

Background

Roza takes its aquatic herbicide treatment program very seriously. Our staff are trained, experienced and properly licensed, they follow the label rates when performing treatments. They keep accurate records which are timely submitted along with sampling and have been doing so for decades. We have strong relationships and good lines of communications with the staff at the State Department of Ecology to handle issues which arise during the course of the irrigation season.

We take the safety of our employees seriously as well as that of our water users who come into contact with treated water. We have far exceeded hold times for treatment return flows to the Yakima River for many years. We issue the required notices to the public, which include signage posted in the field. Roza maintains a list of growers/water users who have requested notification of treatments so that they can turn their water off in order to preserve their organic certifications.

The Roza Irrigation District also has a 40+ year track record of supporting fact driven, science-based, salmon/steelhead recovery measures to enhance sustainable habitat through robust water conservation, fish passage, canal screening, water quality improvements, predation reduction and streamflow supplementation. We have a strong working relationship with the Yakama Nation's tribal fisheries staff, and we have had a biologist on staff since the 1980s. Our biologist has been working on these issues for several decades. We have successfully obtained federal legislation to address these very issues in 1979, 1994 and 2019. Roza has spent tens of millions of dollars in grower funds to implement its water conservation and water quality programs over five decades.

This experience gives us serious concerns about the draft ISAWC general permit.

Special Condition 1

The inclusion of emergent vegetation on the banks of the conveyance system is outside of the scope of the permit and should be deleted.

See also related comments in Section 6.

Does "dry canal" mean merely that diversions have ceased? Roza will shut down during drought conditions and may do treatments during the time that the canal is shut down. If there is residual water following canal draining will the "dry canal" provisions apply or does the clock reset? If there is a rain event during a shutdown do the dry canal provisions apply? How dry is dry in the context of this provision?

We have concerns about how the provisions in this section will be implemented.

Special Condition 2

We have concerns about how the provisions in this section will be implemented.

Special Condition 3

Inclusion of the human health-based criteria in the National Toxics rule is outside the scope of this permit and should be deleted. Roza is a strong proponent of food safety, worker safety and the safety of the natural environment. Including these requirements as presented is arbitrary.

WDFW has informed Roza that “WDFW does not have expertise in toxicity of various conditions and we do not regulate water quality”.

We have concerns about how this provisions in this section will be implemented.

Special Condition 4

Additional specificity is needed to describe what constitutes “low flow” or “high flow” conditions and how phased treatments could/would work.

Section 6.D.-use of acrolein, what are the expectations for “reasonable efforts to reduce the use of acrolein”? What is deemed by Ecology to be “reasonable” or “reduce” and which species are sensitive in this context and why? Where does this exist in state or federal law?

As written, acrolein, endothall and fluoridone application plans must be submitted, the permit does not specify that they must be approved.

WDWF has informed Roza that “WDWF does not have expertise in toxicity of various conditions and we do not regulate water quality”. D(2)(a) does not specify if ESA listed or state listed species receive higher levels of protection and does not address non-listed salmon species (e.g., Spring Chinook) or extirpated and introduced salmon species (Coho, Sockeye) or native predators (pikeminnow). While Roza has a great deal of political capital and grower funds invested in seeing these species recovered to harvestable, sustainable levels, the permit does not acknowledge or recognize these differences.

What are the appeal criteria for (2) if a request is denied?

We have concerns about how these provisions in this section will be implemented.

Special Condition 5

Most of the canal systems have been designed with a network of drains and wasteways for return flows which are nearly as extensive as the canal network. Wasteways is the correct term rather than spillways.

Please refer to Exhibit #6 for more detailed comments.

We have concerns about how the provisions in this section will be implemented.

Special Condition 6

- 6 (C)- Roza uses its website, emails, its annual water user letter, notices in the field and occasionally mailed notice (which is also handed out in the field) in addition to radio ads about canal safety and in person public interactions at community events. Roza also runs hundreds of radio ads about canal safety on Spanish language radio through the irrigation season. Other districts in our TV market run public service announcements on television and radio about canal safety.

While outreach programs vary by district, the permit should not require a separate public education process for districts who already have one. We have a deep interest in ensuring that the public, from

local water users to legislators to consumers of products grown with the water we deliver understand the role irrigation water plays in the local community and the state economy and quality of life. These efforts occur at multiple levels every single day and we support them. Including a requirement for doing so in this permit would add a burdensome and unnecessary planning layer.

Water is not purchased as listed in (g). This is a critical legal distinction which must be corrected. Failure to do increases the districts risk in an unacceptable manner.

Publication of notice in a newspaper of general circulation is not what it used to be. Our district is 95 miles long and there is no one newspaper that covers the entire area and published notices reach almost no people in the modern era. Engaging and notifying the public requires more effective and modern approaches.

- 6(D)(1)(c) would this apply if the treatment were less (shorter in duration, fewer sites or for a shorter period) than described in the issued notice? As written it says “differs”, which if read strictly does not provide for a lessened treatment.
- 6(D)(2)(a)-what is meant by “public” and “highly unlikely” and how is the permit expected to be implemented? Does “treated water” mean being in the water being treated in the canal? As currently crafted D.2.a requires posting “at locations where the public is likely to encounter treated water.” This begs the question what does Ecology mean by “likely to encounter” given the real-world examples above?
- 6(D)(2)(b)-Notice should be posted just upstream of the treatment site. The reason for this is that it is theoretically possible that a landowner could be walking or driving down the canal on or near the O&M road, on property that they own which is encumbered with a canal right of way or easement, and not be trespassing until they enter a treatment site. The barricade style signs that we use now at treatment sites should continue to be used for this reason. 99.99%+ of the time a person on the canal during a treatment will be trespassing. Some of the trespassers do not access the canal via a public road crossing and don’t pass by a warning sign. The barricade at the treatment site handles this type of notice, particularly for a chemical like acrolein.

Roza has what may be a one-of-a-kind physical situation at the milepost 11 treatment site on the Main Canal. The Roza Main Canal comes out of a tunnel and splits into a Y with hydro power water going one way (left in the photo) and irrigation water going another direction and there is nowhere to post the signage and no way to access the treatment location (See exhibit #1). Any other treatment sites should have an upstream sign.

- 6(D)(2)(c)- Section 6.D.2 states that “permittees are not required to post signs in private areas with limited site accessibility where the public is highly unlikely to enter treated areas”. The water in the canal is the area that is being treated and decades of empirical evidence shows that it is highly unlikely for the public to go into the water being treated. It is possible, as seen with the four types of people who tend to wind up in the water, but it is not highly likely or even likely.

One question which arises from this section is whether coterminous (or overlapping) county roads and a canal right of way qualify as a “private area” as shown in the attached picture? See Exhibits #2 & #3.

- 6(D)(2)(d)-Irrigation districts only posts signs on property that they control. “Damage” should be changed to “impact” or this provision should be eliminated.
- 6(D)(2)(e)- Roza posts public notification signs at treatment sites in English and Spanish. The “commonly spoken” catchall provision is of no practical value because it provides no guidance as to how “commonly” is construed in this context. “Write” should probably be changed to “include”.

The District’s general phone number and Ecology’s number are included on the barricade signs at treatment sites already. The people change often enough that their names should not be included on the signage.

There is no requirement in the HEAL act prescribing pictograms. Pictograms do not address visually impaired people.

- 6(D)(2)(f) There are about 50 county road crossings of the Roza Main Canal from Terrace Heights to Benton City. Nearly all are signed with concrete monuments, which are among the most robust canal signs anywhere in the West, and even these signs routinely get hit and broken or knocked over by our equipment and by farmer equipment and the occasional drunk driver or person fleeing the police.

Signs are costly and are a relatively low priority compared to other maintenance work, especially during the water season. Roza went many years with no signs being fixed or replaced due to a lack of staff. We have tried diligently in recent years to make improvements, but even with 54 employees we don’t always get to them in a timely manner. Adding more signs will draw limited resources away from taking care of the signs we already have and struggle to maintain. The concept of requiring hundreds of new signs going up and down seasonally is not feasible due to time constraints.

Ecology needs to have realistic expectations for how new signs can be installed and maintained in the long term and what they can accomplish.

- 6(D)(3) Should specify the title of the person from whom written approval is required.

The notice component of permit cannot be implemented in its current form because it does not spell out where the notice must be posted in the field (e.g., how many signs, how close to the treatment sites and how far downstream). The generalizations are just too broad and do not match the conditions in the field.

If the permit said something like post notice within 50 feet downstream or 250 feet downstream and/or at the public road crossings for a mile downstream would be a standard to manage to. But the permit does not specify how far downstream notice must be posted. Be aware that the farther downstream notice is posted from a treatment site (e.g., miles) the more informal access points along a canal there are between the treatment site and the last sign (see Exhibit #5). At treatment locations, the safety

issue is for the employees making the treatments, rather than for the public encountering the treated water downstream in a canal or after it has been delivered.

If Ecology's is to keep people safe by keeping them away from places they are "likely to encounter treated water" as stated in Section 6.D.2.a, Ecology needs to recognize that Roza already places signs, and installs barricades in places to keep people away from the canals:

1. when the water is being treated with aquatic herbicides;
2. when the water is not being treated with aquatic herbicides; and
3. when there is no water in the canals;

The treatment sites are not open for the public to access. The canal water downstream of a treatment site is also not open for the public to access. The primary danger to people just downstream of a treatment site in a canal is from drowning not from exposure to herbicides in the water. The drowning danger remains when there are no herbicides in the water. There are dangers which remain in and around canals even when there is no irrigation water in the canal (e.g. siphons, check gates, heavy equipment, heavy winter runoff, etc.).

There is no pre-harvest interval (PHI) listed on the labels for the aquatic herbicides that we use.

Treated water can go directly onto food and be consumed safely right after the canal treatment occurs, it is not clear that Ecology staff understand this.

We have locations on the Main Canal where we treat the water and that treated water is delivered several hundred yards downstream within 20 minutes of being treated. That treated water can go directly and safely onto food and which can be safely eaten minutes after the chemical goes in the water under the FIFRA label. No matter how section 6.D.2.a. is worded it will not keep people away from treated water.

The five-year compliance window does not offer any safe harbor because 1 day after the five year window expires, perfect compliance will be expected. A defective permit provision is still defective whether it is in place the day the permit issued or five years and one day later. We need to cure the defect through more practical wording of the provisions in the permit rather than trying to extend the life of defective provisions.

- Exhibit #2 is a picture of the Roza Main Canal along a rural county road.
- Exhibits #3 is a picture of a home along a lateral canal as seen from a county road. Water (including water with aquatic herbicides that we have applied per the FIFRA label) gets to this lateral canal via the Main Canal and a pump system about 1.5 miles upstream. You don't have to drive past a signed location to this home or the canal as it runs along the county road.
- Exhibit #4 is a photo of a house along the Roza Main Canal. Access to the house is over a private driveway bridge. If you were to drive to this house you would not cross the canal on a public road and would not pass a notification sign. You can see that the home has a lawn which runs to the top of the embankment. If a person were to chase a ball out of the yard into the canal during an aquatic herbicide treatment upstream they would not have encountered a sign. Roza has hundreds of houses like this on both sides of a canal. The way the permit is currently drafted, would an irrigation district have to post a sign(s) of an upstream treatment for the people at downstream locations like these?

- Some irrigation districts have thousands of similarly situated houses. Some districts also have parks, schools, golf courses and cemeteries with treated water in open canals flowing by or near them for much of the irrigation season.

Often, landowners on the high side of a canal are not irrigation water users and they may not receive the districts mailed information or information handed out by ditchriders. We do not hand those facts sheets out annually, so any one who bought land since we last did would not be notified in that manner if they are not a water user.

The rub here is:

- Anyone other than an irrigation district employee in the water in a canal or in an irrigation district pond or reservoir is trespassing;
- Anyone fishing in a canal or irrigation district pond is trespassing;
- Anyone walking, riding a horse or a bicycle or driving a vehicle on the canal O&M road during a chemical treatment is trespassing (w/ the exception of a landowner on a canal but not at a treatment site).

Roza has not had an employee encounter a recreational swimmer in a Roza canal in many, many years (20+). Our crews drive the length the Main Canal every calendar day of the irrigation season. Most days we have 15 to 20 people on the canals at various times during the work-day and we do not encounter swimmers.

On the other hand, involuntary swimmers fall into four main categories:

1. Intoxicated people (drivers/walkers/cyclists)
2. people fleeing the police
3. toddlers; and
4. people trying to rescue animals

People in these categories account for nearly all of the people who wind up in a canal, and none of them are dissuaded by signage of any kind. If the permit excludes trespassers from the signage requirements that could likely greatly simplify implementation.

One point of comparison that has not been discussed is the reality that water treated with aquatic herbicides is being delivered to farms downstream in the canal system pursuant to the FIFRA label and farmers, their workers and people doing business on or living near the farm and irrigation district employees are exponentially more likely to come into contact with that water through sprinklers, weir boxes, on farm ponds (where people do swim and fish in places), open lateral canals, hoses and residential lawns than in a main canal, which they can do safely if applied consistent with the FIFRA label.

Special Condition 7

We have concerns about how these provisions will be implemented.

Special Condition 8

F(3)(b)- Aquatic herbicides such as acrolein are toxic to fish. Fish that are in the canal are killed on occasion as a result of treatments.

Despite tens of millions of dollars of public investments in three sets fish screens at Roza dam since the 1970s fish screens are not complete fish barriers. Birds and small mammals can move both live and dead fish into the canals on occasion, and people release fish into the canal system on occasion. Fish can over-winter in siphons and in the tunnels. The number of fish in the canals is a small fraction of what it once was in years past.

We have concerns about how these provisions in this section will be implemented and these provisions need to be revised.

General/Overall

The provision for the DMR to be submitted by a duly authorized person is an improvement. The dye tracing provisions are also a significant improvement over the prior permit.

One problem throughout the permit is the absence of clear and objective standards and a reliance on non-specific generalities which cannot be implemented. The administrators of the permit will change over time, and their views and biases will change as well. We are on the 3rd permit writer since the prior permit was issued.

A companion issue is the absence of statutory or administrative authority citations for permit requirements. The permit has arbitrary provisions in places which are not supported with citations of prescriptive requirements. The draft permit does not show an awareness or understanding of the legal principals of nexus and proportionality for permit conditions. These are foundational concepts essential to successful permitting for both the permitting agency and the permittee.

The irrigation districts are mindful of the potential for both future 3rd party challenges (e.g., farmworker activists or eco-activists) or even Roza landowner challenges to enforce the terms of the permit. The “permit as a shield” concept is only as good as the permit is written and only as good as our ability to implement the permit.

While this permit is for general statewide applicability, local circumstances will vary wide and the permit must account this range of circumstances. The permit must also account for the nature of open channel canals and that circumstances beyond the irrigation districts control can cause calamities like overtopping, and breaches at the most in opportune times and places.

The permit staff also need to engage directly with the chemical manufacturers to more fully understand the science behind the FIFRA labels. We would be happy to arrange those meetings.

The permit staff also need to become familiar with the state Supreme Court’s holdings in *Meyer v. Gen. Elec. Co.*, 46 Wash. 2d 251 252–53, 280 P.2d 257, 258 (1955).

Commenting & Revision Process

There has been no citation as to regulatory authority in statute or administrative code, or any written policy or procedure to limit permit revisions to portions cited in comments. If a comment results in a

revision to section X (used as a generic hypothetical) of the permit which then triggers a corresponding revision to section Y, the entity commenting does not have to comment on both X and Y because we don't know yet how you might revise Y.

Roza requests that the permit be revised to address the issues that we have raised and that a new public comment period occur after those revisions have been prepared so that all interested parties can review them and appeal them if necessary. Roza also asks that the permit writers make field visits to observe more aquatic treatments in the field before the next version of the permit is available for public comment.

Related Comments from Organizations Incorporated by Reference & applicable to the Draft Permit, SEPA documents, and Fact Sheet

1. The Roza Irrigation District is a member of the Roza Sunnyside Board of Joint Control (RSBOJC) and hereby incorporates the RSBOJC written comments by reference.
2. The Roza Irrigation District is also a member of the Yakima Basin Joint Board (YBJB) and hereby incorporates the YBJB written comments by reference.
3. The Roza Irrigation District is also a member of the Washington State Water Resources Association (WSWRA) and hereby incorporates the WSWRA written comments by reference.
4. Roza also incorporates by reference the 11/18/21 letter to Danielle Edelman from the RSBOJC and the 9/24/21 letter to Danielle Eddleman from WSWRA. See exhibits #7 & #8.

Exhibits:

1. Photo of Roza Main Canal at Milepost 11 bifurcation
2. Photo of the Roza Main Canal alongside a county road
3. Photo of a Roza lateral canal and home alongside a county road
4. Photo of a home alongside the Roza Main Canal
5. Photo of the Roza Main Canal farm access points which have been blocked off
6. Photo of Roza Main Canal gates and signage
7. 11/18/21 letter from RSBOJC
8. 9/24/21 letter from WSWRA







