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## **RE: Comments to the Spokane River Draft Trading Framework.**

Dear Ms. Bresler,

These comments are submitted on behalf of Kootenai Environmental Alliance (“KEA”), Spokane Riverkeeper and The Lands Council regarding the proposed Department of Ecology’s draft Water Quality Trading Framework (“Trading Program”).

KEA is a non-profit membership organization dedicated to conserving, protecting and restoring the environment. KEA has members and works with organizations focused on the Coeur d’Alene Basin, Idaho Panhandle, and the Spokane River. KEA members live along the river and enjoy recreation areas such as Lake Spokane, a victim site to blue-green algae blooms and low levels of DO. KEA is a member of the Trading Program Advisory Committee and provided comments on the Spokane River Dissolved Oxygen Total Maximum Daily Load (“DO TMDL”), which is the true target of the Trading Program.

The Lands Council is a not-for-profit conservation group dedicated to protecting the quality of life and the environment in the Inland Northwest. The Lands Council is concerned about the environment’s effect on people’s health and works to protect thousands of acres of public land in order to maintain a clean and healthy environment. These lands include forests, water, and wildlife, including but not limited to the Spokane River Watershed. The Lands Council collaborates with a broad range of interested parties including communities, businesses, recreational groups, government agencies, and elected officials to seek smart and mutually respectful solutions to environmental issues. When necessary, the Lands Council uses litigation to protect forests and waters on behalf of its members and the public. The Lands Council seeks to enforce environmental rules necessary to ensure a clean and healthy environment. The Lands Council is a member of the Trading Program Advisory Committee and also provided numerous comments on the DO TMDL.

The Spokane Riverkeeper is the Spokane River branch of the International Waterkeeper Alliance. Spokane Riverkeeper operates through the Center for Justice, a not-for-profit legal organization. Spokane Riverkeeper conducts surveillance of the Spokane River and its tributaries and reaches out to river users who share its commitment to a river that is swimmable, fishable, free from pollution and properly regulated. To further these goals, Spokane Riverkeeper actively seeks Federal and State agency implementation of the Clean Water Act and, when necessary, directly initiates enforcement actions on behalf of itself and the public. Spokane Riverkeeper is a member of the Trading Program

Advisory Committee.

We appreciate the invitation to comment on the proposed Trading Program. However, we find the proposed Trading Program to be lacking in several important areas. As set forth in the comments below, the Trading Framework falls short of meeting the legal requirements of the Federal Water Pollution Control Act, 33 U.S.C. §§1251 *et seq.* (“Clean Water Act” or “CWA”) in a number of ways and does not provide reasonable assurances that the water quality standards for oxygen-depleting pollutants will be met. *See* 33 U.S.C. § 303(d)(1)(C); 40 C.F.R. § 130.7(c)(1)(i). As KEA, Spokane Riverkeeper and The Lands Council have explained throughout this process, the Clean Water Act is silent on the issue of nutrient trading as a means to meet National Pollutant Discharge Elimination System (“NPDES”) permit limits, and the only way the groups will approve of this process is with concrete evidence that water quality improvements will and are occurring in Lake Spokane. We therefore request the following amendments to the current draft Trading Program.

## **I. GENERAL COMMENTS**

As explained throughout this process, the environmental groups are wary of nutrient trading between point and non-point sources, and therefore these comments focus on trades between those partners.

EPA and Ecology cannot point to another program in the Country that successfully reduced nutrients in a watershed based on a trading program between point and non-point sources. The uncertainty of using Best Management Practices (“BMPs”) as the focal point of reducing pollution, given the Spokane Watershed’s unique ecology, requires monitoring prior to determining compliance with NPDES permit limits. Therefore, Ecology should require at least two year’s worth of monitoring prior to the expiration of the dischargers compliance schedule to demonstrate the exact pollutant reduction.

A comprehensive, enforceable, and scientifically based plan for pollution elimination is the only mechanism that KEA, Spokane Riverkeeper and the Lands Council believes will lead to the clean up and protection of the Spokane River and Lake Spokane. In order for KEA, Spokane Riverkeeper and The Lands Council to agree to the Trading Program they need a clearly defined plan to ensure that BMPs and corresponding ratios are scientifically defensible and are implemented and ground-truthed to guarantee their use and effectiveness. They need to see clear requirements to ensure transparency, compliance, and enforcement. Finally, the environmental community needs to see a framework that does not merely reallocate pollution, but has an immediately actionable plan to reduce oxygen depleting pollution in the Spokane River.

## **II. SPECIFIC COMMENTS**

### **A. The Trading Program Must Include a Fully Developed Compliance and Enforcement Plan**

The Trading Program inadequately describes compliance and enforcement, particularly when the trade is between a point source discharger and a non-point source. While we understand that this is a draft in its early forms, and that the draft is for a Statewide program, the actual details of the Spokane trading program must contain specifics for how compliance will be measured and what enforcement will occur if non-compliance is detected.

As drafted, the Trading Program for a point source to non-point source trade appears to allow compliance determinations be made by the discharger, with oversight conducted by Ecology. However, Ecology was directly asked at the first meeting on the trading scheme whether it would dedicate a person to determine compliance and enforcement of this program and the answer was no. How will Ecology ensure that a discharger is complying with its permit limits? How will that compliance occur between Idaho dischargers and Washington dischargers? How will Idaho DEQ and Ecology ensure that trades between an Idaho discharger and a Washington non-point source, or vice versa, will accurately reflect the amount of pollution reduced?

The regulator cannot merely assume that the discharger and the contract party that installs a BMP will adequately ensure compliance with the trading program. We want more guidelines on enforcement of BMP compliance, including not only adequate implementation but also assurances that the BMP is working as designed and intended. The best method for determining compliance is monitoring. If a party enters into a contract with a 3<sup>rd</sup> party for implementation of a BMP, we request that someone conduct stormwater sampling prior to implementation of the BMP to determine the baseline for the site, and then sampling during the BMPs existence, to ensure that expected reductions are actually occurring. We also want transparency of the monitored results. We ask for this transparency to come in the form of online accessibility to the monitoring results and the effects of the BMPs.

**Recommendation:** We recommend that a third-party be hired to conduct monitoring and compliance for non-point source and point source credits/trading. We request the monitoring be paid for by the participants of the Trading Program and be overseen by Ecology. Alternatively, given Ecology's budgetary constraints, an independent organization that will report to Ecology may be hired. Eastern Washington and Northern Idaho have several Universities and Community Colleges that have water quality sampling and monitoring capabilities that could oversee such a program. Without adequate oversight, the real possibility exists that the Trading Program will fail to actually reduce phosphorous levels in Lake Spokane. The environmental organizations are not interested in a scenario, where the parties are negotiating another "solution" to the nutrient problem decades after the first "solution" was implemented.

#### **B. The Trading Program Lacks Provisions Guaranteeing Transparency of Trades and BMP Effectiveness.**

We require that all credit trading and BMPs are transparent and readily available for review without request. We want easy readily available monitoring of trading practices open to the public. In order to promote transparency, we request that the results of the monitoring and compliance are posted online by the organization overseeing compliance. We request detailed DMRs be completed on a monthly basis, and that Ecology reject any discharger's suggestion that compliance be determined on a seasonal basis. The Clean Water Act, all applicable regulations, and the TMDL, require compliance with effluent limits be during the reporting period, i.e., monthly for phosphorous limits. We request that the monitoring be completed and submitted to Ecology in the same timeframe as DMRs, to ensure compliance with NPDES permit limits.

**Recommendations:** We request that the trades be posted online as soon as completed. We also request that the third party verifiers have access to the same database to upload data on the effectiveness of BMP's within 3 days of their verification. We want all sampling results to be posted online so the public, the discharger, and Ecology may monitor the effectiveness of the BMPs.

Included in the third party verification must be the location of the trade, the identification of the trading partners, including the name, phone number, NPDES permit number and address of the person in

charge of maintaining the BMP. We want full details on the BMP utilized in the trade, including a description of when it was installed, verification that it was implemented correctly and is continuing to function as required, and an explanation of any modifications or changes to the BMP during the reporting period.

### **C. Science Behind Trading One Pollutant for a Different Pollutant**

We are skeptical about the prospects of trading one pollutant for a different pollutant. The Draft Trading Framework page five title “Defining the trading universe” subheading “Determining eligible trades” proposes trading one oxygen related pollutant for another. We believe that trading one nutrient for another is unequal and will not alleviate the amount of Dissolved Oxygen in the water. The EPA has also provided guidance documents that point out that each pollutant affects every water body differently.<sup>1</sup> We want to see verifiable science supporting the decision to allow trading between pollutants in the Spokane River. This science must reflect Spokane River specific tests to establish these trading ratios. We need to see results that demonstrate a reduction of Dissolved Oxygen in Lake Spokane, prior to the expiration of the discharger’s compliance schedule to ensure that when the trades occur the discharger is in compliance with its NPDES Permit.

**Recommendation:** We recommend against developing a nutrient trading program that allows trading one oxygen related pollutant for another. The uncertainty in establishing exact ratio’s is a waste of resources at this time, when the parties are still trying to determine whether trades of the same pollutant will reduce phosphorous in the watershed. The parties may revisit this issue as the Trading Program is developed, but Ecology should require dischargers to focus on trades between like pollutants.

### **D. The Trading Program must have waterbody specific trading ratios.**

Trading ratios are required when trading between a point source and a non-point source. Other trading programs have established trade ratios that are specific to their watersheds. Trading ratios that are specific to the Spokane River benefits both dischargers and environment. Arbitrary ratios could lead to ineffective BMP’s receiving more credit than they are worth. This would result in more pollution entering into the River than traded for. Arbitrary ratios can also be damaging to the discharger if they are overwhelmingly hard to meet to enable or incentive trading.

**Recommendation:** We want the Trading Program to establish specific trading ratios based on the Spokane River and Lake Spokane. We want this to be done with verifiable site specific sampling and testing. These ratios do not need to be established in the Trading Program at this time, they can be developed over time based on experience and effectiveness of BMPs. Ecology must be able to monitor and adjust trading ratios to reflect their true value to both the dischargers and the environment. We acknowledge that we will gain insight on the effectiveness of the trading program over time. We do not want to lock ourselves into trading ratios that reflect neither the nature of the Spokane River nor the specific characteristics of the BMP.

### **E. The Trading Program Must Require Trades to Occur Contemporaneously.**

We require that all credits and trading occur contemporaneously. The EPA provides guidance documents on Nutrient Trading. We agree with the EPA that credits should be generated before or during the same period that they are used.<sup>2</sup> We also want assurances that credits will not be built up in

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<sup>1</sup> [http://www.epa.gov/npdes/pubs/wqtradingtoolkit\\_app\\_a\\_case\\_studies.pdf](http://www.epa.gov/npdes/pubs/wqtradingtoolkit_app_a_case_studies.pdf) See A-40

<sup>2</sup> [http://www.epa.gov/npdes/pubs/wqtradingtoolkit\\_app\\_b\\_trading\\_policy.pdf](http://www.epa.gov/npdes/pubs/wqtradingtoolkit_app_b_trading_policy.pdf) See § (III)(G)(3)

the winter months and used in the summer months, when high levels of phosphorous are a problem and the River is running low.

**Recommendation:** We suggest adopting the language from EPA's guidance document adding a section to the Trading Program that requires credits to be generated during the same period as they are used.

**G. The Trading Program Lacks Oversight and Regulations for Trading within Entities.**

The Trading Program proposes the possibility of trading within entities without going into detail about what is required for those entities to disclose. The concern is that nutrient trading within entities will go unmonitored by the public, or will merely be a program that an entity is already legally required to do by another statute or regulation. An entity should not be able to double dip and make a "trade" with itself unless it demonstrates a clear reduction of that pollutant, and that the reduction is outside additional regulatory requirements.

**Recommendation:** We want assurances that trading within entities will comply with the same requirements as trades between point and non-point traders, if applicable. We particularly want guarantees for enforcement, transparency, and contemporary trading, the same guarantees as explained in section A, B, and F of this comment letter.

**H. Non-point Source Entities Must Achieve a Baseline of Compliance before being Eligible to Trade.**

In keeping with the requirements in the DO TMDL, and what the parties all understood the process to include, we reiterate that the Trading Program must require non-point sources to meet a baseline threshold of reductions before they can trade credits. The tributaries all have minimum reductions that must be met prior to allowing dischargers to trade with entities on those waterbodies. That practice must be upheld to encourage the implementation of conservation practices and allow flexibility in order to ensure that a variety of agricultural producers are eligible for trading.

**Recommendation:** The DO TMDL model is based on reductions from all sources, especially the tributaries, and a discharger should not be allowed to discharge excess pollution until the tributary has met the reduction requirement. If a net reduction of oxygen depleting pollutants in Lake Spokane is the goal, the tributaries must meet their reduction requirements before they are eligible to enter the trading market.

**I. The Clean Water Act is silent on nutrient trading in waterways.**

We remind those engaged in the Trading Program that the Clean Water Act is silent on nutrient trading. The Nation's experience with nutrient trading makes us skeptical of the success of this program, particularly based on point source to non-point source trades. However, we acknowledge that nutrient trading has the potential to make a positive impact on the health of the Spokane River. With that said, we demand verifiable proof that nutrient trading will work in the Spokane River before we make a long-term commitment to the Trading Program. It benefits all parties to produce verifiable site-specific data showing that a nutrient trading program will successfully reduce phosphorous in Lake Spokane before the Trading Program is approved. We want to see a Trading Program that is transparent, that is enforceable, and has a system that will effectively increase the dissolved oxygen levels in Lake Spokane.

In the event that the Trading Program fails to achieve its goals of using BMPs to reduce pollution in Lake Spokane we remind discharges that they must meet their effluent limits as required by the DO TMDL and their NPDES Permits. We interpret the Clean Water Act's silence on nutrient trading to represent Congress's intent not to have water pollution handled in this manner. We are prepared to pursue judicial recourse in the event the Trading Program fails to achieve the wasteload allocations set forth in the DO TMDL.

### **CONCLUSION**

For the reasons listed above KEA, Spokane Riverkeeper, and The Lands Council are unable to support the Trading Framework as written in its draft form. The citizens that utilize the water deserve a Trading Program that achieves a net reduction of pollution in the Spokane River, and actually increases dissolved oxygen levels in Lake Spokane. The theoretical will not suffice. We request amending the Trading Program to reflect the provisions in this comment letter. We hope that an agreement can be reached that will lead to a successful program that helps protect the Spokane River watershed.

Sincerely,



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Michael J. Chappell  
Director, Gonzaga Environmental Law Clinic  
On Behalf of Kootenai Environmental Alliance, the  
Lands Council and Spokane Riverkeeper