



Association of
Metropolitan
Sewerage Agencies

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John Kirk

July 15, 2002

Comment Clerk (W-02-07)
Water Docket (MC4101)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

To Whom It May Concern:

The Association of Metropolitan Sewerage Agencies (AMSA) appreciates the opportunity to provide comments on the U.S. Environmental Protection Agency's (EPA's) proposed *Water Quality Trading Policy* ("proposed policy"), published in the *Federal Register* on May 15. See 67 *Fed. Reg.* 34709. Founded in 1970, AMSA represents the interests of over 270 of the nation's publicly owned wastewater utilities (POTWs). AMSA members serve the majority of the sewered population in the United States and collectively treat and reclaim over 18 billion gallons of wastewater every day. As holders of enforceable National Pollutant Discharge Elimination System (NPDES) permits, AMSA's members are interested in trading as a potential mechanism to achieve water quality standards and to bolster the use of watershed management.

AMSA supports EPA's efforts to craft a water quality trading program that addresses past concerns with trading and that leaves many of the necessarily site- or state-specific issues to their discretion. Several AMSA members are actively exploring opportunities under existing state or local trading initiatives, and others have expressed an interest in further investigating trading under EPA's proposed criteria and provisions. AMSA supports EPA's emphasis on trading being voluntary, the ability to trade prior to and following a total maximum daily load (TMDL) allocation, and the Agency's enhanced discussion of nonpoint source controls. While AMSA, on balance, is supportive of trading, our members have raised several substantive concerns which indicate that significant changes must be made to ensure that the process works effectively and that it is equitable for all parties involved.

These comments include specific and general concerns, discuss recommended revisions to the proposed policy, and highlight areas where EPA's policy strikes the right balance. AMSA's major concerns and recommendations are as follows:

- **Voluntary participation by all parties must continue to be the foundation of EPA's trading policy.**
- **NPDES permits must be adjusted to reflect a water quality trade.** Further clarification is needed on how EPA's proposed "variable" or "alternate" permit limits would shift the pollutant reduction obligations between trading parties.
- **EPA should encourage trading of additional parameters beyond nutrients where possible.**
- **Pre-TMDL trading should achieve a "no net increase" in pollutants.** The proposed policy's emphasis on achieving a "net reduction" in pre-TMDL trading is misplaced and should be revised to use a "no net increase" benchmark.
- **Trading ratios in both pre- and post-TMDL trades should not be higher than 1:1.**
- **The "no net increase" language in the proposed policy's antidegradation discussion should be modified to acknowledge already authorized allowances for *de minimis* increases.**
- **The antibacksliding language concerning conditions under which original permit limits are held in place should be retained.**
- **A TMDL margin of safety is not the appropriate mechanism to address trading uncertainties.**

AMSA's Specific Comments and Recommendations

AMSA offers the following specific comments and recommendations for EPA's consideration:

Establishing Equitable Allocations Between Point and Nonpoint Sources

AMSA strongly believes that trading must not be used to replace a fair and equitable allocation of pollution control responsibilities among sources in an impaired waterbody. As AMSA highlighted in our April 30, 2002 letter to the Administrator (see attached), a TMDL is the appropriate mechanism to establish the baseline for trading in impaired waterbodies with respect to the pollutant removal responsibilities of point and nonpoint sources. Unless a balance of responsibility is achieved between permitted point sources, including POTWs, and unpermitted nonpoint sources, trading faces serious hurdles. For most point/nonpoint source trades, the incentive to enter into a trade will not exist without a prior allocation of pollutant removal responsibilities. AMSA recommends that EPA emphasize in any final policy the importance of the TMDL allocation for point/nonpoint source trades. AMSA will continue to work with EPA on ways to improve the trading concept to ensure that it works hand-in-hand

with the TMDL program and Watershed Rule. See AMSA's comments below concerning both pre- and post-TMDL trades.

Voluntary Participation in Trading Programs

AMSA supports the voluntary nature of EPA's proposed policy. As a market-based program, trading should operate exclusively by choice of the participants. Participation in a trading program should not be compelled in any way. The proposed policy appropriately recognizes that state programs should merely set up the program framework and let the potential participants determine whether trading makes sense in a particular situation.

Shifting Liability with Trades

AMSA has consistently emphasized the importance of providing a fair and equitable process for all parties involved in trading. For trading to respect POTWs' legal obligations to comply with their individual NPDES permit, all trades must shift responsibility for the pollutant reduction from the trading source to the recipient source. Therefore, NPDES permits must reflect a lowered pollutant removal requirement for the trading source following a completed trade. In the event that the recipient source fails either to implement promised best management practices (BMPs) or treatment, or to achieve the expected amount of pollutant removal, the POTW that traded with this source must not be held liable, and no enforcement action should be sought against that wastewater treatment authority for the increment of pollutant reduction that it has traded to the other source.

The proposed policy should more clearly empower permit authorities to adjust NPDES permits to reflect trades. Provision # 3 (see p. 6 - 7) includes some alternatives that may further this objective, including the reference to the use of "variable permit limits that may be adjusted up or down based on the quantity of credits generated or used" and the use of "alternate permit limits or conditions that establish restrictions on the amount of a point source's pollution reduction obligation that can be achieved by the use of credits if trading occurs." The final policy should include further details on how these permit adjustment methods would work, and include examples to give more detailed guidance to permit writers on how to use these tools. In particular, AMSA suggests that the final policy explain whether variable permit limits would be available for all potential trades, including point/point and point/nonpoint trading. For example, if a point source trades with a nonpoint source, would a variable permit limit reduce the water quality-based effluent limit in the corresponding NPDES permit by the expected load reduction from the nonpoint source?

Regarding trades with nonpoint sources, AMSA is extremely concerned with the proposed policy's suggestion that "specific trades may be identified in NPDES permits, including nonpoint source requirements where appropriate." (see Provision # 3, page 7) The language appears to suggest that POTW permits should be used as a backstop for unsuccessful nonpoint source control actions that were agreed upon through a trade. This language will make the POTW responsible for the actions taken (or not taken) by its trading partner(s). Such a result could represent a significant obstacle to trading. POTWs should be responsible for meeting their contractual obligations under a trade, but should not be held accountable for the actions of their trading partners.

Trading of Additional Pollutants

The proposed policy emphasizes trading primarily with nutrients and sediments (see Provision # 2, p. 3). While the proposed policy acknowledges the potential for trades involving other parameters, it relegates those parameters to “second tier” status, which could be interpreted as placing additional constraints on those pollutants. AMSA does not believe that the policy should give preferential status to certain parameters. EPA should avoid presenting barriers to those sources and states that might be interested in trading of parameters other than nutrients or sediments (e.g., mercury).

Measurement of Nonpoint Source Loadings in Certain Watersheds

AMSA supports EPA’s inclusion of specific measurement tools, such as the Natural Resource Conservation Service’s (NRCS) sediment loss equations, to determine approximate nonpoint source loadings (see Provision # 3, p. 5). Use of a consistent tool for making such estimates will add credibility to the process where nonpoint source trades are made. AMSA suggests that flexibility to use other tools on a case-by-case basis be endorsed in the final policy as long as they are found to be appropriate by the various stakeholders.

Net Load Reductions and Ratios for Pre-TMDL Trading

The proposed policy establishes EPA’s support for pre-TMDL trading in impaired waters “that achieves a net reduction of the pollutant or pollutants causing impairment” (see Provision # 11, p. 8). AMSA does not believe that pre-TMDL trading in impaired waters justifies the achievement of a net load reduction. We believe that the more appropriate constraint should be that the pre-TMDL trade achieves a “no net increase” in the discharge or loading of the pollutant. There may be legitimate reasons for entities to pursue point source/point source trades that simply shift, but do not reduce loads.

In addition, trading ratios that appear to inherently penalize point sources with higher removal responsibilities continue to be a concern and could present a significant obstacle to trading. The proposed policy indicates that “EPA considers greater than 1:1 point/point source and point/nonpoint source trading ratios necessary to provide a net water quality benefit unless it can be demonstrated that 1:1 trading ratios are consistent with achieving progress towards meeting water quality standards or a direct environmental benefit beyond pollutant load reductions results in progress towards restoring designated uses.” (see Provision # 3, p. 8) A higher default trading ratio is a significant deterrent to trading. A 1:1 ratio should be the presumptive ratio unless environmental or water quality impacts would result. We note that when potential ancillary benefits are considered, there will be some situations where a ratio of less than 1:1 could be justified.

Trading and Antidegradation

The proposed policy indicates that “EPA will consider trades and trading programs that achieve a no net increase in the discharge or loading of the same pollutant in waters that fully support designated uses as satisfying the antidegradation requirements of the CWA.” (see Provision # 10, p. 8) As currently stated, this provision can be read to indicate that the antidegradation policy requires a “no net increase” regulatory approach. In fact, AMSA notes that *de minimis* increases in loadings are allowable under the CWA and the anti-degradation policy.

Trading and Anti-Backsliding

AMSA supports EPA's interpretation of the backsliding provisions of the CWA (see Provision # 7, page 7). EPA correctly indicates that it will "not consider backsliding triggered where a source makes surplus reductions and later decides to discontinue generating credits as long as the actual discharge level does not exceed the discharge level previously authorized by a permit."

Enforcement of Trading

The proposed policy recommends that states and Tribes consider "establishing *enhanced enforcement provisions* for failure to generate the quantity of credits or allowances that are traded" (italics added) (see Provision # 4, page 5). AMSA does not understand the need for enhanced enforcement measures for trading. It would appear that the existing level of enforcement oversight would suffice to ensure that permit provisions are being met. AMSA is concerned that increased, and unnecessary, enforcement oversight would chill the potential for trades and discourage potentially interested parties.

Trading Currencies

AMSA recommends that EPA encourage flexibility in the definition of the trading currency or units. The currency should build in some method of accounting for multiple or ancillary environmental benefits that result from the trade.

Trading Between Sources Owned/Operated by Same Entity

The proposed policy needs to explicitly allow loads to be traded between sources owned or operated by the same entity. For example, a POTW or municipality with two distinct discharges, or types of discharges (e.g., municipal separate storm sewer system and treatment works discharges), should be allowed to trade between those two discharges.

Interstate Trading

The proposed policy does not clearly state how trading is to occur in watersheds that are affected by multiple states. The final policy should discuss, or include reference to, existing guidance for interstate compacts and how the existing processes may be used in concert with trading.

Margin of Safety

- The proposed policy indicates that the TMDL "margin of safety should account for the uncertainty of load shifts between point and nonpoint sources that may result from trading." (see Provision # 12, p. 9) AMSA opposes the use of the margin of safety in this manner because not all trades will necessarily be contemplated at the time of TMDL development. We recommend that any uncertainty be addressed in connection with the terms of the trade, and through the adjustments made in the NPDES permit limits.

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Thank you again for the opportunity to provide the Agency with comments on the proposed policy. We look forward to working with you further as this document is modified in response to comments. If you should have any questions regarding AMSA's letter, please contact Greg Schaner at 202/296-9836 or gschaner@amsa-cleanwater.org.

Sincerely,

A handwritten signature in black ink, appearing to read "K Kirk". The "K" is a simple, blocky letter, while "Kirk" is written in a more fluid, cursive style.

Ken Kirk
Executive Director