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Via Washington Department of Ecology Online Public Comment Form

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Washington Department of Ecology
P.O. Box 47696
Olympia, WA 98504-7696

Re: Comments on Ecology's draft 2025 General NPDES Permit for Managing *Zostera japonica* on Commercial Clam Beds in Willapa Bay

Dear Shawn:

Our law firm represents Twin Harbors Waterkeeper ("THW"). On behalf of this organization, this letter provides comments on the Washington Department of Ecology's ("Ecology") draft 2025 General National Pollutant Discharge Elimination System Permit for Managing *Zostera japonica* on Commercial Clam Beds in Willapa Bay ("the Permit"). Please respond to these comments in writing and include these comments and associated attachment in the administrative record for this matter.

THW is a 501(c)(3) non-profit organization based in southwest Washington. The mission of THW is to protect and improve water quality and marine and freshwater habitats on the Washington coast, including in Willapa Bay and Grays Harbor. THW is especially interested in the health of Willapa Bay ("the Bay"), the second largest estuary on the West Coast. Much of the Bay is protected by the Willapa National Wildlife Refuge. The refuge's abundant salt marshes and tidal mudflats, coastal dunes and beaches, grasslands, freshwater wetlands, and old-growth forests are home to many fish, wildlife, and plant species. Over 200 species of birds are documented annually in Willapa Bay, including the endangered marbled murrelet. Additionally, green sturgeon (*Acipenser medirostris*) spend the summer in Washington State coastal estuaries like Willapa Bay where they feed on burrowing shrimp. The southern distinct population segment of green sturgeon is listed as threatened under the Endangered Species Act.

Willapa Bay has suffered from infestations of invasive species due to human activity such as industrial forestry and shellfish aquaculture. Other harms to the Bay caused by industrial forestry include sedimentation and water quality degradation. Because of these and other factors, native species and the ecology of the Bay have been compromised.

Dedicated scientists work to manage invasive plants and invertebrates so that aquaculture can continue to thrive. Additionally, Washington State has expended significant resources in attempts to recover wild salmonid populations. Despite these efforts, salmonid populations and Southern Resident Killer Whales, which depend on these salmonid species, face the threat of extinction.

Although THW understands the need to balance farming the tidelands and protecting native species of the Bay, THW advocates against any actions that pose additional risks to the Bay and to the rare, sensitive, threatened, and endangered species that rely on it, including the application of herbicides such as imazamox to control *Zostera japonica* on commercial clam beds.

For these reasons, we strongly urge Ecology to strengthen the Permit in the following ways:

I. The Draft Permit's Monitoring and Reporting Requirements Are Insufficient.

The Permit does not include sufficient reporting and monitoring requirements, resulting in a lack of transparency and accountability to Ecology and to the public. The Permit should be revised to include additional application, reporting, and monitoring requirements.

Specifically:

- The Permit requires the following submittals: (1) a Discharge Management Plan ("DMP") once per coverage or update; (2) an annual pre-treatment plan; and (3) an annual post-treatment report. *See* p. 1, Table 1. Only "as necessary" are permittees required to submit notices of noncompliance or spill. *Id.*

  In addition to these submittals, the Permit should be revised to require monthly reporting on compliance with (or non-applicability of) Special Condition S3, S4, and S5 requirements during the permissible imazamox application window (currently May through July) regardless of whether treatment has occurred or is planned. Such reporting should be made available to the public through Ecology's Permitting and Reporting Information System ("PARIS").

  This reporting should include, but is not limited to:

  - Proof that application does not cause or contribute to violations of Water Quality Standards, Groundwater Quality Standards, Sediment Management Standards, and human health criteria in the National Toxics Rule. *See* Special Condition S3.A, pp. 6–7.
  - Proof that permittees use All Known, Available, and Reasonable methods of prevention, control, and Treatment ("AKART"), including compliance with the Washington Pesticide Control Act, Washington Pesticide Application Act, Federal Insecticide, Fungicide, and Rodenticide Act, and product labels. *See* Special Condition S3.A and pp. 6–7; *see also* Special Condition S4.

- Proof of compliance with WAC 173-201A-410. *See* Special Condition S3.B, p. 7.
- Proof that treatment does not cause or contribute to further impairment of Willapa Bay for any parameter for which Willapa Bay is listed as impaired. *See* Special Condition S3.C, p.7.
- Proof that treatment does not cause harm to sensitive, threatened, or endangered animal species or rare plant populations. *See* Special Condition S3.D, pp. 7–8. This should include monitoring of and reporting on what species interact with the area before, during, and after application of imazamox.
- Proof of compliance with permittee's DMP. *See* Special Condition S3.E, p. 8.
- Proof of compliance with the product label and all pesticide application requirements mandated by Special Condition S4.A, pp. 8–10.
- Proof that permittee has maintained the required buffer per Special Condition S4.B, including photographic evidence. *See* p. 10.
- Proof that permittee has complied with the posting requirements of Special Condition S4.D, including photographic evidence. *See* p. 10.
- Sample results from a laboratory registered or accredited under Chapter 173-50 WAC, including the following parameters:
  - Date, place, and time of sampling;
  - Date and time of sample analyses;
  - Who performed the analyses;
  - Analytical techniques and methods used;
  - Results of analyses;
  - Flow;
  - Temperature;
  - Settleable solids;
  - Conductivity;
  - pH; and
  - Turbidity

  See Special Condition S5, pp. 11–12.

- Proof that permittee has measured the buffer distance in compliance with Special Condition S5.A, including reporting on any *Zostera* plants affected by treatment beyond the parcel boundary.
  - Photographs required by Special Condition S5.A should be made available to the public.

  See p. 12.

In addition to requiring more detailed and more frequent reporting, and making such reporting available to the public through PARIS, THW urges Ecology to make the following Permit revisions:

- Special Condition S2.C.3 (pp. 3–4) provides that "[p]ermittees renewing their permit coverage are not required to publish a public notice." Public notice should be required for first-time applicants, existing permittees applying to modify permit coverage, *and* for

permit renewals. Thus, THW requests a revision to Special Condition S2.C.3(c) to require public notice so that the public, including organizations like THW, can review permittee's compliance with their current permit and comment prior to Ecology issuing a renewal.

- Proposed revisions and additions for Special Condition S4.A:
    - Informed by what is necessary to protect Willapa Bay from harmful water quality impacts, Special Condition S4.A should specify what spray equipment is permissible for application and what equipment is prohibited.
        - THW attended Ecology's in-person public workshop and hearing on January 7, 2025, at the Willapa Harbor Community Center. There, THW learned that backpack sprayers are required for application of imazamox. This should be specified in the Permit. Additionally, the Permit should specify how applicators are permitted to access the spraying zone and whether application must be done on foot. THW strongly urges Ecology to revise the Permit to prohibit the use of vehicles to assist in the spraying process.
    - Special Condition S4.A.2(e) (p. 9) should be revised to shorten the application window to when application is likely to be most effective, ending in early June. *See* Kim D. Patten, *Imazamox Control of Invasive Japanese Eelgrass (*Zostera japonica*): Efficacy and Nontarget Impacts*, 53 J. Aquatic Plant Mgmt. 185–90, 189 (2015) (attached as Exhibit A).
    - Special Condition S4.A.2(g) (p. 9) should require more than one hour of dry time before tidal inundation. THW proposes six hours of dry time. Additionally, the area should be monitored during the dry time.
    - Special Condition S4.A.2(i) should describe how wind speed must be measured or, in the alternative, require permittees to report on how wind speed was measured and when it was measured relative to application.
    - Currently, Special Condition S4.A.2(j) (p. 10) prohibits application of imazamox directly into drainages that contain *Z. marina* and move water off the treatment site. In order to avoid harm to *Z. marina*, please require that no spraying be allowed near or over pools where it exists and require that no spray be allowed near drainage swales that contain *Z. marina*.
    - As described above, permittees should be required to report on compliance with these and all other parameters in monthly and annual reporting.

- Special Condition S4.B (p. 10) requires a minimum buffer width of 10 meters for all treatment sites. Please require markers such as food-grade dye or flags to mark boundaries and the buffer area.

- In addition, Special Condition S4.B should require exact monitoring requirements to ensure the buffer is protective of adjacent vegetation. THW suggests vegetation plots in the buffer to measure for *zostera spp.* plant kill every 250 feet in the buffer one week

after herbicide application. The results of this monitoring should be a required component of monthly and annual reporting.

- Special Condition S4.D (p. 10) requires permittees to post signs near the treatment site 24 hours prior to treatment. However, most of the treatment sites are not accessible to the public, so there is no way (1) for the public to see the postings and be informed of treatment or (2) to ensure that permittees comply with the posting requirements. Please revise the permit to require signs posted four business days prior to treatment at and around Leadbetter Point, including near and around Leadbetter Point State Park and the Willapa National Wildlife Refuge. In addition to what the draft site signage template already requires (treatment dates, applicator contact information, and permit number), these postings should include:

    - The location of application, including both a written description and a map;
    - The amount of imazamox to be applied;
    - The number of acres to be treated; and
    - Name and contact information of commercial clam bed owner/operator

- Currently, the Permit merely requires the permittee to conduct monitoring and retain records to be made available to Ecology upon request. *See* pp. 11–13. As detailed above, the Permit should instead require permittees to submit Special Condition S5 monitoring (pp. 11–12) to Ecology once per month during the permissible treatment window regardless of whether treatment has occurred or is planned. Such reports should then be made available to the public on PARIS.

- Special Condition S7.B (pp. 13–14) requires permittees to provide notice to Ecology and adjacent landowners "at least 10 days prior to each herbicide treatment." In addition, the notification forms (Ecology Pre-Treatment Notification Form and Landowner Pre-Treatment Notice) should be publicly posted online.

II. <u>The Draft Permit Fails to Ensure Compliance and Accountability</u>.

THW is concerned about current and future compliance with the Permit. Based on information publicly available, it appears Ecology has never inspected or taken any enforcement actions against permit holders.

To address these concerns, THW requests the following information and proposes the following changes to the Permit:

<u>Fact Sheet and Reporting on Past Compliance and Ecology Action:</u>

The Permit's Fact Sheet should detail whether the nine current permit holders have complied with and are in continued compliance with the Permit, including all Special Condition S3, S4, and S5 requirements.

For example:

- Were all applications of imazamox directly supervised by a properly licensed applicator?
- Was all equipment properly calibrated and maintained?
- Were application rates less than 1.4 ounces per acre?
- Did permittees refrain from applying other pesticides to commercial clam beds four days before and after imazamox application?
- Did permittees refrain from applying imazamox unless and until *Z. japonica* levels met or exceeded DMP action thresholds?
- Did permittees allow at least one hour of dry time before tidal inundation?
- Did permittees refrain from application when wind speeds exceeded 10 miles per hour and how was this measured?
- Etc.

If this change is not made, can Ecology please provide this information in response to these comments?

Additionally, the Permit's Fact Sheet should summarize any and all Ecology enforcement actions and inspections under the Permit to date. If this change is not made, can Ecology please provide this information in response to these comments?

Reporting on Compliance with Special Conditions S3 and S4:

As aforementioned, the Permit prohibits violation of Water Quality Standards and requires permittees to use AKART. *See* Special Condition S3.A and pp. 6–7; *see also* Special Condition S4. However, the draft Permit fails to provide any means of ensuring or enforcing compliance with these requirements.

Similarly, the Permit "prohibits treatment that causes oxygen depletion to the point of stress or lethality to aquatic biota from plant die-off, the mortality of aquatic vertebrates, or unintended impacts to water quality or biota"; prohibits application of active ingredient imazamox at a rate of more than 1.4 ounces per acre; and prohibits aerial application, among other requirements and limitations. *See* Special Condition S4, pp. 8–10.

Rather than one annual report, the Permit should require permittees to submit monthly reporting during the permissible treatment window, made available to the public via PARIS, regarding compliance with Special Conditions S3 and S4. Reporting should be required even if no treatment has occurred or is planned.

Inspection:

General Condition G3 gives Ecology the right of entry. *See* p. 18. Instead, Ecology should proactively conduct regular inspections.

Since permittees can only apply imazamox once per year (*see* Special Condition S4.A.2(f), p. 9), and given that there are currently only nine permittees, THW proposes that Ecology conduct two inspections per permittee each year during the permissible treatment

window. One inspection should occur prior to planned treatment and one should occur following treatment. Inspection reports should be made available to the public thirty days following inspection.

THW proposes adding these requirements to Special Condition S5 while leaving General Condition G3 intact.

If Ecology declines to make these revisions, can Ecology please explain, in response to these comments, how it ensures compliance with the Permit?

Who Is Liable?

The draft Permit fails to make clear who is liable for compliance with the Permit.

Special Condition S2.A notes that "[c]overage under this permit is for pesticide applicators . . . and their **Sponsors** who specifically want to use imazamox to control Z. japonica within commercial clam beds in Willapa Bay." *See* p. 2. The Permit defines "applicant" as "[t]he WSDA-licensed Pesticide Applicator with an aquatic pest control category endorsement and their Sponsor applying for permit coverage"; "permittee" as "[a]ny WSDA licensed Pesticide Applicator with an aquatic pest control category endorsement having coverage under this permit"; and "sponsor" as "[a]n individual or entity in the business of commercial production and sale of clams that has the legal authority to decide to apply herbicide to its owned or leased commercial clam beds." *See* pp. 24, 26, 27. The nine current permitholders listed in PARIS are all shellfish growers.

The Permit should make clear that it is the entities in the business of commercial production and sale of clams—i.e., the owners/operators of the permitted facility—that are the permit holders liable for compliance. This aligns with other Ecology NPDES permits where the owner/operator of the discharging facility is liable for permit violations not, for example, third parties hired to help with facility management or permit compliance.

Specifically, THW proposes the following revisions:

- Special Condition S2.A should state: "Coverage under this permit is for individuals or entities in the business of commercial production or sale of clams that have the legal authority to decide to apply herbicide to owned or leased commercial clam beds and want to use imazamox to control *Z. japonica* within commercial clam beds in Willapa Bay ("Permittees"). Coverage under this permit must be obtained before imazamox treatment begins. Permittees are required to apply with a pesticide applicator licensed by the Washington State Department of Agriculture with an aquatic pest control category endorsement ("Sponsors")."
- Applicant should be defined as: "The individual or entity in the business of commercial production or sale of clams applying for permit coverage and the WSDA-licensed Pesticide Applicator with an aquatic pest control category endorsement acting as their Sponsor."

- Permittee should be defined as: "An individual or entity in the business of commercial production and sale of clams that has the legal authority to decide to apply herbicide to its owned or leased commercial clam beds."
- Sponsor should be defined as: "Any WSDA-licensed Pesticide Applicator with an aquatic pest control category endorsement applying with a Permittee under this Permit."
- Changes should be made throughout the Permit to reflect these revisions (e.g., current uses of "permittee" to describe pesticide applicators should be changed to "sponsor," and current uses of "sponsor" to describe clam bed owners/operators should be changed to "permittee").

If Ecology declines to make these revisions, can Ecology please respond to these comments by specifying which party is liable for noncompliance with the Permit?

III. Experimental Use Should Not Be Permitted Under this Permit.

Special Condition S1.A provides that "[p]ermittees may apply chemicals not listed in this permit on a limited basis in the context of a research and development effort under the jurisdiction of the Washington State Department of Agriculture by obtaining a Washington State Experimental Use Permit." *See* p. 2. Special Condition S4.E provides that "[e]xperimental use of chemicals not listed in this permit may occur on a limited basis in the context of a research and development efforts [sic] related to the chemical control of Z. japonica." *See* p. 11.

The experimental use of chemicals should not be allowed under this Permit. Washington State and Federal experimental use permits are not NPDES permits and there is no notice or opportunity under this Permit for the public to participate and ensure that such chemicals do not harm Willapa Bay. Moreover, the Permit does not provide limits or assurances that these experimental chemicals will not cause harm beyond the scope of the Permit.

While THW proposes elimination of these provisions, at a minimum, the Permit should require permittees to report any experimental use and related permits in their application, modification, and renewal materials, giving the public an opportunity to comment on the use of experimental chemicals to control *Z. japonica* in Willapa Bay. Permittees should also be required to report the use of any experimental chemicals in their monthly and annual reports with citations to their experimental use permits.

If Ecology declines to adopt these changes, can Ecology please explain, in response to these comments, why it believes the Permit should allow experimental uses and how these Permit provisions ensure (1) no harm to Willapa Bay and (2) the public's right to be informed and to comment on the use of experimental chemicals in Willapa Bay to control *Z. japonica*?

IV. Conclusion.

Twin Harbors Waterkeeper is concerned that Ecology's Permit, as written, fails to sufficiently protect Willapa Bay and the species that rely on it. Please consider the concerns and suggested revisions expressed in these comments. Please also explain how the current and draft

Permits are effective in regulating imazamox applications, holding permit holders accountable for compliance, keeping the public informed, and protecting Willapa Bay. Please respond to these comments in writing so our clients and others can understand Ecology's views on these issues, and please include these comments and all attachments in the administrative record for this matter.

We appreciate the opportunity to comment on the draft 2025 *Zostera japonica* Management on Commercial Clam Beds in Willapa Bay General Permit. THW supports Ecology's efforts to regulate imazamox. However, the Permit must include stronger mechanisms for permittee accountability, Ecology inspection and enforcement, and public reporting and transparency.

Thank you for taking the time to review and respond to these comments and questions. Please notify me and Twin Harbors Waterkeeper in writing of any subsequent action on this Permit. Please also contact me with any questions or concerns about these comments or to meet with me or my clients to discuss them. You can reach me at the phone number or email address listed in the letterhead or by mail at Kampmeier & Knutsen PLLC, 705 Second Avenue, Suite 901, Seattle, Washington 98104.

Sincerely,

KAMPMEIER & KNUTSEN, PLLC

By: s/ Erica L. Proulx
Erica L. Proulx

cc. Sue Joerger and Lee First, Twin Harbors Waterkeeper