

## Comments on EPA's Proposed Regulations

EPA's Proposed Revisions to the National Pollutant Discharge Elimination System (NPDES) Program and Federal Antidegradation Policy (40 CFR Parts 122, 123, 124 & 131) and Water Quality Planning and Management Regulation (40 CFR Part 130)

### **I. Background**

The federal Clean Water Act (CWA) clearly states the policy of Congress to recognize and preserve the primary responsibility and rights of the states to develop and implement programs to control pollution and achieve and maintain water quality standards. Water quality trading programs administered by the states can facilitate achieving the goals of the CWA by providing greater flexibility and reducing pollution control costs.

Research and trading projects conducted across the country clearly demonstrate the environmental and economic benefits that trading can provide. Pilot projects have also shown that prior agency approval and permit requirements increase administrative and transaction costs that deter market performance.

The immediate opportunities for and greatest water quality and economic benefits from trading exist where pollutant reductions are needed to achieve water quality standards. Watershed-based trading programs that achieve a net loading reduction for each trade can improve water quality and achieve progress towards attainment pending the development of a total maximum daily load (TMDL). Trading among and between point and nonpoint sources (NPS) provides flexibility and can optimize the cost of achieving the reductions established under a TMDL. Trading where water quality standards are being met can establish incentives for environmentally sound development, accommodate growth and maintain high water quality. These goals are consistent with the CWA.

Clear legal authority is necessary for trading to occur. This can and should be provided by EPA under the existing CWA through a combination of policy, published regulations, guidance and approvals of state water management programs.

In the words of J. Charles Fox, Assistant Administrator for the Office of Water, the proposed regulations are "all about trading" (September 10, 1999). Offsetting is indeed a form of trading that has been successfully applied under the federal Clean Air Act for many years. The requirement to obtain offsets in conjunction with technology-based requirements for controlling emissions in areas where ambient air quality standards are not being met has allowed development to occur while at the same time achieving a net emission reduction and progress towards attainment. Transferring the offset concept to water is environmentally sound and would facilitate achieving the goals of the CWA. Specifically, it would allow pollutant reductions in impaired waters prior to the development of TMDLs. This approach is consistent with the TMDL Federal Advisory Committee Act (FACA) Committee recommendations. More importantly, it is a clear indication that the CWA does not prohibit trading and nothing in the CWA bans the issuance of permits for new or increased uses in impaired waters for which a TMDL has not yet been developed.

The concept of offsetting is consistent with Michigan's water quality standards, antidegradation policy and would be allowed under Michigan's proposed statewide water quality trading program. The requirement to obtain offsets to accommodate growth and development in impaired waters prior to the development of a TMDL would provide an additional driver for trading to occur.

### **II. Overview of the Proposed Regulations**

On August 23, 1999, the United States Environmental Protection Agency (EPA) in the Code of Federal Register published proposed revisions to NPDES program, federal antidegradation policy and water quality planning regulations. The proposed revisions to 40 CFR 122, 123, 124 and 131 collectively provide for NPDES permits to be issued to new and increased uses in impaired waters for which a total maximum daily load (TMDL) has not been developed. The proposed regulations establish permit conditions and offset requirements necessary for this to occur. To achieve reasonable further progress towards attainment pending the development of a TMDL, significant new and increased discharges would be required to be 'offset' at a ratio of 1.5:1. Offset reductions may be obtained from another point or a NPS. Where offsets are provided by another point source, the proposed regulations require that the permit for that source be modified to include revised effluent limits. Where offsets are provided by a NPS, the NPS offset requirements must be incorporated in the new or increased use permit. The only mechanism for offsetting to occur under the proposed regulations is in the context of NPDES permits. Offsetting by permit is a very narrow application of trading and would also be very time and resource intensive for sources and states. A recent point/nonpoint source trade in Minnesota took over two years to complete by permit. This clearly illustrates how resource intensive trading by permits can be. Most state agencies do not have the resources to issue permits or require formal permit modifications for every trade. The proposed regulations should also allow offsets to be provided under a state water quality trading program that has been approved by EPA as an element of the state's NPDES permit program delegation and water quality management plan.

One of the primary objectives of the proposed water quality planning and management regulations (in conjunction with the proposed NPDES program revisions) is to provide greater assurances that TMDLs will be implemented. Although EPA's Draft Framework for Watershed-Based Trading (Framework) recommends that trading be done in the context of a TMDL or a TMDL-equivalent, the proposed regulations make no provision for trading to achieve the reductions under a TMDL. Trading is discussed in the preamble but the concept is not defined, referenced or included in the proposed regulations. The proposed regulations establish a new requirement that implementation plans are included in the minimum elements of TMDLs submitted for approval by EPA (40 CFR 130.33(b)(10)). Each plan must include all the information in 40 CFR 130.33(b)(10)(i – viii). These regulations make no provision for trading as an instrument to provide flexibility and optimize the cost of implementation.

Language should be added to make it clear that water quality trading and other incentive based non-regulatory programs can be incorporated into Water Quality Plans and site-specific TMDLs that are approved by the states and EPA. This approach will provide states and communities with the flexibility to obtain offsets and implement TMDLs in the most cost-effective manner.

### **III. Antidegradation Policy**

In *Arkansas v Oklahoma*, the United States Supreme Court found that the CWA does not prohibit the issuance of permits to new or increased uses in impaired waters. The court also noted that the CWA vests the EPA and states with broad authority to develop long-range, area wide programs to control pollution (503 U.S. 91). Establishing a reasonable further progress (offset) requirement in impaired waters for which a TMDL has not yet been established while accommodating growth and development is within the authority vested with EPA under the CWA. Offsets and other water quality trading that achieve a net loading reduction and does not result in an adverse localized impact is consistent with CWA. Establishing an offset requirement for the permitting of new or increased uses in impaired waters would improve water quality and facilitate attainment of water quality standards. It would establish a driver for trading.

As noted above, the CWA provides EPA with the authority to establish an offset requirement. The proposed offsetting requirements are intended to apply only to waters that do not fully support designated uses. Revising the federal antidegradation policy to require progress towards attainment goes beyond the current 'no lowering of water quality' policy established under the

Great Lakes Initiative. Some commentors may question whether this approach is consistent with the basic framework created under Sections 303(d)(4)(A) and (B) of the CWA. It may be more straightforward and less confusing to incorporate the offset requirement as an interim permitting requirement for impaired waters for which a TMDL has not been established.

Consideration should be given to deleting the offset requirement from 40 CFR 131.12 and adding it as a separate pre-TMDL' or 'interim-TMDL' section under 40 CFR 130. The proposed regulations should be very clear that offset requirements only applies until a TMDL has been established or the site delisted as provided under the CWA. The proposed regulations should also make it clear that relaxing a point source effluent limitation or a nonpoint source requirement used to provide an offset would not constitute backsliding if a higher limit or less restrictive nonpoint source is allowable under a TMDL.

The proposed regulations should also be amended to expressly allow trading as a means of providing offsets to improve water quality pending TMDL development. The regulations should clearly state that an offset shall constitutes reasonable further progress towards attainment. It is appropriate for different offset ratios to be established by a state under a program approved by EPA as provided under the proposed regulations. Where a different ratio is established, the regulations should include language to have the alternate ratio constitute reasonable further progress.

A fundamental difference between the air and water programs is that federal renewable operating permit requirements apply to major sources and major modifications. NPDES permits are required for all sources that discharge to the nation's navigable waters. Consideration should be given to application of the offset ratio to all new and increased use permits issued in impaired waters pending a TMDL, not just significant increased uses.

The following recommendations are offered to address these issues.

1. Language should be added to make it clear that providing an offset shall constitute reasonable further progress towards attainment, pending development and implementation of TMDLs required under the act. A different net loading reduction may be required once the TMDL has been established.
2. The regulations should provide language to allow different ratios to be established by the states for nutrients, pollutants other than nutrients and cross-pollutant trading.
3. Offsets for oxygen demanding pollutants should be contemporaneous with the period for which they are used.
4. Offsetting should not be allowed for bioaccumulative chemicals of concern.
5. Offsets should be media specific but the regulations should not preclude the use of atmospheric emission reductions to offset for new or increased use water discharges. These types of offsets should be allowed on a case by case basis subject to state and EPA approval.
6. A 1.5:1 offset ratio is not be appropriate for all the different sources in various watersheds. The regulations appropriately allow states to establish a different offset ratio where it can be shown that a different ratio is consistent with the attainment of water quality standards.
7. The regulations should have clear language that allows offsets to be provided under state water quality trading programs, water quality management plans or site specific TMDL implementation plans that have been approved by a state and EPA. The provision for incorporating, but not requiring, offsets through NPDES permits should be retained. The following language is suggested.

*Offsets shall be established and made enforceable through NPDES permits or under a state water quality trading program that has been approved by EPA as a revision to the state NPDES permit program under 40 CFR Part 123, a revision of a state Water Quality*

*Management (WQM) plan prepared under Section 303(e) of the CWA"; or, under a site specific TMDL implementation plan prepared for a water body that has been listed by a state under Section 303(d) of the CWA.*

#### **IV. NPDES Permit Program**

Establishing offsets to facilitate permitting new and increased uses while improving water quality pending TMDL development is appropriate. The proposed regulations (40 CFR 122.4(j)(2)(v) and (vi)) require existing point source permits to be modified where an offset is provided by another point source; or, for NPS offset requirements to be incorporated into the permit issued for the new or increased use. Requiring a permit modification for each offset is extremely resource intensive. It is overly burdensome on the sources and the states. Most importantly, it is not necessary to establish NPS accountability.

The proposed NPDES program regulations should be revised to allow offsetting for nutrients and pre-TMDL nutrient trading to occur by rule under a state water quality trading program approved by EPA. This would provide a uniform approach and greater flexibility for the states to develop and implement watershed based management programs. Language should provide that nutrient trading by rule constitutes a permit modification for a point source that generates or uses credits under the EPA approved program.

NPS reductions that are used as offsets or to create credits that can be traded under a state program should not be required to be incorporated in NPDES permits. While this may be appropriate in some cases, it is a prescription for failure if required for all trades. Incorporating NPS requirements in a point source permit is viewed by many as a backdoor approach to regulating nonpoint sources. Point sources view this approach as highly inequitable since they have borne the burden of improving water quality under existing regulatory programs. There is no support for this approach from point or nonpoint sources in Michigan and a number of other states.

NPS accountability can and should be established directly by rule or under other voluntary state programs that meet EPA's reasonable assurance criteria.

#### **V. TMDL - Water Quality Planning**

The proposed water quality planning and management regulations should be revised to expressly allow trading under state water quality trading programs to obtain offsets and to improve water quality in impaired waters pending the development of a TMDL and as part of an approved TMDL implementation plan.

TMDLs provide the greatest driver for trading and the baselines necessary for trading to occur. Trading is an instrument to implement TMDLs. In fact, achieving the reductions required under a TMDL in certain watersheds may not be possible without the flexibility and cost savings that trading offers. It is extremely important that the proposed regulations allow trading as a means of achieving offsets and improving water quality pending TMDL development. This is vital to the Chesapeake Bay Program, Michigan's statewide water quality trading program and a number of other programs that are emerging across the country.

Clear provisions for trading need to be included in 40 CFR Part 130. Language should be added that clearly establish that trading may be done in impaired waters pending TMDL development and to achieve the reductions required under a TMDL. Pre-TMDL trading should at a minimum meet the reasonable further progress (offset) requirements.

The proposed regulations should include language that allows states to include trading programs in the continuing planning process and water quality management plans submitted under 130.61.

The proposed regulations must be revised to make it clear that formal TMDL modifications are not required for each offset or before trades can occur once a TMDL has been established. Requiring a formal TMDL modification for each offset or for every trade is another prescription for failure. It is agency intensive, overly burdensome and unnecessary. This approach provides no flexibility and is beyond the requirements of Section 303(d)(1).

For offsetting and trading to occur, the caps established by a TMDL must remain in place. Offsetting or the exchange of credits through a trading program that provides a net loading reduction does not change the TMDL. The assimilative capacity must remain fixed to assure the integrity of the TMDL and trading programs. Changes to the waste load and load allocations must change for trading to occur. However, this should not be construed to be a modification of the TMDL. Section 303(d) of the CWA refers to TMDLs as a *load* established at a level necessary to achieve water quality standards. TMDL's are defined in 40 CFR as the sum of the individual point source waste load and NPS load allocations and natural background. A TMDL is a load not the allocation of the load.

A change in an individual point source waste load or NPS load allocation that does not result in an increase in the net load should not be construed to be a modification of the TMDL. To do so would discourage sources and states from making any voluntary reductions and making reductions beyond the level required under the TMDL. It is an extremely onerous and unnecessary requirement for EPA and the states. This interpretation will frustrate rather than facilitate implementation of TMDLs and all voluntary community-based watershed initiatives.

Language must be added to the proposed regulations that clearly states that reductions from individual sources, offsets and net load reductions greater than required under a TMDL shall not be construed to constitute a change to the TMDL for which a formal modification is required.

The following language is suggested:

*"Trading conducted in the context of a TMDL approved by EPA shall be consistent with and based on the pollutant cap and the pollutant-specific point source waste load allocation and nonpoint source loading allocation established under the TMDL. The point source waste load allocations and nonpoint source load allocations established under a TMDL shall constitute the baselines for trading under a TMDL. The generation and use of credits among and between point and nonpoint sources that results in a net greater reduction than would be achieved without trading shall not constitute a change of the TMDL that requires a formal modification".*

## **VI. Antibacksliding**

The proposed regulations do not address antibacksliding. Language should be added that makes it clear that a point source that provides offsets or generates credits that are traded under a state program approved by EPA shall not be considered to "backslide" if at a later time the source decides to discontinue providing offsets or generating credits. At that time the source should be allowed to discharge at a level consistent with technology requirements or water quality standards, whichever is applicable.

*Information on each of Michigan's Trading Program elements is available on this site. Links to other sites are also provided.*

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