
HOUSE BILL 3182

State of Washington

58th Legislature

2004 Regular Session

By Representatives Chandler, Talcott and Schoesler

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1 AN ACT Relating to national pollutant discharge elimination system
2 permits for application of aquatic pesticides; amending RCW 90.48.020,
3 90.48.030, 90.48.260, and 90.48.465; adding new sections to chapter
4 90.48 RCW; creating a new section; and declaring an emergency.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 NEW SECTION. **Sec. 1.** (1) The legislature declares that effective
7 aquatic pest control is crucial to maintaining and enhancing
8 agricultural, aquacultural, fishing, and recreational opportunities as
9 well as the quality of life in Washington. The legislature recognizes
10 that aquatic pesticides are an integral part of strategies to eliminate
11 and control the growth of aquatic pests. The legislature also
12 recognizes that aquatic pesticides include a variety of chemicals, such
13 as herbicides, insecticides, piscicides, and algaecides, that are
14 applied in our state's lakes, rivers, and estuaries.

15 (2) The legislature also recognizes that the ninth circuit court of
16 appeals concluded in *Headwaters, Inc. v. Talent Irrigation District*,
17 243 F.3d 526 (9th cir. 2001), that an application of aquatic herbicides
18 into an irrigation canal was the discharge of a pollutant to navigable
19 waters from a point source. In addition, the legislature recognizes

1 that the ninth circuit court of appeals in the *Talent* decision
2 concluded that such an application required a national pollutant
3 discharge elimination system (NPDES) permit. The legislature
4 recognizes that the court in the *Talent* decision also determined that
5 compliance with the registration and labeling requirements of the
6 federal insecticide, fungicide, and rodenticide act (FIFRA) did not
7 obviate the need for the NPDES permit.

8 (3) The legislature further recognizes that the department of
9 ecology implemented an NPDES permit program for the application of
10 aquatic pesticides in response to the *Talent* decision. The legislature
11 recognizes that the department of ecology has developed NPDES permits
12 for irrigation system weed control, mosquito larvae control, noxious
13 weed control, nuisance plant and algae control, fish management, and
14 oyster growers.

15 (4) The legislature also recognizes that, after the *Talent*
16 decision, the federal environmental protection agency issued guidance
17 that the application of an aquatic herbicide consistent with the FIFRA
18 label to ensure the passage of irrigation return flow is a nonpoint
19 source discharge not subject to NPDES permit requirements under the
20 federal clean water act. The legislature recognizes that the federal
21 environmental protection agency based its decision on the federal clean
22 water act's exemption of discharges composed entirely of return flows
23 from irrigated agriculture and its exclusion of return flows from the
24 point source definition. The legislature also recognizes that this
25 federal guidance does not address whether other types of direct
26 applications of FIFRA-registered pesticides beyond the scope of the
27 exemption are subject to NPDES permitting requirements.

28 (5) The legislature declares the state should require NPDES permits
29 for application of aquatic pesticides only when such requirement is
30 consistent with federal environmental protection agency guidance and
31 federal permitting requirements in nondelegated states. The
32 legislature therefore intends to require this consistency in the
33 state's NPDES permit program.

34 (6) The legislature also intends to transfer authority for issuing
35 any NPDES permits required for application of aquatic pesticides from
36 the department of ecology to the department of agriculture, subject to
37 federal approval, and provide for permit program operations until
38 federal approval of transfer of this authority is obtained.

1 **Sec. 2.** RCW 90.48.020 and 2002 c 161 s 4 are each amended to read
2 as follows:

3 ~~((Whenever the word))~~ The definitions in this section apply
4 throughout this chapter unless the context clearly requires otherwise.

5 (1) "Aquatic pesticides" includes a variety of chemicals, such as
6 herbicides, insecticides, piscicides, and algaecides, applied in waters
7 of the state for aquatic pest control.

8 (2) "Person" ~~((is used in this chapter, it shall be construed to))~~
9 includes any political subdivision, government agency, municipality,
10 industry, public or private corporation, copartnership, association,
11 firm, individual, or any other entity whatsoever.

12 ~~((Wherever the words))~~ (3) "Waters of the state" ~~((shall be used in~~
13 ~~this chapter, they shall be construed to))~~ includes lakes, rivers,
14 ponds, streams, inland waters, underground waters, salt waters, and all
15 other surface waters and watercourses within the jurisdiction of the
16 state of Washington.

17 ~~((Whenever the word))~~ (4) "Pollution" ~~((is used in this chapter, it~~
18 ~~shall be construed to))~~ means such contamination, or other alteration
19 of the physical, chemical, or biological properties, of any waters of
20 the state, including change in temperature, taste, color, turbidity, or
21 odor of the waters, or such discharge of any liquid, gaseous, solid,
22 radioactive, or other substance into any waters of the state as will or
23 is likely to create a nuisance or render such waters harmful,
24 detrimental, or injurious to the public health, safety, or welfare, or
25 to domestic, commercial, industrial, agricultural, recreational, or
26 other legitimate beneficial uses, or to livestock, wild animals, birds,
27 fish, or other aquatic life.

28 ~~((Wherever the word))~~ (5) "Department" ~~((is used in this chapter it~~
29 ~~shall))~~ means the department of ecology.

30 ~~((Whenever the word))~~ (6) "Director" ~~((is used in this chapter it~~
31 ~~shall))~~ means the director of ecology.

32 ~~((Whenever the words))~~ (7) "Aquatic noxious weed" ~~((are used in~~
33 ~~this chapter, they have))~~ has the same meaning ~~((prescribed under))~~ as
34 in RCW 17.26.020.

35 ~~((Whenever the words))~~ (8) "General sewer plan" ~~((are used in this~~
36 ~~chapter they shall be construed to))~~ includes all sewerage general
37 plans, sewer general comprehensive plans, plans for a system of

1 sewerage, and other plans for sewer systems adopted by a local
2 government entity including but not limited to cities, towns, public
3 utility districts, and water-sewer districts.

4 **Sec. 3.** RCW 90.48.030 and 1987 c 109 s 123 are each amended to
5 read as follows:

6 Except as provided in RCW 90.48.260, the department shall have the
7 jurisdiction to control and prevent the pollution of streams, lakes,
8 rivers, ponds, inland waters, salt waters, water courses, and other
9 surface and underground waters of the state of Washington.

10 **Sec. 4.** RCW 90.48.260 and 2003 c 325 s 7 are each amended to read
11 as follows:

12 (1) The department of ecology is hereby designated as the State
13 Water Pollution Control Agency for all purposes of the federal clean
14 water act (~~(as it exists on February 4, 1987)~~), and is hereby
15 authorized to participate fully in the programs of the federal clean
16 water act as well as to take all action necessary to secure to the
17 state the benefits and to meet the requirements of that act. With
18 regard to the national estuary program established by section 320 of
19 that act, the department shall exercise its responsibility jointly with
20 the Puget Sound (~~(water quality authority)~~) action team.

21 (2) The department of ecology may delegate its authority under this
22 chapter, including its national pollutant discharge elimination permit
23 system authority and duties regarding animal feeding operations and
24 concentrated animal feeding operations, to the department of
25 agriculture through a memorandum of understanding. Until any such
26 delegation receives federal approval, the department of agriculture's
27 adoption or issuance of animal feeding operation and concentrated
28 animal feeding operation rules, permits, programs, and directives
29 pertaining to water quality shall be accomplished after reaching
30 agreement with the director of the department of ecology. Adoption or
31 issuance and implementation shall be accomplished so that compliance
32 with such animal feeding operation and concentrated animal feeding
33 operation rules, permits, programs, and directives will achieve
34 compliance with all federal and state water pollution control laws.

35 (3) Subject to federal approval, the department's authority related

1 to national pollutant discharge elimination system permits for
2 application of aquatic pesticides shall be transferred to the
3 department of agriculture.

4 (a) The department and department of agriculture shall specify in
5 a memorandum of understanding their respective responsibilities and
6 activities, including permit issuance and collection of permit fees,
7 with respect to national pollutant discharge elimination system permits
8 for application of aquatic pesticides during the transfer period. The
9 memorandum of understanding remains in effect until federal approval
10 for the transfer is received.

11 (b) Until federal approval is received, the department of
12 agriculture's adoption or issuance of aquatic pesticide application
13 rules, permits, programs, and directives shall be accomplished after
14 reaching agreement with the director. Adoption or issuance and
15 implementation shall be accomplished so that compliance with such
16 aquatic pesticide application rules, permits, programs, and directives
17 will achieve compliance with all federal and state water pollution
18 control laws.

19 (4) The powers granted herein include, among others, and
20 notwithstanding any other provisions of chapter 90.48 RCW or otherwise,
21 the following:

22 ~~((1))~~ (a) Complete authority to establish and administer a
23 comprehensive state point source waste discharge or pollution discharge
24 elimination permit program which will enable the department to qualify
25 for full participation in any national waste discharge or pollution
26 discharge elimination permit system and will allow the department to be
27 the sole agency issuing permits required by such national system
28 operating in the state of Washington subject to the provisions of RCW
29 90.48.262(2). Program elements authorized herein may include, but are
30 not limited to:

31 ~~((a))~~ (i) Effluent treatment and limitation requirements together
32 with timing requirements related thereto;

33 ~~((b))~~ (ii) Applicable receiving water quality standards
34 requirements;

35 ~~((c))~~ (iii) Requirements of standards of performance for new
36 sources;

37 ~~((d))~~ (iv) Pretreatment requirements;

38 ~~((e))~~ (v) Termination and modification of permits for cause;

1 (~~(f)~~) (vi) Requirements for public notices and opportunities for
2 public hearings;

3 (~~(g)~~) (vii) Appropriate relationships with the secretary of the
4 army in the administration of (~~(his)~~) the secretary's responsibilities
5 which relate to anchorage and navigation, with the administrator of the
6 environmental protection agency in the performance of (~~(his)~~) the
7 secretary's duties, and with other governmental officials under the
8 federal clean water act;

9 (~~(h)~~) (viii) Requirements for inspection, monitoring, entry, and
10 reporting;

11 (~~(i)~~) (ix) Enforcement of the program through penalties,
12 emergency powers, and criminal sanctions;

13 (~~(j)~~) (x) A continuing planning process; and

14 (~~(k)~~) (xi) User charges.

15 (~~(2)~~) (b) The power to establish and administer state programs in
16 a manner (~~(which)~~) that will (~~(insure)~~) ensure the procurement of
17 moneys, whether in the form of grants, loans, or otherwise; to assist
18 in the construction, operation, and maintenance of various water
19 pollution control facilities and works; and the administering of
20 various state water pollution control management, regulatory, and
21 enforcement programs.

22 (~~(3)~~) (c) The power to develop and implement appropriate programs
23 pertaining to continuing planning processes, area-wide waste treatment
24 management plans, and basin planning.

25 (5) The governor shall have authority to perform those actions
26 required of him or her by the federal clean water act.

27 **Sec. 5.** RCW 90.48.465 and 2002 c 361 s 2 are each amended to read
28 as follows:

29 (1) The department shall establish annual fees to collect expenses
30 for issuing and administering each class of permits under RCW
31 90.48.160, 90.48.162, and 90.48.260. An initial fee schedule shall be
32 established by rule and be adjusted no more often than once every two
33 years. This fee schedule shall apply to all permits, regardless of
34 date of issuance, and fees shall be assessed prospectively. All fees
35 charged shall be based on factors relating to the complexity of permit
36 issuance and compliance and may be based on pollutant loading and
37 toxicity and be designed to encourage recycling and the reduction of

1 the quantity of pollutants. Fees shall be established in amounts to
2 fully recover and not to exceed expenses incurred by the department in
3 processing permit applications and modifications, monitoring and
4 evaluating compliance with permits, conducting inspections, securing
5 laboratory analysis of samples taken during inspections, reviewing
6 plans and documents directly related to operations of permittees,
7 overseeing performance of delegated pretreatment programs, and
8 supporting the overhead expenses that are directly related to these
9 activities.

10 (2) The annual fee paid by a municipality, as defined in 33 U.S.C.
11 Sec. 1362, for all domestic wastewater facility permits issued under
12 RCW 90.48.162 and 90.48.260 shall not exceed the total of a maximum of
13 fifteen cents per month per residence or residential equivalent
14 contributing to the municipality's wastewater system.

15 (3) The department shall ensure that indirect dischargers do not
16 pay twice for the administrative expense of a permit. Accordingly,
17 administrative expenses for permits issued by a municipality under RCW
18 90.48.165 are not recoverable by the department.

19 (4) In establishing fees, the department shall consider the
20 economic impact of fees on small dischargers and the economic impact of
21 fees on public entities required to obtain permits for storm water
22 runoff and shall provide appropriate adjustments.

23 (5) The fee for an individual permit issued for a dairy farm as
24 defined under chapter 90.64 RCW shall be fifty cents per animal unit up
25 to one thousand two hundred fourteen dollars for fiscal year 1999. The
26 fee for a general permit issued for a dairy farm as defined under
27 chapter 90.64 RCW shall be fifty cents per animal unit up to eight
28 hundred fifty dollars for fiscal year 1999. Thereafter, these fees may
29 rise in accordance with the fiscal growth factor as provided in chapter
30 43.135 RCW.

31 (6) The fee for a general permit or an individual permit
32 (~~developed solely as a result of the federal court of appeals decision~~
33 ~~in *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3rd 526 (9th~~
34 ~~Cir. 2001)) for the application of aquatic pesticides is limited,
35 until June 30, 2003, to a maximum of three hundred dollars. (~~Such a~~
36 ~~permit is required only, and as long as, the interpretation of this~~
37 ~~court decision is not overturned or modified by future court rulings,~~
38 ~~administrative rule making, or clarification of scope by the United~~~~

1 ~~States environmental protection agency or legislative action. In such~~
2 ~~a case the department shall take appropriate action to rescind or~~
3 ~~modify these permits.))~~ Thereafter, the fee may be increased according
4 to the fiscal growth factor as provided in chapter 43.135 RCW.

5 (7) All fees collected under this section shall be deposited in the
6 water quality permit account hereby created in the state treasury.
7 Moneys in the account may be appropriated only for purposes of
8 administering permits under RCW 90.48.160, 90.48.162, and 90.48.260.

9 (8) The department shall present a biennial progress report on the
10 use of moneys from the account to the legislature. The report will be
11 due December 31st of odd-numbered years. The report shall consist of
12 information on fees collected, actual expenses incurred, and
13 anticipated expenses for the current and following fiscal years.

14 NEW SECTION. Sec. 6. A new section is added to chapter 90.48 RCW
15 to read as follows:

16 (1) A national pollutant discharge elimination system permit for
17 the application of aquatic pesticides shall be required only, and as
18 long as, such a permit requirement is consistent with:

19 (a) Rules, guidance, or policy of the United States environmental
20 protection agency; and

21 (b) The United States environmental protection agency's permit
22 requirements in states that have not been delegated authority under the
23 federal clean water act to issue such permits.

24 (2) If any inconsistency in permit requirements as specified in
25 subsection (1) of this section occurs, the department, or the
26 department of agriculture once transfer of permit authority receives
27 federal approval, shall take appropriate action to rescind or modify
28 any permits that have been issued.

29 NEW SECTION. Sec. 7. A new section is added to chapter 90.48 RCW
30 to read as follows:

31 (1) The department and department of agriculture shall cooperate in
32 requesting federal approval for the transfer of the national pollutant
33 discharge elimination system permit program for the application of
34 aquatic pesticides from the department to the department of
35 agriculture. When federal approval is received, the department of

1 agriculture shall assume the powers and duties of the department
2 specified in this chapter as they relate to the aquatic pesticide
3 permit program and consistent with the federal approval.

4 (2) By December 31, 2004, the department and the department of
5 agriculture shall jointly submit to the legislature a progress report
6 regarding the transfer of the aquatic pesticides permit program and the
7 federal approval and include in that report recommendations for any
8 statutory or regulatory changes necessary to facilitate the transfer.

9 NEW SECTION. **Sec. 8.** If any provision of this act or its
10 application to any person or circumstance is held invalid, the
11 remainder of the act or the application of the provision to other
12 persons or circumstances is not affected.

13 NEW SECTION. **Sec. 9.** This act is necessary for the immediate
14 preservation of the public peace, health, or safety, or support of the
15 state government and its existing public institutions, and takes effect
16 immediately.

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