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## State Representative Tim Ormsby

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Email: [Ormsby.timm@leg.wa.gov](mailto:Ormsby.timm@leg.wa.gov)

Re: HB 2559 Legislation - re water quality trading/offsets/banking (w/amendments)

Mr. Ormsby,

The following is a legal and public policy analysis conducted by the Gonzaga Environmental Law Clinic regarding HB 2559 in conjunction with Rick Eichstaedt of the Center for Justice/Spokane Riverkeeper. Rick requested that I send you the analysis for your review prior to the hearing tomorrow on HB 2559.

### Legal Talking Points

- I. If passed, HB 2559 would be preempted by Federal law because it directly conflicts with the Clean Water Act (CWA). Because Federal law preempts State law, the State may only legally implement standards that will be more stringent than Federal standards; not less stringent, and there is no scientific evidence that nutrient trading or banking is more stringent than existing Clean Water Act requirements.
  - a. Federal regulations require technology-based effluent limitations in all National Permit Discharge Elimination System (NPDES) permits. 40 CFR 122.44(a)(1).
  - b. By establishing a workgroup of “entities regulated under this chapter to achieve water quality objectives and standards in this State *in lieu of* other technology- or water quality-based requirements”, Washington is attempting to legislate out requirements in the CWA.
    - i. Specifically, HB 2559 as amended attempts to offset NPDES permitting requirements (namely compliance with technology-based effluent limitations or State water quality standards/objectives) by directing

limited to local governments and other stakeholders, to develop implementation guidance for trading, offsets, and banking as an option...to achieve water quality objectives and standards in this State *in lieu of* other technology- or water quality-based requirements.”

- c. The CWA prohibits the issuance of permits where the resultant discharge will cause or contribute to the violation of water quality standards. 40 C.F.R. § 122.4(i).
    - i. The water quality trading/offset/banking option proposed by this bill would allow a permittee to discharge above the technology-based standards end-of-pipe, which means they will be in violation of their permit; further, it allows a permittee to discharge above State water quality standards, in violation of CWA.
  - d. Washington law does not allow for nutrient offsets for existing dischargers and Federal law prohibits offsets for new dischargers therefore any trading scheme developed by the state could not be used under any circumstance for a new source or discharge, such as the proposed Spokane County plant.
    - i. WAC 173-201A-450 specifically provides for water quality offsets for “any proposed new or expanded actions.” Neither this regulation nor any other regulation provides for any offsets for existing discharges. Moreover, the Ninth Circuit’s decision in *Friends of Pinto Creek v. United States Environmental Protection Agency* 504 F.3d 1007 (9th Cir. 2007) calls into question whether any sort of water quality offsets are allowable, particularly for new dischargers. Specifically, the Court stated, “However, there is nothing in the Clean Water Act or the regulation that provides an exception for an offset when the waters remain impaired and the new source is discharging pollution into that impaired water.”
- II. The water quality trading/offset/banking option creates the illusion that the discharger may be in compliance with the law, when they really are not; this bill will not shield

dischargers from enforcement actions for violations of the technology and water quality requirements in their NPDES permits.

- i. The legislation notes that while the “guidance is being developed, the department shall continue to *authorize* trading, offsets, and banking that achieve early pollutant load reductions; reduce the cost of implementation of total maximum daily loads and complying with the federal clean water act; and achieve a net environmental benefit for waters of the State.” It appears that the legislation is attempting to provide Ecology the authority to implement the trading, offsets, and banking prior to development of the guidance document.
- ii. This amounts to backsliding and it flies in the face of the CWA’s antidegradation policy (1. maintain and protect uses and water quality conditions necessary to support such uses; 2. maintain and protect high quality waters; 3. maintain and protect water quality in outstanding natural resource waters.)

### **Policy Talking Points**

- I. The draft legislation will not achieve “a net environmental benefit for waters of the State,” because...
  - a. Rather than reducing the overall amount of pollutants discharged, the pollution trading/offset/banking option would simply allow one discharger to exceed their effluent limitations, and offset their excess by trading with other dischargers. In other words, even if trading/offsets/banking succeeds, and the science is still unclear on this, it may be a zero sum result. Possible reductions may be cancelled out by the higher discharge of pollution end-of-pipe.
  - b. Nutrient trading guidance and water quality trading are problematic because determining compliance is difficult, if not impossible. A net reduction may be the result of different factors outside the trading scheme, for example a reduction in the net loading of phosphorous on the Spokane River may be the result of the proposed lawn fertilizer ban and point source dischargers should not get “credit” for the net reduction.
  - c. As EPA has admitted, the results of nutrient trading is uneven and is merely a tool to be used to reduce pollution, in conjunction with NPDES permitting requirements, not in lieu of the requirements. For example, the Chesapeake Bay’s attempt to implement nutrient trading has not resulted in a net decrease in

pollution in the Chesapeake Bay. The original nutrient trading program was implemented in 1987 with a goal of reducing nutrient loads by 40% by 2000. In 1999, EPA, the State of Virginia and several environmental groups entered into a consent decree that required EPA to adopt TMDL's for the Chesapeake unless the Bay was removed from the 303(d) list of impaired water bodies by 2010. In 2007, EPA admitted that it will not reach its goal and will have to do TMDLs for nutrients on the Chesapeake Bay. A nutrient trading program that is in year 23 of existence has not resulted in a net reduction in pollution and the science does not indicate that it .

- d. The Clean Water Act's NPDES program is a proven commodity that has improved water quality with proper implementation, oversight, and enforcement (three things lacking in Washington's NPDES program).

Please contact Rick or myself if you have any questions.

Sincerely Yours,

/s/ Michael J. Chappell

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