



1130 Connecticut Ave NW
Suite 1050
Washington DC 20036

T (202) 833-2672
F (888) 267-9505
www.nacwa.org

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Adam Krantz

December 18, 2019

Attention Docket ID No. EPA-HQ-OW-2019-0415
Amelia Letnes
Water Permits Division, Office of Wastewater Management
Office of Water, Mail Code 4203M
US Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC, 20460
Submitted via regulations.gov

Re: Comments on Notice: Water Quality Trading Under the National Pollutant Discharge Elimination System Program (EPA-HQ-OW-2019-0415)

Dear Ms. Letnes,

On behalf of the National Association of Clean Water Agencies (NACWA) and its more than 330 public clean water agency members around the country, thank you for the opportunity to provide comments on the September 19, 2019, notice, *Water Quality Trading Under the National Pollutant Discharge Elimination System Program* (84 Fed. Reg. 49293). NACWA appreciates the Administration's leadership on the issue of water quality trading and its continued interest in jumpstarting market-based and other innovative approaches to improving water quality.

Water quality trading and other collaborative approaches can provide NACWA's members with more flexibility to meet pollutant reduction requirements while incentivizing wider participation from nonpoint sources in implementing holistic water quality solutions. Active participation from both point and nonpoint sources in most watersheds is absolutely critical to achieving water quality, and we are encouraged by EPA's efforts to achieve smarter, more effective investments in our watersheds that make more economic sense and provide potential benefits beyond simply reducing pollutant levels.

NACWA was encouraged by the February 9, 2019, memorandum and EPA's recommitment to market-based approaches. NACWA was pleased EPA acknowledged that being innovative in this space can extend beyond water quality trading. It is critically important that we explore the full range of options, including looking at existing opportunities to address some of our toughest water quality challenges outside of the conventional Clean Water Act (CWA) framework.

Beyond Trading, TMDLs and the CWA

As discussed in EPA's August 13, 2015, Memorandum: *Information Concerning 2016 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions*, and in earlier integrated reporting memoranda, the 305(b) listing and 303(d) total maximum daily load (TMDL) programs both contain provisions to allow for alternative restoration approaches (e.g., Category 4b and Category 5-Alternative) that can relieve some of the rigid constructs that a conventional TMDL approach includes.

NACWA encourages EPA to work with states to better facilitate the use of these approaches where point and nonpoint collaborative efforts to improve watershed water quality can be provided with more flexibility. To date these alternative approaches, where used, have suffered from unrealistic expectations regarding demonstrating progress, often exceeding what may have been involved with a traditional TMDL approach. EPA appropriately recognized the negative implications of conservatism in nutrient permitting in its February 2019 memo; the Agency needs to reinforce these observations with the states and regions where uncertainty in the benefits of management actions outweighs the science that is available.

The issue of nutrient pollution in our nation's waterways – where water quality trading and collaborative efforts between point and nonpoint sources are most often used – will ultimately take more creativity to solve than is currently allowed by the CWA. NACWA believes that EPA should support more serious conversation around a 'beyond the CWA', watershed-based approach to nutrients. This will likely involve statutory changes in addition to EPA's current regulatory flexibility in this area, but there are stakeholders on all sides that are willing to carry that message to Capitol Hill to ensure we do not find ourselves in another 15 years talking about ways to jumpstart water quality trading.

At the very least, EPA should, as it relates to nutrients, state a clear preference for watershed or water-quality based approaches over technological or technology-based approaches, especially in situations where there is no numeric water quality standard.

NACWA has written previously with concerns over the Agency's 2003 Water Quality Trading Policy, including on issues such as trading ratios, which can be one of the biggest obstacles for point source interest in trading. NACWA's most recent letter on the policy is attached. NACWA is encouraged that this administration is reaffirming EPA support for water quality trading and broader watershed collaborative efforts and encourages the Agency to look for more ways to increase support for and adoption of these tools. It is critical that EPA continue to articulate its clear support for these watershed-level approaches and its concern for other approaches that do not provide environmental outcomes commensurate with invested resources.

To that end, NACWA believes there have been enough developments and advancements on this issue that it is time to revisit the Agency's 2003 Water Quality Trading Policy to ensure it is not presenting obstacles to greater adoption of trading and broader water quality partnerships.

New Baseline Definition Would Provide Needed Flexibility

NACWA is encouraged by EPA's willingness to look for innovative ways to open more opportunities for water quality trading. The context for the September 19 notice – watersheds with EPA-approved TMDLs – can be one of the most challenging environments to operate in when looking to use market-based approaches.

From our conversations with EPA staff, we understand that the biggest potential policy change contemplated in the notice relates to the definition of baseline outlined in Sections III. A and III. B. NACWA fully supports EPA's efforts to provide more flexibility to allow nonpoint sources to generate credits before the TMDL baseline requirements have been met as long as such actions do not impinge on a state's ability to achieve the load allocation in the applicable TMDL.

NACWA understands the limitations EPA thinks it has and believes the suggested change would provide a good compromise – allowing nonpoint sources to generate credits for practices or other actions that have not been identified as necessary to meet the load allocation. In our conversations with EPA staff several examples were provided that we think would be helpful to share should EPA pursue this change further (e.g., if six management practices have been identified as the baseline derived from a load allocation, nonpoint sources could generate credits before the baseline actions are taken if they implement a seventh practice not included in the baseline).

NACWA understands, however, that many existing TMDLs have likely not been crafted in a manner that will provide opportunity for pre-baseline credit generation. Our understanding is that most TMDLs employ an 'E3' or 'everyone, doing everything, everywhere', approach to crafting the load allocations. This could mean that under existing TMDL situations, the only opportunity for pre-baseline credit generation could be taking agriculture land out of production. NACWA knows that this would be a non-starter for most in the farming community.

There is great opportunity, however, in those places where TMDLs have not yet been developed and where these new concepts could be incorporated from the start to help jumpstart market-based approaches and engage all sources in the water quality solution. This raises the broader issue of TMDL development and ensuring that assumptions and requirements in TMDLs are better defined.

Where TMDLs already exist and would need to be changed to allow for baseline flexibility and in watersheds where yet to be developed TMDLs could be better structured to allow for pre-baseline credit generation, the state water regulators will be critical partners. NACWA encourages EPA to work closely with the states to ensure these concepts, if pursued further as EPA policy, are fully understood. They hold tremendous promise for a more reasonable approach within the TMDL context, but if these actions add complexity to the TMDL process, it could limit their effectiveness. To help facilitate this work, EPA should work to review and update its *Protocol for Developing Nutrient TMDLs* (EPA 841-B-99-007; November 1999).

Consistent with NACWA's comments above regarding work beyond TMDLs, EPA should also consider looking at the entire TMDL program and how it may need to change in the nutrient context. For example, EPA should consider whether, in a watershed-based approach, the baseline concept is relevant and whether the goal should instead be a prioritized list of options for reducing loads across the watershed without reference to point or nonpoint sources.

In alignment with integrated planning, the relevant entities within a watershed should determine which projects will reduce the greatest amount of nutrients at the lowest cost with the most significant community-desired outcomes. Efficiency and effectiveness of management actions must be a goal and priority. This approach would best be facilitated through use of a watershed-based permit applied to a watershed-based entity representing the community or communities and other entities involved.

Compliance Schedules and Variances

NACWA appreciates EPA's efforts to bring attention to compliance schedules and variances, reinforcing that the use of these important CWA tools to provide relief to the regulated community and ensure permits are in compliance with water quality standards is supported by the Agency. However, the use of these tools in the trading context raises some serious concerns.

Where a point source has received a water quality-based effluent limit (WQBEL) and desires to work with a nonpoint source partner to generate sufficient credits or offsets to achieve compliance with the WQBEL, a compliance schedule could be a useful tool for accomplishing this arrangement. NACWA encourages EPA to underscore the fact that, provided they are allowed for in state law or regulations, nothing prohibits compliance schedules from extending beyond a single permit term.

However, this arrangement raises questions about whether a regulator may seek to compel a permittee to implement nonpoint source reductions as terms for receiving the compliance schedule. This approach would only be acceptable if it were completely voluntary, where the permittee decides that this arrangement is in its best interests.

The concern with a regulator compelling a permittee to address nonpoint pollution is more acute in the context of water quality standards variances, and NACWA believes that water quality trading should not be used in conjunction with variances. For instance, where a point source has received stringent water quality-based effluent limits that it cannot meet without, for example, causing widespread and substantial economic impact, a water quality variance could provide temporary relief from meeting the stringent limit. This approach would ensure continued progress toward improving water quality and enable the point source to explore partnerships with nonpoint sources for pollutant reduction offsets. But this arrangement could also serve as an incentive to state regulators to impose stringent limits in order to force point sources to pay for nonpoint source controls as required pollutant minimization under the variance, effectively imposing additional costs on the utility that would not otherwise be required in the absence of trading.

Nonpoint source trading required as part of a variance would exert additional costs on financially challenged utilities, draw resources from other community priorities, and undermine the voluntary nature of trading. This type of approach would only work if it was part of a broader, multi-stakeholder watershed-wide program not controlled by the regulators.

NACWA Supports the Other Concepts Discussed in the Notice

Incremental Baselines – As it would work to support EPA's suggested new approach to baselines, NACWA supports the use of incremental baselines. Here again, however, using incremental baselines would rely heavily on state water regulators and increase the complexity of TMDL development. In addition, the incremental baseline approach could yield an unintended trading barrier if coupled with trading ratios. These overlapping conservative approaches could dramatically increase the cost of nutrient credits and hamper implementation of nonpoint source reductions.

Disaggregation – NACWA supports the alternative approaches to disaggregation outlined in the notice. The success of these alternatives will rely on state water regulators to implement, and NACWA encourages EPA to work with the states to ensure they have the necessary resources.

In-Lieu Fee Program – NACWA believes that broader use of in-lieu fee programs could attract more point source participation if structured properly to ensure that payment guarantees the permit holder compliance. This results in less risk than market-based trading programs. However, while we strongly support the concept of an in-lieu fee program, such a program can only be viable if it remains voluntary and cost-effective. If fees ultimately exceed treatment costs, either due to trading ratios or other reasons, an in-lieu fee program will not succeed.

Ultimately, across all of EPA's work on water quality trading and watershed-based solutions, the Agency and its partners must provide sufficient flexibility and time to better understand how designed systems and programs actually work in the field. For example, using "green" techniques, such as the use of mussels to filter out microbial organisms, must allow enough time for performance testing, variability in effectiveness due to environmental conditions and uncertainty. These green or natural solutions and other non-traditional pollution abatement approaches demand more flexibility and a willingness to proceed in an adaptive manner.

Thank you for the opportunity to provide comments on the notice.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Hornback". The signature is fluid and cursive, with a large initial "C" and "H".

Chris Hornback

Deputy CEO

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July 19, 2012

Denise Keehner

Director, Office of Wetlands, Oceans and Watersheds

Environmental Protection Agency

Ariel Rios Building

1200 Pennsylvania Ave. NW

Washington, DC 20004

Dear Ms. Keehner,

The National Association of Clean Water Agencies (NACWA) appreciates the opportunity to provide EPA with feedback related to the Agency's 2003 Water Quality Trading Policy.

NACWA represents the interests of more than 350 municipally owned wastewater treatment agencies and affiliated organizations. Our members are dedicated environmental stewards who treat and reclaim the majority of the wastewater generated each day in the United States while working to carry out the goals of the Clean Water Act (CWA).

Pressured by funding shortfalls, aging infrastructure and increasingly stringent water quality criteria, clean water utilities are under immense pressure to rehabilitate their systems and meet regulatory requirements, while at the same time ensuring that local ratepayer dollars are stretched as far as possible. For a long time NACWA members have been at the crux of this challenge, exploring innovative approaches to meet CWA requirements at less cost. Water quality trading is one approach gaining a lot of momentum, and NACWA members recently formed a Water Quality Trading Working Group to promote these markets and think strategically about how to overcome some of water quality trading's main barriers.

Water quality trading can provide much-needed relief, potentially generating environmental benefits greater than can be achieved under traditional regulatory

approaches and at a lower cost. By providing dischargers with more flexibility to meet pollutant load-reduction requirements, water quality trading also incentivizes wider participation from nonpoint sources, including agriculture. In most watersheds throughout the U.S., nonpoint pollution is the primary source of excess nutrients to waterbodies. Participation from both point and nonpoint sources is absolutely critical to achieve meaningful water quality improvements.

While NACWA is encouraged that EPA recognizes water quality trading as an approach to achieve water quality goals more efficiently, we are concerned that, as currently written, EPA's Water Quality Trading Policy could limit trading and the broader establishment of regional water quality trading programs. In particular, NACWA is concerned that EPA's Policy appears to focus primarily on linking water quality trading to implementation of total maximum daily loads (TMDLs). NACWA believes that EPA should embrace water quality trading as a more holistic approach to reducing the load and impact of pollutants irrespective of a waterbody's status as impaired under §303(d) of the CWA.

In order to encourage greater market formation and broader market participation, NACWA offers the following comments on, and recommended changes to, EPA's Water Quality Trading Policy, organized by corresponding section:

I. BACKGROUND AND PURPOSE OF THE POLICY

1. An impairment should not have to be declared for trading to be utilized. EPA should embrace trading if the goal of the program is to provide continued and sustainable approaches for reducing the load and impact of pollutants. Although a TMDL may help facilitate trading, it is not a legal requirement nor is it necessary from a practical standpoint. There may be many instances in the absence of a TMDL where trading is a viable way to reduce pollutant load-reduction requirements.
2. Increased emphasis needs to be placed on the environmental benefits associated with trading. While EPA's Policy considers the economic advantages of water quality trading, the environmental advantages are inadequately conveyed. These benefits can go beyond just water quality improvements to include things like wetlands and habitat restoration. NACWA recommends amending the last line of the third paragraph to read: *"Trading achieves desired water quality improvements as efficiently as possible by capitalizing on economies of scale and the control cost differentials among and between sources."*
3. The Policy should acknowledge that water quality trading is a practical tool for protecting water supplies that can be utilized under an integrated plan developed pursuant to EPA's final *Integrated*

Municipal Stormwater and Wastewater Planning Approach Framework. This approach allows municipalities to identify a prioritized path to achieving CWA objectives by identifying efficiencies in implementing overlapping and competing requirements that arise from separate wastewater and stormwater projects. Water quality trading is one such efficiency, using the power of the market to find creative, cost-effective solutions that focus on more than just the end-pipe to reduce water pollution.

II. TRADING OBJECTIVES

1. The Policy identifies eight conditions under which EPA would support water quality trading by states, interstate agencies and tribes. The Policy could be interpreted as requiring that all eight conditions be met in order for EPA to support a trade or a trading program. NACWA does not believe that all conditions must be met for a trading program to be established and/or a trade to proceed, and recommends amending the first sentence under “Trading Objectives” to read: *“EPA supports implementation of water quality trading by states, interstate agencies and tribes where trading meets one or more of the following objectives:”*
2. Trading should be encouraged if it can meet environmental goals equal to or greater than those under existing regulatory programs at less cost. Achieving greater environmental benefit is certainly encouraged although it should not be a requirement. NACWA therefore recommends amending Objective (F) to read: *“Trading achieves environmental benefits equal to or greater than those under existing regulatory programs.”*
3. NACWA warns against the term “retirement” when referring to credits. The retirement of a credit implies a credit has a defined shelf-life. With regulatory requirements, technologies, and plant processes constantly changing, compliance buyers depend on a program’s flexibility to decide when to purchase, sell, redeem or trade credits. So long as a credit is maintained to a rigorous standard and its custody is tracked, a credit should remain valid. NACWA recommends amending Objective (G) to read: *“Trading secures long-term improvements in water quality through the purchase and ongoing maintenance and management of credits.”*

III. WATER QUALITY TRADING POLICY STATEMENT

1. Clean Water Act Requirements
 1. Water quality trading and other market-based programs are a way to achieve the objectives of the CWA. Not only should water quality trading programs be consistent with the CWA, the

Policy should explicitly recognize trading and other market-based programs as tools to help achieve CWA goals.

2. Trading Areas

1. The Policy states that “all water quality trading should occur within a watershed or a defined area for which a TMDL has been approved”. Water quality trading should not be limited or confined to the TMDL process. While a TMDL can help facilitate trading, it is not a requirement and should not be interpreted as such. In addition, trading should be encouraged to address the areas of impact, including but not limited to upstream of the area of impact. This will increase participation from multiple sectors and drive more trades.

Furthermore, trading outside the TMDL process can provide a means to ensure that water quality standards will be met by reducing overall pollutant loads in a waterbody, and obviate the need for a TMDL. This will save costs for State and Federal agencies on the TMDL development process and benefit the environment.

2. EPA should state its support for interstate trading. Water does not recognize state boundaries, and water quality improvement approaches should not be artificially constrained by state boundaries either.

3. Pollutants and Parameters Traded

1. The Policy states that EPA believes that trades for parameters other than nutrients or sediment may pose a higher level of risk. EPA does not provide evidence as to why they believe this is the case. The inclusion of this statement may present a barrier for trades involving parameters other than nutrients or sediment. NACWA recommends that this statement be removed from the Policy. The fundamentals of water quality trading are such that a well-designed market should work for any type of pollutant.
2. Clarification is needed as to what the Policy means when it states “EPA does not support any trading activity that would exceed an acute aquatic life criteria within a mixing zone or a chronic aquatic life or human health criteria at the edge of a mixing zone . . .” The Policy should not preclude trading if the trades reduce overall pollutant loads.

4. Baselines for Water Quality Trading

1. More discussion is needed on how to deal with establishing a baseline for agriculture. While there is an advantage to establishing a consistent nationwide sector-specific approach,

NACWA does recognize that regional inconsistencies make this hard to do. Still, promoting best management practices (BMPs) by sector is more efficient than analyzing property on an individual basis. This is the approach EPA already takes when establishing technology based effluent limits and it can be effectively applied to suites of BMPs to determine how much of a specific pollutant they remove or otherwise treat.

Furthermore, NACWA is concerned that setting rigorous baseline requirements for agriculture may hinder trades in water quality trading programs. By requiring a demanding minimum practice standard to participate in a trading program, farmers who have not voluntarily adopted the minimum set of practices may not find it in their interest to enter the market because of the entry cost associated with meeting a baseline. NACWA fears this competitive disadvantage could ultimately limit participation, hampering credit supply and adversely affecting market efficiency.

5. When Trading May Occur

1. If pre-TMDL trading is unsuccessful in attaining relevant water quality standards, EPA should conduct a use attainability analysis (UAA) to analyze a waterbody prior to developing a TMDL. This will maximize limited resources and help develop more appropriate site-specific standards.
2. Clarification is needed as to what the Policy means when it states “EPA does not support any trading activity . . . that would cause the combined point source and nonpoint source loadings to exceed the cap established by a TMDL.” This could be interpreted as requiring a trading program to be designed to ensure that a TMDL will be met for an entire waterbody before the program can be approved. Instead, this section should state that trading programs would be allowed in these cases as long as an overall load reduction is achieved.

6. Alignment with the CWA

1. Point-source permittees should be relieved from anti-backsliding rules provided that the total pollutant load to the receiving water is not increased. EPA’s Policy is fairly ambiguous, saying anti-backsliding provisions “will generally be satisfied” where a point source increases its discharge through use of credits and in a manner consistent with trading provisions under a TMDL. However, pollutant loads in a waterbody may increase beyond, and in spite of, the control of the clean water utility, who acted in good faith to reduce its pollutant discharge. These utilities should not be saddled with water quality based effluent limitations they would have never otherwise agreed to.

7. Common Elements of Credible Trading Programs

1. Where a TMDL has been established, methods to address nonpoint source uncertainty, beyond what is addressed in the TMDL Margin of Safety requirement, are unnecessary. Additional measures to address uncertainty can be burdensome, discouraging nonpoint source credit generation and reducing the efficiency of trading.
2. EPA identifies a number of different approaches to compensate for nonpoint uncertainty, including the use of greater than 1:1 trading ratios. NACWA believes that trading ratios of 1:1 may be appropriate depending on the characteristics of the receiving stream segment, applicable trading areas, and effluent equivalencies, and should not be precluded by the Trading Policy. Greater ratios should be reserved for situations where the discharger cannot show exactly how much of a pollutant is removed by the activity or BMP.

In addition, it appears that EPA is suggesting that all approaches to address nonpoint uncertainty be reflected in a trade. If this is the case, the effective trade ratio will be much greater than the explicit trade ratio due to the compounding effect of conservative assumptions, and may in fact present an obstacle to trading.

NACWA appreciates EPA's commitment to advancing water quality trading programs and encourages the Agency to review and update the 2003 Water Quality Trading Policy. Additionally, we request a meeting with EPA to discuss these comments and any feedback you may have. Should you have any questions, please contact Hannah Mellman at hmellman@nacwa.org.

Sincerely,



Ken Kirk
Executive Director
National Association of Clean Water Agencies

Cc: Ellen Gillinsky, EPA Office of Water

NACWA Letter to EPA on Water Quality Trading Policy

July 19, 2012

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Bob Rose, EPA Office of Water

Amelia Letnes, EPA Office of Water