

November 19, 2010

Ms. Helen Bresler
Washington Department of Ecology
P.O. Box 47600
Olympia, WA 98504-7600

Submitted by email to hbre461@ecy.wa.gov

Re: Comments on Draft Water Quality Trading Framework

Dear Ms. Bresler,

We very much appreciate that the Washington Department of Ecology has undertaken to produce a policy framework for water quality trading in our state. Such a framework is badly needed. Its continued absence would have been a significant deterrent to local communities who might wish to take advantage of the much needed benefits of water quality trading – both environmental and financial. Thank you for moving ahead with this. And thank you for providing the opportunity to comment.

As you know, we at American Farmland Trust have been working for some time to encourage credible trading programs here in Washington and throughout the county. Water quality trading offers the opportunity for communities to meet and exceed water quality standards (whether there is a TMDL yet in place or not) while also improving environmental quality in other critical regards. It also helps to keep rural agricultural lands in farming and out of development – itself a highly desirable environmental goal. If, however, the rules we create make responsible, credible trading impractical, the potential for these immensely valuable benefits will evaporate. So it seems well worth the struggle to design a trading system that can credibly and effectively protect and improve water quality while also reducing social costs and achieving these other valid social goals.

To this end, we offer the following comments on your Draft Framework document:

- **Overview – ancillary benefits:** In the overview pages, could the Department recognize some of the above ancillary benefits of trading? Perhaps there could be a few sentences describing the multiple ecosystem services often resulting from water quality BMPs implemented by nonpoint sources. And perhaps there might be mention of the possibility that efforts to meet water quality standards could be integrated into other environmental protection efforts as well. As we know, point to non-point trading (unlike point-source infrastructure investments) can provide much more in environmental benefits than just reduction in a specific water quality pollutant. For example, the BMPs used can also provide aquifer recharge and relief from flooding (both of which have their own attendant water quality benefits). They can also provide wildlife habitat & migration corridors. They can sequester carbon. And they can provide ancillary water quality improvements for pollutants that may not be directly involved in a permit or in a TMDL (for example, a BMP targeting nitrogen can also reduce sediment or phosphorous or improve groundwater, etc.). This is not to mention the considerable environmental advantages of keeping our rural lands rural – a desirable outcome that the trading discussed in this Draft Framework could greatly aid.

Certainly we realize that the Department's charge in protecting water quality and in meeting the requirements of Federal and State clean water laws is a heavy one. And clearly, the Department must focus on that priority. But where there are possibilities for achieving substantial additional environmental and other social benefits as well, it also seems that we ought to consciously and expressly acknowledge them so that our policy product will be more likely to help make them happen where that is possible.

- **Overview – cost:** The overview section takes pains to make a strong statement (p.1) that the purpose of trading is NOT financial gain. But it seems unclear why this language is needed. And the intent is a bit confusing considering that the overview also clearly acknowledges that one of the valid objectives of trading is cost savings – a particularly critical recognition in the water quality trading arena where there is frequently a dramatic difference in financial cost between meeting water quality standards using technology infrastructure and meeting them using watershed restoration through BMPs implemented by farmers and ranchers.

Perhaps it might be sufficient simply to state that even though cost savings are a valid objective in designing rules for trading, the ultimate outcome must result in fully and credibly meeting clean water standards and this that ultimate outcome cannot be compromised by reason of cost.

- **Overview – limits of technology:** The Draft Framework seems, generally, to reflect a significant implied bias toward requiring permittees to achieve load allocations and water quality using on-site technological solutions, pretty much regardless of cost, unless the use of technology is plainly and entirely impossible. This seems surprising in that one might presumably not expect to see, from our Department of Ecology, a preference for complex technology over watershed restoration through BMPs.

The use of technological fixes for reducing pollution is, of course, at the heart of water quality law. And technology has, without doubt, taken us a good way down the road toward clean water. So perhaps there is a sense of confidence in technology born out of familiarity. But given the magnitude of the nonpoint issues we face, clearly future solutions must increasingly focus on reducing nonpoint source pollution. Water quality trading creates an opportunity to begin achieving meaningful nonpoint control and it would seem that we should welcome and make the most of this opportunity.

Perhaps, too, the Department lacks confidence in the effectiveness or the certainty of BMPs as a tool to achieve genuine, credible, and reliable reductions in pollution. Indeed, one of the advantages of giving trading a try is that doing so will quickly remove such doubts – one way or the other.

As for the effectiveness of trading, we at AFT are thoroughly convinced that properly designed, modeled, and implemented BMPs can be highly successful at eliminating pollution. There a great deal of research on most of these BMPs and some 60 years of experience with them upon which to draw in understanding their impact. So we ought to be

able to act with a good deal of prior knowledge about those impacts and confidence in the outcomes.

As for the certainty of pollution reductions, BMPs, also seem a much better bet. The use of credit pooling and the purchase of excess credits from a large number of landowner participants can easily guarantee that there will be no real possibility of even a minor lapse in credit production. Can one truly say the same for a single large technological infrastructure facility that depends on constant maintenance, reliable staffing, a steady (and substantial) supply of electricity, etc.? Even a brief failure of such a facility can result in a massive discharge to the waters of the state. We at AFT believe that watershed restoration is a much safer, more reliable, certain, and publicly responsible answer.

- **Overview – reasonable certainty in achieving nonpoint allocations:** Point source controls have succeeded in great improvements in water quality over the past 30 years. But we now (perhaps thanks to these controls) face a different world than the one that existed in the 1970s. Nonpoint pollution (in which agriculture plays a substantial role) is the overwhelming contributor to today’s water quality problems. Yet our success at regulating nonpoint is little better today than it was 40 years ago.

When the Department of Ecology submits its TMDLs for approval by USEPA, it must present plans that offer reasonable certainty, not just in the point source controls it will require, but also in the achievement of nonpoint source load allocations as well. Given our poor record of success with regulating nonpoint, and given our similarly poor record of success using traditional “cost share” “incentive” programs and relying on the typically uncertain funding they offer, one must ask: How can either the Department of Ecology or USEPA truly and honestly argue or conclude, with any reasonable certainty, that those promised nonpoint load allocations will actually be achieved? What earthly sense does it make to present a plan that might offer near absolute certainty in point source controls, but almost none for nonpoint?

As discussed above, trading can result in pollution reductions in excess of those needed to reach the actual load allocation in a watershed – point and nonpoint. And it can make that happen much sooner than might otherwise be possible. It also offers considerably greater prospects of success than traditional nonpoint programs. Unlike traditional “cost share” programs, trading pays (above baseline) for the full cost and value of the BMPs farmers will implement – assuring that a likely large majority of them will take an interest and want to participate. This is quite different from relying on the small minority of landowners who typically participate in “cost share” programs which require the landowner to pay a significant portion of the cost themselves. Moreover, because trading typically saves the NPDES permittee substantial expense, we know the funding will actually and readily be available. This is quite unlike the dependence on uncertain public appropriations required for publicly-funded “incentive” programs.

Moreover, we are to be reasonably certain our nonpoint strategies will be successful, we need also to have confidence that our communities now and in future will support them. If, for example, our strategy relies upon future nonpoint regulations, we need to account for the

likely resistance that approach may engender both to the rules themselves and to the funding needed to enforce them. Trading, on the other hand, is popular. It actually saves the community money. It can produce a multitude of benefits beyond just the pollution reductions it will provide. It does not require the adoption of new rules – the authority is already in place - but even if new rules were needed, one could count on community and political support. For nonpoint pollution, trading, like incentives, also offers one very large advantage over regulations in that it can enlist landowners in making affirmative improvements on their properties rather than simply preventing them from causing harm.

Given our history of failure with addressing nonpoint using our current tools (regulatory and cost-share incentives), and given the promise offered by trading, it would seem we should be actively seeking out new opportunities to use it, not closing them off. If that is one of the purposes for this new Draft Framework, it would be useful if it could mention some of these advantages. That additional understanding might be useful for communities which, in future, might consider using it.

Overview – Pre-TMDL trading – P. 2: There is very little in this Draft Framework that would be encouraging for communities potentially interested in pre-TMDL trading. Trading before the implementation of a TMDL represents a real opportunity to get early improvements, perhaps to actually achieve water quality standards without the need for a TMDL, and to get communities fully engaged in trading before it may be strictly required by law. Perhaps there might be more discussion of these possibilities and how they might work.

Instead, the discussion of pre-TMDL trading in the overview (P. 2) actually seems pretty negative – referring to “some limited circumstances” when a community might choose to be proactive. Surely there are more than a few rare occasions when proactive community efforts can be worthwhile. And near the bottom of page 2, the overview actually uses a double negative to apparently, but unnecessarily, emphasize the point that compliance with the process outlined in the Draft Framework is required (pre-TMDL) if a permittee is to later use its activities in complying with their legal requirements.

How trading works – P. 3: The third bullet in this section seems to say that an entire non-point source watershed or community must meet its collective nonpoint load allocation before any trading can be credited. If this is the intent, it is a major and highly counterproductive barrier to any possibility of trading. As is mentioned above, it seems unlikely that most of these communities will in fact ever succeed in achieving their nonpoint load allocation using current traditional tools (see the discussion of reasonable certainty, above). And even if they do, it seems likely that it will take a good long time to get there – during which time water quality standards are not being met and trading will not be possible. This highly punitive provision will simply prevent trading from becoming available to those landowners in such a watershed who are actually able to help and who might be willing to do so if allowed to trade their excess performance with interested permittees.

Why would one refuse to allow the sale of and credit for water quality benefits generated by an individual farm landowner in a watershed to the extent that those benefits are clearly above that landowner’s share of the collective community responsibility? Wouldn’t it be

better to simply assign an appropriate share of the full nonpoint community's allocation to each participating individual landowner seeking to sell credits? One could consider their share of the total acres, the nature and proximity of their land, the type of agriculture, or other factors that might reflect that landowner's share of the full community allocation. This would then be treated as that landowner's individual baseline above which trading would be allowed. Or, one might simply establish a baseline of practices that would meet the allocation if all those in the nonpoint community used them. Then allow any individual landowner who implements those practices and then exceeds them to sell the excess.

- **Elements of a credible water quality trading program** – P. 4: It would be useful if the Draft Framework could include mention that one of the elements of a credible water quality trading program is that there be early participation by nonpoint sources, by permitted point sources, and by the community in designing the market arrangements that will be used. Such input is quite important if we are to develop community support and confidence in the final product and if we are to have confidence that the ultimate program will be reliable. And it is necessary to have such input from the farm community, for example, if we are to be sure the program will be workable for agriculture.
- **Identifying eligible BMPs for nonpoint trades** P. 4: To apply the above point specifically to this section: in identifying a specific, prioritized set of BMPs that will be used for trading, it would be useful if the Draft Framework were to include a process to take input on and ground-truth those BMPs with the farmers in that watershed. It will be pointless if we end up with BMPs that simply don't work for local farmers or that have drawbacks that aren't addressed – like the need for continual maintenance, for example.
- **Quantifying/estimating pollution reductions** – P. 5: This section doesn't convey a lot of detail about how the Department of Ecology will go about estimating pollution reductions. If we are to assure public confidence in the use of trading while taking advantage of its legitimate potential, perhaps it might be useful to include a process for making sure the "standard methodology" referenced is peer reviewed as well as accepted by the regulatory agency.
- **Establishing trading ratios - risk** – P. 5: Perhaps it might be useful to mention in this section something concerning the potential for credits to be pooled and aggregated. This is an important tool for assuring the absolute certainty of credit production. Mentioning it would help communities anticipate the potential for its approval as a means to create the needed certainty. Pooling could be a factor in reducing an otherwise onerous trading ratio.
- **Ecology issues NPDES permit** – P. 7: This section states that the NPDES permit can only allow trading above the "best technology dischargers can achieve." We appreciate that the State of Washington must require use of that level of technology that is required under federal law. The hope is, however, that the standard suggested does not require greater use of costly and uncertain technology than is already required under the Federal Clean Water Act when less costly and more certain and effective trading regimes might be readily available. (See the discussion above under: "Overview – limits of technology.")

- **Implementation requirements – credits completed in advance of permit** - P. 7: The first bullet under “implementation requirements” on page 7 seems to require that a credit will not be allowed consideration in negotiations for an NPDES permit unless it has been implemented previously. If this reading is correct, this seems extraordinarily restrictive. In current practice, permittees are NOT typically required to construct and make their technological solutions operational prior to approval of a permit – why would one require this for nonpoint BMPs that will be used for the same purpose.

This is more than just a matter of timing. It would require the permittee to secure credit to pay for nonpoint BMP implementation before securing its approved permit, which is probably impossible or at least very difficult. And there is no apparent reason for this requirement, other than, perhaps, an unjustified confidence in the reliability of technology.

- **Permittee implements offset** - P. 7: This section requires that the “discharger must certify each month that . . . pollution reduction associated with the action is being achieved.” This is highly burdensome. It certainly seems appropriate to require frequent assurance by discharger that, indeed, the practices are in place and being operated correctly. But it also seems a bit excessive to require such often certification that the actual pollutant reductions are, in fact, being achieved – this would require monthly (and highly costly) monitoring which seems quite impractical and unnecessary. If one has (as one should) the confidence in the effectiveness of the BMP when a trade transaction is initially approved, why would one require such burdensome monitoring and rigorous frequent certifications later on. The interval for this requirement should be a good deal less frequent.
- **Credit expiration/retirement** – P. 8: In this section it might help to also acknowledge and account for the fact that some credits actually become more effective over time (like planting trees along streams) while others require regular maintenance to generate the same amount of credits (like mowing grass buffers and reseeding them periodically).

Also, in this section, it seems unwise to force the expiration of credits if a higher standard of load allocation is established in a subsequent permit. There is a big advantage to longer-term contracts for all concerned. The initial formation of such long-term contracts should be encouraged by allowing them to be completed for their full term. New, higher standards can later be met with additional new contracts when the time comes.

Thank you for the opportunity to comment of this Draft Framework. We appreciate the Department’s efforts to begin providing guidance for communities seeking to use water quality trading to meet their responsibilities to meet Washington’s clean water standards. And we look forward to working with you to help make that happen in the months and years ahead.

Sincerely,

Don Stuart
Pacific Northwest Regional Director