

November 22, 2010

Helen Bresler
Department of Ecology
Water Quality Program
P.O. Box 47600
Olympia, Washington 98504-7600

RE: Washington Department of Ecology's Draft Water Quality Trading Framework

Dear Ms. Bresler:

Avista appreciates the opportunity to provide comments on the Draft Water Quality Trading Framework (Draft Framework) that Ecology has developed. We hope this trading program will lead to real improvements in water quality throughout the state and locally within the Spokane River and Lake Spokane.

We have three general comments on the Draft Framework. First, we believe the trading program should be open to any entity with a legal obligation to improve water quality, including entities with obligations based on a TMDL. As you know, Avista has been actively involved in Ecology's development of the Dissolved Oxygen Total Maximum Daily Load for the Spokane River and Lake Spokane (DO TMDL). Avista's responsibility for improving DO in Lake Spokane is set out in Table 7 of the DO TMDL. However, since it does not discharge any DO-depleting pollutants, Avista has limited options for fulfilling its responsibility. Its preference, and that of Ecology, is to reduce nonpoint sources of nutrients to the lake (DO TMDL at p. 46 and C-9). To accomplish this, as well as to reduce other potential nutrient sources to the lake, Avista should have access to the same trading opportunities that will be available under the Draft Framework.

As currently drafted, however, it is not clear whether Avista would be allowed to conduct trades under the Draft Framework because the document appears to be written only with dischargers in mind. For example, under the heading "How trading works," the Draft Framework, (p. 3) states that:

Point sources can meet their wasteload allocation (WLA) by:

1. Meeting the permit limit based on the WLA through on-site actions, (for example, by reducing the quantity or improving the quality of discharge).
2. Earning "credits" by implementing pre-approved nonpoint source pollution control measures, or
3. Buying "credits" from other sources that have reduced pollutants below their own allocation.

Within this context, there is no similar statement that an entity with a water quality improvement obligation—but no point source discharge—can earn or buy credits. Similarly, the Draft Framework suggests that only a point source discharger may propose alternative trades: “A discharger proposing a trade not on the approved eligible trade list (determined by Ecology) is responsible for showing that it will actually offset a portion of the discharger’s water quality-based effluent limit and meet all other trading requirements listed in the Introduction section” (p. 5). The section of the Draft Framework that discusses implementation of trades seems to assume that a point source will always be involved (p. 7). Avista encourages Ecology to revise the Draft Framework to make clear that it applies not only to point source dischargers, but to any entity with a legal obligation to improve water quality.

Second, there continues to be confusion over the terms “trade,” “offset,” and “credit” as used in the Draft Framework. The terms apparently refer to three distinct concepts. As we understand it, a “credit” is a unit of pollution that can be “traded” for use as an “offset.” If our understanding is correct, the definitions of “offset” and “trading” do not make the differences between them clear. We suggest that Ecology revise the draft definitions to read as follows:

Offset: A reduction in pollutant discharge from a source, measured in credits, that is used to balance or compensate for pollutant discharges from a different source. Examples include water conservation, using phosphorus-free fertilizers, or reducing other pollutants with a similar impact on water quality. This term was included in the concept of “delta management” used in the TMDL.

Trading: The exchange of credits for use as offsets. Trading can be done pursuant to agreements with either point source or non-point source dischargers requiring reductions in pollutant discharges. This term was included in the concept of “delta management” used in the TMDL.

Third, the Draft Framework contemplates a number of decisions that must be made before trading can begin, including the types of projects that can generate credits, the methodologies used to calculate the amount of credit assigned to a pollutant reduction project, and how monitoring to document credits will be incorporated into existing models. Since these decisions will have a major impact on the feasibility of the trading program, Ecology should not make them in isolation. We think it is critical that Ecology consider input from the parties who will participate in the trading programs, including entities that receive waste load allocations or other responsibilities based on a TMDL.

We also have specific comments on some provisions of the Draft Framework. Those provisions, and the headings under which they appear, are set out below. Our comments follow immediately after the provisions.

1. How trading works.

The third bullet states that “*Nonpoint pollution sources receive a load allocation, which establishes the baseline that must be met before nonpoint credits that may be traded accrue.*” We assume Ecology included this statement to implement another provision of the Draft Framework, the notion that credits cannot be given for actions that are already required by a TMDL load allocation (p. 8).

However, we think this statement fails to make an important distinction between load allocations and waste load allocations. Waste load allocations apply to specific sources, such as a single discharger. On the other hand, at least in the DO TMDL, load allocations apply to entire water bodies, such as rivers or creeks. This means that load allocations do not apply to particular nonpoint pollution sources. For example, the DO TMDL assigns load allocations to the Spokane River tributaries. While there may be several discrete nonpoint sources on each tributary, the DO TMDL obligation to decrease discharges does not require action by any specific nonpoint source. Instead, the pollutant reduction required by the load allocation is to come from the tributary as a whole.

This is important, because it means that individual nonpoint sources are under no obligation to reduce their discharge. Those individual nonpoint sources should therefore be able to generate credits for trade, even before the tributary's overall load allocation is met. We believe the statement made in the third bullet—that load allocations must always be met before nonpoint credits can accrue—should be revised accordingly; otherwise it is not likely significant improvements will ever occur in the tributaries.

We understand there may be a concern about potential double-counting of pollutant reductions within a tributary—that is, a concern that the reductions associated with the trade must occur in addition to the reductions required under the load allocation. However, we believe that the credit accounting system described in the Draft Framework will ensure that no double-counting occurs.

2. What is a credit?

The third bullet states that a credit is “*Generated by a nonpoint source from the installation of best management practices beyond those required to meet the most stringent load allocation applicable to that nonpoint source.*” We believe this statement is unnecessarily narrow. The reference to “installation of best management practices” may imply that credit can be earned only if a structural change is made to a pollutant-generating activity. However, actions other than structural changes can reduce pollution. For example, land currently used for farming could be taken out of production entirely. This would not involve *installation* of any best management practices, but would result in fewer nutrients being discharged to nearby water bodies. We believe any action that reduces pollutant discharge should be eligible to generate credits under the trading program, even if it does not require *installation* of best management practices, and the Draft Framework should clearly state this.

The fifth bullet states that “*Nonpoint source credits and trading ratios must be measured or calculated from the same baseline used in the TMDL and must be consistent with the assumptions used to develop the load allocation.*” We fully appreciate the importance of establishing a sensible baseline, but this statement is not clear to us. Please explain what it means for source credits and trading ratios to be measured or calculated from the same baseline used in the TMDL, and what it means for those credits and ratios to be consistent with the assumptions used to develop the load allocation.

One component of Ecology's Margin of Safety for the DO TMDL was establishing the baseline using 2001 conditions, which represented a low-flow, high temperature year (i.e., the 7Q10). Nonpoint source credits and trading ratios used to meet waste load allocations and other responsibilities under the DO TMDL will therefore be measured or calculated from 2001

conditions. Since it's likely that the assumptions used to develop the load allocation will change over time as new data become available, how will real-time monitoring data be meshed with the 2001 load assumptions? In other words, how will Ecology measure compliance with two separate data sources, one being real-time BMP effectiveness monitoring results and the other being the 2001 loading assumptions?

The methods for managing uncertainty will presumably need to include the trading ratio, monitoring results, modeling results, and BMP efficiency estimates. This is a complex suite of tools, and we think it will be important not to incorporate unnecessary conservatism into the use of these tools. For example, Ecology should not discount trading ratios excessively based on concerns about uncertainty, especially since monitoring will show whether expected reductions actually occur. If actual reductions are higher or lower than expected, Ecology can adjust the credits to reflect what really happened. But there may be little interest in participating in the trading program in the first place if credits are set unreasonably low to account for uncertainty.

3. Elements of a credible water quality trading program.

The first bullet states that a credible water quality trading program "Must define a common unit of credit, such as pounds of phosphorus per day." It may be appropriate to introduce other common units of credit for definition, such as pounds of other nutrients or pounds of dissolved oxygen.

4. Determining eligible trades.

The introductory sentence states that "*Ecology, with input from interested parties, will determine what types of trades will be eligible for each specific pollutant/watershed water quality trading program.*" How will Ecology's determination be communicated—through an order or some other final decision document? Will interested parties have an opportunity to dispute the determination?

5. Quantifying/estimating pollutant reductions.

The first sentence states that "A standard methodology must be used to estimate the amount of pollution reduction expected from the implementation of eligible BMPs." In view of the fact that there are literally dozens of methodologies that might be considered "standard," how and by whom will the "standard methodology" be selected or developed? It is also important to note that all methodologies do not work in all situations. For example, the CE-QUAL model provides a very precise and robust methodology for assessing the Lake Spokane, but cannot assess reductions at a given source miles up the tributaries. Will more than one methodology be available for use, given that the Trading Framework is for the entire State, which includes water bodies with myriad water quality concerns?

The second sentence states that "*Monitoring must measure actual reductions periodically and adjust, if necessary, the estimated reductions.*" This could be read to say that monitoring will adjust reductions, but in fact Ecology will need to adjust the reductions based on the monitoring results. We suggest this sentence be rewritten so it reads "Periodic monitoring must measure actual reductions, and the monitoring results will be used to adjust, if necessary, the estimated reductions."

6. Establishing trading ratios.

The fifth bullet states that one of the factors to consider when establishing a trading ratio is “*Risk—likelihood of BMP failing or of implementer renegeing.*” We disagree that the likelihood of a BMP failing or of an implementer renegeing should be considered when establishing trading ratios. Doing so could unfairly deprive buyers and sellers of the full value of a trade based on only a possibility that the pollution reduction will not occur. Besides, the Draft Framework includes other safeguards to ensure that credits cannot be earned if the predicted pollutant reductions do not occur. For example, under the heading “Credit expiration/retirement” on page 8, the Draft Framework states that approved credits will expire “If the BMPs by which the credits are accrued are shown to be ineffective or less effective than originally expected.”

The last sentence states that “*Retiring credits—a certain proportion may be retired, which means that those improvements must remain in place forever.*” We do not understand this concept. Please explain what it means to “retire” a credit; an example or two would be helpful.

7. Implementation requirements.

The first bullet states that “Implementation of the offset/credit for any proposed new or expanded actions must be demonstrated to have occurred in advance of the proposed action.” This statement is unclear to us. We assume that an “action” is a discharge or other operation that affects water quality. Is that correct? How would this statement apply to an existing discharge or other operation that may affect water quality, such as a dam?

The second bullet states that “*Point or nonpoint source controls must be secured using binding legal instruments between any involved parties for the life of the project that is being offset.*” We interpret this to mean that contracts or other binding legal instruments must be in place for any period when credits are being used to meet an obligation to improve water quality. Thus, a discharger could sign a series of short-term contracts, “stacking” them so the discharger has necessary credits as long as its discharge continues. We do not read it to say that the duration of *each* such contract must be for the “life of the project that is being offset.” In our view, that could be an unworkable requirement for two reasons. First, sources that generate credits may be unwilling or unable to enter into such long-term commitments for legal or other reasons. Second, it may not be clear what the “life of the project” will be, given the diverse nature of projects that may use offsets, including municipal sewage treatment plants, industrial dischargers, and dams. We would appreciate clarification on this point.

8. Ecology issues the NPDES permit.

The first and second bullets use the phrase “best technology” when describing dischargers’ obligation to treat their wastewater before discharge. The first sentence below the bullets uses a similar phrase, “best effluent technology.” Under Washington law, dischargers are not required to use “best technology,” or “best effluent technology.” Instead, they are required to apply all known, available, and reasonable methods of treatment (AKART) to their wastewater. Ecology should replace the phrase “best technology” each time it appears with “AKART.”

9. Permittee implements offset.

The second bullet states that “*Ecology may conduct periodic inspections, including but not limited to visual inspections, and water quality monitoring, at any time during the life of the offset.*” Does Ecology intend to enter onto private property to conduct inspections and monitoring? If so, will it obtain access using its own authorities, or will it expect entities who buy credits to negotiate access on Ecology’s behalf? We believe that if entities buying credits are to negotiate independent access for Ecology, the terms of access should provide that Ecology may enter onto the property only during normal business hours, and only after giving reasonable advance notice to the property owner and to the entity that holds the credit.

10. Credit expiration/retirement.

The first bullet states that approved credits will expire “*If they become actions required by a permit, by a TMDL load or wasteload allocation or TMDL implementation plan, or by policy regulation.*” Please delete the next-to-last word in this sentence, “policy.”

The second bullet states that approved credits will expire “*If the BMPs by which the credits are accrued are shown to be ineffective or less effective than originally expected.*” We agree that credits should expire if actions taken to reduce pollution are wholly ineffective. But if they are simply less effective than originally expected, Ecology should adjust the credits downward, rather than causing them to expire altogether. By the same token, we believe that Ecology should adjust credits upward if monitoring results or other information show them to be more effective than originally expected.

Thank you for considering our comments. We look forward to working with Ecology as it further develops the water quality trading program. Please feel free to contact me at (509) 495-4998 if you have any questions or wish to discuss our comments.

Sincerely,



Elvin “Speed” Fitzhugh
Spokane River License Manager

c: Dave Moore, Ecology