments. This document becomes part of the permanent administrative record of issuance of the Aquatic Noxious Weed Control General Permit.

Ecology received written comments on the draft permit from the following individuals or organizations:

1. United States Department of Fish and Wildlife
2. Clallam County Noxious Weed Control Board
3. King County Noxious Weed Control Board
4. Washington State Department of Agriculture
5. Washington State Department of Transportation
6. Laura Pond, private citizen

Ecology received oral testimony from the following individuals at the public hearings; a transcript is available from Ecology upon request.

November 5 Hearing in Lacey, Washington

1. Fritzi Cohen, Moby Dick Hotel and Oyster Farm
2. Keith Stavrum, Moby Dick Hotel and Oyster Farm

Comments

Written Comments on the Draft Permit

Commenter #6 requests that Ecology issue this permit each year rather than once every five years.

Response: EPA's rules state that delegated state, such as Washington issue National Pollutant Discharge Elimination System (NPDES) permits for a period of five years. Ecology's Aquatic Pesticide Program covers

seven permits conducting hundreds of projects around the state. Ecology issues general permits such as this one for five years because of both the permit administration workload as well as the resources spent writing these permits.

Commenter #1 requested that Ecology add a statement clarifying that this permit does not cover people under the Endangered Species Act or the Magnuson-Stevens Act (both federal regulations). The commenter suggests the following sentence be added: *“This Permit does not provide the permittee coverage under section 7 of the Endangered Species Act of 1973 (both U.S. Fish and Wildlife Service and National Marine Fisheries Service), as amended (16 U.S.C. 1531 et seq.) and the Magnuson-Stevens Act (Essential Fish Habitat (EFH) under NMFS), as amended.”*

Response: Ecology notes this comment. However, statements of other pertinent statutes not administered by Ecology do not belong in the permit.

Commenter #1 requests that Ecology add a statement to the permit requiring that Ecology be sent a copy of the Biological Assessment (BA) for each project, where a BA was required. The sentence would read *“If there is a federal nexus and a Biological Assessment (BA) is needed, then please provide WADOE with a copy of the BA.”*

Response: Ecology has other means to obtain BA’s and need not incorporate this language into the permit.

Commenter #2 requests that Ecology clarify that the Marine Emergent Control sections of the permit identify the need to sometimes treat along marine shorelines for non-marine species, such as knotweed. They are unsure which section of the permit this type of activity might fall under.

Response: Ecology has clarified this by adding language to the section referring to other wet areas. Because this is not a true tideland application, but rather a potential overspray issue, Ecology has determined that the proper sections of the permit to follow would be the “Freshwater Emergent Weed control” in other wet areas.

Commenter #2 requests that all references to noxious weeds be followed by a reference to the state-listed quarantine weeds, since the permit covers both plant lists. This is left out in Section 4.C of the draft permit.

Response: Ecology agrees and has added the requested language to S4.C.

Commenter #2 wants to know if there are notification requirements for undeveloped land adjacent to publicly accessible areas. (S5.A.2.b.)

Response: The permit does not require applicators to notify adjacent undeveloped landowners of freshwater treatments in advance of treatment because the likelihood of impacts is low.

Commenter #2 wonders if there is a specific list of dyes that should be provided to permittees.

Response: Ecology does not maintain a list of approved dyes. The dye chosen should be specifically labeled for use as a spray or marker dye. Spray marker dyes are not toxic. This does not include dyes that are also labeled as pesticides themselves.

Commenter #2 has the following concerns with S5.C.2.c. Posting is required at any boat launch on the water body that is within ½ mile of any treatment. What rationale is being used to increase the posting distance to ½ mile required vs. the ¼ mile required for notification? Only ¼ mile should be required, and for sites on a river, stream, or other water body with one-directional flow, this requirement should only apply downstream. What rationale is there to require upstream posting when the herbicide could only go downstream? If there is concern that a citizen could put in at one stretch of river (upstream), and take out at a site downstream? There is no possibility that they could inadvertently be exposed in the water, because the flow is all downstream. A boater would have to pass or take out at a posted site downstream of treatment. Further, these requirements are in a section for treatments to emergent vegetation along a shoreline, or inadvertent overspray, not direct treatments to water. The risk to a boater is virtually non-existent. This requirement should be reduced to ¼ mile, and only downstream on river, streams or one-directional flow water bodies.

Response: Ecology is concerned with notification to people recreating in areas within 1/2 mile of the treatment site. The ½ mile is an established distance used in the Aquatic Plant and Algae Management NPDES General Permit. Even on a one-directional flow water body, they could end up in the treated area, including pulling up on shore into plants that were just treated. This language remains unchanged.

Commenter #2 has the following concerns about S5.C.3.c. This section states that signs must remain in place for 48 hrs for glyphosate treatments, but apparently only as long as there are water restrictions for other herbicides. Except for glyphosate, this is inconsistent with the posting templates provided in the permit; they all say for two days after treatment. Posting for glyphosate should only have to be for as long as there are water restrictions (there are none) or should equal those on land, which is 24 hrs. (A further comment related to this issue will be given about the templates). What is the reason for requiring postings of glyphosate treatments for 48 hours? Is this requirement based on an estimate of the time it may take for glyphosate to be bound up in water? Please provide further rationale for this requirement. Or please change the requirement to as long as there are water restrictions plus 24 hrs.

Response: Ecology agrees with the commenter's statement, and has changed the requirement to show that posting is required as long as there are recreation restrictions, plus 24 hours.

Commenter #2 has concerns with S5.C.3f.iii. "The Permittee shall post both the property where the treatment occurs and the adjacent properties." What if an adjacent property owner is not willing to allow a posting? Must an applicator document this unwillingness? Why not simply notify the landowner? What is the rationale for this posting requirement?

Response: In the event that a property owner is not willing to have their property posted, the applicator should document that lack of consent. The rationale for this posting requirement is that this section of the permit refers to projects where a pesticide is applied directly to the water. The pesticide moves when it is applied to the water, and many waterfront property owners may recreate off their property and could be exposed to the treatment. The following language has been added to the permit "The Permittee shall keep written documentation if a property owner refuses to allow posting on their property."

Commenter #1 states that there is a grammatical error in S5.C.3.g.i. The sentence that includes "...and any other area where that the public are intended to access the water" should be corrected to read "...and any other area where the public is intended to access the water."

Response: Ecology agrees and has made this change to S5.C.3.g.i.

Commenter #2 requests that S5.C.3.g.vii. posting distance be changed from 1½ miles to ¼ mile.

Response: Ecology disagrees and S5.C.3.g.vii remains the same. Because boats have the ability to travel great distances, it is important that all boat launches within 1 ½ miles be posted for safety.

Commenter #2 requests that the posting on water requirement for buoys be removed.

Response: The buoy requirement remains in the permit because it is important to delineate the treated area when pesticides are put directly into the water and the area contains a publicly accessible area.

Template comments

Commenter #2 requests that the templates be changed to represent the possibility that only shoreline vegetation was treated. They would also like the amount of time the posting is required to remain changed to as long as there are water restrictions plus 24 hrs.

Response: Ecology agrees and has modified the template language to reflect this. The person posting the signs must now circle either “near” or “to” as it refers to the location of the herbicide application in relation to surface water.

Commenter #2 requests that the need to post maps with treatment signage be removed from the permit. (S5)

Response: Ecology disagrees and the requirement to post maps at public access areas remains in the permit. This condition only applies to work occurring in publicly accessible areas and in the water, not along the shoreline. It is important for people recreating at public access areas to know where they are in relation to the treatment. This allows them to more accurately assess the risks of swimming or other water activities.

Commenter #3 noticed inconsistencies in the language in S1.B.2-4. Please make them consistent.

Response: Ecology has modified the language as suggested.

Commenter #3 is concerned that the language in S5.C.2.c. only includes language about boat launches, when there are also public accessible parks and swim beaches on some rivers.

Response: Ecology understands your concern, but S5.C.2.c only applies to treatments already occurring within a publicly accessible area. This includes swim beaches and parks. This section refers to the posting of boat launches within ½ mile of this area, because they may pull up at a publicly accessible area somewhere downstream. The public areas themselves already require posting.

Commenter #3 believes that the language in S5.C.3.h.iii. should be changed to state “...need not use buoys.”

Response: Ecology agrees and has made this change.

Commenter #4 suggested that the statement in S1.C that says “*The general permit covers the control of noxious and quarantine list weeds throughout the state of Washington*” be changed to read “*The general permit covers the activities listed in S1.A throughout the state of Washington.*”

Response: Ecology agrees and has changed the language in S1.C.

Commenter #4 suggests that the language in S2 be changed to read “*This permit covers activities outlined in S1.A that are being performed by government entities, private applicators, or non-governmental organizations. Washington State government entities may, in turn, contract with other government entities, non-governmental entities or private individuals for the chemical treatment of noxious or quarantine list weeds.*”

Contractors shall agree to carry out actual treatments in a manner that complies with the permit. Notification, monitoring, reporting, documentation, plans and other administrative issues can be carried out by either the permittee or contractor per individual agreements.”

Response: Ecology agrees with the commenter and has changed the language in S2 to reflect the comments.

Commenter #4 requests that Ecology change the sentence under S4.A.1 to read *“Beginning on the effective date of this permit and until this permit is replaced or revoked...”*

Response: Ecology agrees and has changed the sentence to reflect the comments.

Commenter #4 requests that Ecology include categorical exclusions in this section based on the monitoring results obtained under the current NPDES permit similar to those found in S6.B.5.

Response: Ecology disagrees and retains the right to monitor for imazapyr and glyphosate under the Spartina program.

Commenter #5 requests that Ecology define the difference between “direct” and “indirect” applications.

Response: Ecology agrees and added these definitions to Appendix A – Definitions and Acronyms.

Commenter #5 wonders why S1.B.1 only covers detention and not retention ponds.

Response: Ecology has added retention ponds to this section and defined this in Appendix A – Definitions and Acronyms.

Commenter #5 suggests that S1.B.1 and S1.B.2 could be combined. What is the difference between “excluded” and “does not require coverage”?

Response: Ecology believes that S1.B.1 and S1.B.2 differ. S1.B.1 refers to a type of project that already has permit coverage under another permit – so long as the permit includes vegetation management, the potential applicant need not apply for coverage under this permit. S1.B.2 refers to types of projects that are extremely small in nature, and Ecology believes will have little to no impact on surface waters of the state. The exemptions in S1.B.2 do not necessarily exclude a permittee from needing coverage under some other type of NPDES permit.

Commenter #5 wants it made clear that “or ponds” in S1.A is referring to man-made ponds for wastewater and stormwater treatment.

Response: Ecology has added a statement to S1.A clarifying that this condition applies to any pond that is man-made or natural. There are a number of situations in which conditions in S1.B.1 or S1.B.2. will not apply to a man-made pond. Many ponds are not covered under other permits, they cannot be kept from draining for two weeks following treatment, or they are greater than five acres in size. These other sites are not exempted from coverage under this permit.

Commenter #5 notes that the WAC reference in S3.A.1 is wrong – it should be WAC 173-201A-410, not 110.

Response: Ecology agrees and has made the change.

Commenter #5 requests clarification of S3.A.4 which states that “limits the short-term water quality mod to hours, days, or weeks”; but there are no “limits” on the applications. What is the purpose of this statement?

Response: The short-term modification language refers to the amount of time the statute allows a pesticide to remain in the water column before it must comply with the Washington State surface water quality standards. None of the pesticides used under this permit would require modification of the water quality standards for longer than hours, days, or weeks of time before they degrade.

Commenter #5 would like “state” added in front of “listed noxious weeds” in S4.A.2.

Response: Ecology agrees and has added this language to S4.A.2.

Commenter #5 states that the two line web link to approved adjuvants in S4.B does not work.

Response: Ecology corrected the web address in the permit.

Commenter #5 states that S4.D.2 be rewritten to allow for pesticide applications on the day right before or after a holiday.

Response: Ecology concurs and to address this has exempted roadside or enclosed wetland treatments from this permit condition.

Commenter #5 would like the footnote for Table 1 to be amended to reflect the fact that these are not all of WDFW’s official timing windows for in-water work.

Response: Ecology has added language clarifying that these timing windows only apply under this permit for the sole protection of salmonids when pesticides are being applied near or into water. While WDFW has other timing windows, no other timing windows apply here.

Commenter #5 requests that S5.C.2.f be reworded to allow for signs to be removed after 48 hours or at the end of the treatment season.

Response: Ecology agrees and added this language to S5.C.2.f.

Commenter #5 requests that Ecology provide the phone number for notification in S8.F.2.

Response: Ecology added the phone number for the aquatic pesticide program manager at Headquarters to S8.F.2.

Commenter #5 requests that Ecology provide the phone number for notification in S9.B.

Response: Ecology provided a link to the spill response information for each region in S9.B of the permit.

Commenter #5 requests that Ecology clarify whether or not a permit can be modified to add a new pesticide at the conclusion of the public comment period mentioned in S10.C.1.a.

Response: Ecology added language making it clear that the permit can be modified after the public comment period and after Ecology approval of a new herbicide.

Oral Testimony

Testimony From Public Hearing in Lacey, Washington

Keith Stavrum, Moby Dick Hotel and Oyster Farm.

On the issuing of the permit, I think that we should issue it yearly. I believe that in doing so I'm founding on the fact that we are testing a lot of our oysters, and soils and so on and substrates and water quality at the Moby Dick at a great burden to ourselves. With this, this information we'll be coming back and if there is damage to our oyster beds or if there is something wrong with what you are spraying or doing we would like to be able to say hold on a second you have to do something different. For that reason I would like a one year issuing limit on the permit. So if we do find that hey this is getting into our water supply or this is killing all the oysters or it's killing all the natural set oysters, but not our triple A's or whatever. We need to really watch to this because the amounts and the mixtures don't match with what seems to supposedly have gone on.

Response: EPA's rules state that delegated state, such as Washington issue National Pollutant Discharge Elimination System (NPDES) permits for a period of five years. Ecology's Aquatic Pesticide Program covers seven permits conducting hundreds of projects around the state. Ecology issues general permits such as this one for five years because of both the permit administration workload as well as the resources spent writing these permits. Ecology has the authority to require monitoring each year under the permit. Ecology can also revoke permit coverage if it finds that herbicide treatments are causing undue harm to non-target organisms.

Let me add this because it just I noticed that Dick Sheldon sprayed up by Ledbetter Point and when he did he posted a little yellow sign that said "we are spraying Spartina grass but as soon as we're done spraying, you can eat all the fish and all the crab that you want out of the bay." That's what the sign says, it says nothing else. I don't believe that that falls into the same category of warnings that should be posted at a boat launches and so on. Which by the way weren't posted in Nahcotta either. So there is a lot of stuff that is missing here and with the simple things of warning the public missing I'm not that comfortable with everybody thinking hey we can just do this and go on with it.

Response: Ecology has developed required templates for signage under this new permit. This means that anyone treating noxious weeds at Willapa Bay must use the template for the product they are applying. The sign will contain any restrictions or advisories required by the Washington State Department of Health, Ecology, or the federal pesticide label.

Fritzi Cohen, Moby Dick Hotel and Oyster Farm.

I think it would be a good time to maybe reintroduce the short-term water quality modifications. Because at least then you're just doing it for a year at a time so that the permit. This permit isn't changed, it's only effect, until it lapses, it's only in effect for say a year.

Response: Ecology cannot legally issue a short-term modification of the water quality standards without the authority of a permit. Ecology's only alternative is to issue National Pollutant Discharge Elimination System permits. Ecology issues general permits such as this one for five years because of both the permit administration workload as well as the resources spent writing these permits. Ecology has the authority to require monitoring each year under the permit. Ecology can also revoke permit coverage if it determines that herbicide treatments are causing undue harm to non-target organisms.

So what I'm going to say that any permit that certainly the Department of Ecology puts out should have much more emphasis on protecting the public health and also protecting what an environmental is saying. Because too often the environmental community is just blowing you know in the wind.

Response: Every permit Ecology issues allowing pesticides to be used is highly scrutinized and evaluated by the agency and the public. Each chemical allowed for use under this permit has undergone rigorous review. Ecology has conducted completed risk assessments and environmental impact statements for each allowed pesticide. In addition, the Washington State Department of Health reviewed each risk assessment and commented during the process. Under RCW 90.48.445 Ecology must issue permits for the control of Spartina and other noxious weeds, and cannot overburden control efforts. This permit, as written, protects water quality, public health, and complies with state law.

In that respect getting back for instance to your test. It seems to me now the risk assessments. It seems now in light of global warming that it's very important really that people begin to think about pesticide use in terms of global warming. Also in terms of endocrine disruption. This is something that has been discussed quite a bit now and it's a totally, very, very new exploration into it. It has to do with infertility to mutation in genes. I'm not that kind of a scientist, but I'm in touch with a toxicologist at the University of Wisconsin who actually critiqued the risk assessment that was done by Entrix. And he gave me also a copy of two scientists at the center of reproductive biology at Washington State University that talked about endocrine disrupters. This is an area, true, it's something that's been talked about maybe in the last, seriously in the last five or six years. But a lot of people think it needs to be fully taken into consideration. So what I'm saying is that your scientific, what you're looking at, when you ask for risk assessments can not be as superficial.

Response: Ecology follows the research on endocrine disrupting chemicals, and will adjust monitoring as necessary in the future to address any issues that arise.

Entrix completed the risk assessment not for Ecology, but for the Washington State Department of Agriculture (WSDA) as mandated by law. Ecology is requiring WSDA to complete additional imazapyr risk assessments on human health and ecological risks in freshwater applications. The following language has been added to a new section S8 of the permit: “The Permittee shall complete additional risk assessments on imazapyr prior to the end of the 4th year of the permit. These risk assessments shall cover human health and the ecological risks of applying imazapyr in freshwater systems.”

You have to know they are testing whatever they’re going to use in the area in which they’re going to use it. They can’t test in fresh water for a use that is going to be in salt water. And this is something, also one of the things because I have had, we’ve had samples taken they have not come back from the lab yet. I’ve been, I’m being mentored by a very professional Ph.D. Toxicologists who are basically telling us what to ask. They ask us to try to get a vial of what is in the tank actually because we demand it. Unfortunately we’re able to get notice only for the area immediately to the north and south of Moby Dick when we were sprayed. And we wanted actually to have not notice 24 hours before but we wanted notice that we were denied that would have given us in an area where we felt we potentially subject to drift. We wanted to get notice, you know, a day or two after they had sprayed. But we were denied that.

We asked for a vial of the, and we had somebody who was going to be there. It wouldn’t have been Keith or me. It would have been a person who is considered, I’ve forgotten where, you know where he can, the custody issue. He is licensed to do this kind of thing. So we asked for that we were denied that on the basis that we weren’t the appropriate office to get a vial. What this does is, is it means we’re never quite certain what they are actually spraying.

Response: Any product registered for use in estuarine areas by EPA has undergone testing on organisms that are found in salt water, in addition to fresh water testing. Fresh water organisms cannot function as surrogates for saltwater organisms. If an individual is concerned about the tank mix and its constituents, he or she can contact both the Department of Ecology and the Compliance Section at WSDA and ask to have inspectors onsite during treatment. WSDA and Ecology have the authority to sample the contents of the tank of an applicator.

So with that in mind, I that’s why I think it is really important for the Department of Ecology, and I’m assuming you’re the appropriate people, is to do some surprise checking. Spot checking to see that what they say they are using is indeed what they are using. I don’t think that is unreasonable. In fact when I’ve talked to, when I’ve talked to a lot of people who are involved in this business they say that’s what’s sort of, just sort of part of it.

Response: Ecology has the authority to inspect any treatment occurring under this permit, and plans on completing inspections after this permit is issued.

I think that it's very important that we know that we see the licenses of the applicators. That we know, I'm very concerned about the private parties that are doing their own sprayings. For one of the reasons is I'm not sure that we really know what they are spraying. As it turns out I think the risk assessment was done on the basis of Habitat®, but they are using Polaris®, which at least 53 percent of the ingredients are imazapyr but what are the other 47 percent? We don't know.

Response: Any person applying pesticides must have a copy of their applicator's license on them. Private citizens can also check people's licenses by going to WSDA's website and typing in the person's name. Their license information will be pulled from the database and appear on the screen.

On the issue of inert ingredients, that information is proprietary business information and no one is allowed to see that. The risk assessment done by Entrix evaluated the active ingredient imazapyr, not the formulated end-use product Habitat.

All right we're using, Kim Patton said that we've got a new chemical, imazapyr. And we're going to go to this new chemical because it is more effective and less toxic. Well it's more effective and less toxic and then when I look at the reports that I've been getting, the spraying reports. I find that the use of imazapyr is 1/5 of the glyphosate. So you say have one gallon of imazapyr to six gallons of aquaneat. I don't understand it. Maybe I'm missing something. imazapyr was supposed to be less toxic and more effective than glyphosate. Which by the way, the information that is now evolving with glyphosate is that it is not a benign chemical. No one knows what the two things together can do to the life in the bay, to everything, including to the public health because there is drift and it gets into the air and possibly it even gets into our groundwater.

Response: Imazapyr is a less toxic chemical, and it has shown to be highly effective on Spartina. However, glyphosate and imazapyr together are also extremely effective, and one of the benefits of using glyphosate is that you are able to see treated area damage within a few weeks. With imazapyr, you must wait until the next treatment season to see the effectiveness of the treatment. The studies you are mentioning about glyphosate are not actually about glyphosate, but about Roundup formulations. Roundup, the terrestrial form of glyphosate used in agriculture and by homeowners, carries a surfactant, which is toxic to fish. In this case the formulated product is actually more toxic than the active ingredient pesticide. If you have any studies on glyphosate that you are concerned about, please submit them to Ecology for review.

On Long Beach Peninsula we are little sliver of land. We get our water from aquifers. There is several different layers of them. When the water comes in, aside from just lapping along the shores, and there isn't going to be much Spartina left to protect the shores from what would be coming in from the water. The slews bring water in. So it could sink in, it goes into the ground. Imazapyr is known for getting into the ground water which is one of the concerns about it because normally it's used on land not on water.

Response: Imazapyr can be mobile in dry soils. Imazapyr is not mobile in soils that are wet. Since Spartina is growing in the intertidal zone, imazapyr would not likely be mobile after treatment. The plant also binds with imazapyr, making it unavailable for movement in soil. Ecology will consider your sediment concerns when working with permittees on their annual monitoring plan.

Again I think that the notice is inadequate. The notice should really not make it look this is just something oh don't worry about it. You know you can go swimming, you can and catch your crab if there is any left or fish in the bay. I think that there's got to be something different. And I think just for Ecology's, for Ecology's basic understanding of what is happening is that not everyone who is a landowner around Willapa Bay supports this. Basically very intimidating notices are sent around to them on an annual basis that say we will spray, we will spray your land free of charge but if you don't, you don't want herbicides to be used then you have to do whatever you do at your own expense and then they tell you about the different fines that can be imposed through the noxious weed law. What I would like to say the Department of Ecology demand that when these notices go around that a more intelligent and truthful description of the chemicals that are being used is made. Basically it's just a off-hand all these things have been tested and they are safe. That isn't sufficient.

Response: Ecology will review the notices that applicators send to homeowners in 2008. The permit requires that the notices include months of treatment, name of water body(ies) to be treated, chemicals to be used, names and phone numbers of Ecology and WSDA contacts, and education information on Spartina. Ecology does not have the authority to change what local jurisdictions put on their notices, as long as it meets the requirements of the permit.

Kelly told me at one point, I actually found a comment that I had made years ago about the drying time. The drying time initially on Rodeo® was I think it was six hours and the wind was five miles per hour. I may have this wrong, but anyway there was a change that was made which I never knew about and when I mentioned it to Kelly she told me, and this was before your time, that basically a change in the label on Rodeo® that occurred no public hearing or comment. But that DOE simply deferred to Washington State Department of Agriculture and EPA.

Response: Ecology defers to the agencies that register pesticides on label issues. Ecology has no authority over label requirements such as the drying time, EPA's scientists make those decisions. Ecology also has no jurisdiction over the registration of a pesticide in Washington State. WSDA makes those decisions through their pesticide registration division.

