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Sewerage Agencies

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January 22, 2002

David Batchelor
Senior Policy Advisor
U.S. Environmental Protection Agency (MC 4101M)
1200 Pennsylvania Ave., N.W.
Washington, DC 20460

Dear David:

It was a pleasure to meet with you and Lynda Hall Wynn on December 20 to discuss the U.S. Environmental Protection Agency's (EPA's) plans to develop a comprehensive water quality trading program for the Office of Water. During that discussion, you suggested it would be of assistance to the Agency for the Association of Metropolitan Sewerage Agencies (AMSA) to provide you with a list of issues which, from the municipal wastewater treatment perspective, must be addressed in a successful trading program. In response to your request, we held several discussions with our Water Quality and Legal Affairs Committee leadership in order to develop a list of AMSA issues for your consideration. We hope that the following list of issues and corresponding discussion provides you with some insights into AMSA's perspective on water quality trading. We look forward to working with you and Lynda further as the Agency's initiatives develop.

As we discussed, AMSA has a long history of working with EPA to craft workable programs. AMSA members are always interested in seeking innovative ways to achieve water quality goals. At the same time, our members are pragmatic about the types of programs that work and their necessary ingredients for success. AMSA supports the trading concept as a potential voluntary tool for triggering cost-effective pollutant reductions in a non-traditional manner, and for providing needed flexibility in the clean water program. However, we want to be careful to ensure that any trading program is fair and equitable, and provides proper assurances to all participants involved.

AMSA's list of issues (see below) is divided into two substantive categories. These include: (1) pre-requisites for any water quality trading program, and (2) priority issues of concern to publicly owned treatment works (POTWs). The following sections discuss the issues in both categories.

1) Pre-Requisites for Any Water Quality Trading Program

AMSA members feel strongly that there are several minimum attributes that must be present in any trading program in order for trading to succeed. Without these minimum attributes, AMSA believes that the trading program will be handicapped from the start.

▪ *Trading Must Be Fair And Equitable For All Watershed Pollutant Sources*

In order to lay the groundwork for a fair and equitable process, any trading that is consummated under this program must result in a shift in liability from the trading source to the recipient source. This means that if a trade occurs, the permit must be adjusted to reflect a lowered pollutant removal requirement for the trading source. For example, if a point source trades X amount of nitrogen to a nonpoint source, the NPDES permit must reflect a reduction in pollutant removal responsibility by exactly the same X amount. AMSA believes there is no way to get around this basic requirement, and that if liability remains with the trading source (the NPDES permit holder in this example), the viability of the trade will be severely compromised.

Furthermore, 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. In other words, no enforcement action should be sought against the POTW for the increment of pollutant reduction that it has traded away. Under no circumstance should the POTW be held accountable for the failure of another party to carry out its agreed upon actions.

▪ *Start With A Completed TMDL Or Watershed Allocation, Then Allow Trading*

AMSA believes that watershed trading must not occur until and unless a TMDL or an equivalent allocation has been developed. This is consistent with EPA's trading principles contained in the draft 1996 *Framework for Watershed-Based Trading* (see page 2-6). By their very nature, TMDLs determine the sources of water quality impairment, and allocate pollutant removal responsibilities in direct proportion to the relative impact from each source. If done correctly, each point and nonpoint source in an impaired waterbody will receive a proportionate wasteload allocation (point source) or load allocation (nonpoint source).

AMSA's main concern with trading is the potential for it to be used to supplant a fair and equitable TMDL allocation, instead of being used, as intended by EPA, as a supplemental tool to achieve the TMDL apportionment. What should result from a TMDL process is a very sensible and rational, as well as a cost-effective and water quality-based allocation. From this allocation, AMSA believes that trading should be available as an optional method to implement the required allocation. AMSA fears that because EPA has minimal regulatory control over nonpoint sources, TMDL implementation plans will ultimately be distorted in such a way that a far greater emphasis is placed on point source pollutant reductions. In the absence of a truly fair and equitable allocation, it is likely that trading in this context will be used as a vehicle to achieve greater control over nonpoint sources with point sources being used for leverage. Therefore, AMSA recommends that EPA clarify up front that trading is to be used as a

supplemental tool to achieve pollutant reductions after allocations have been made under an approved TMDL.

To further illustrate the rationale for proceeding after the completion of a TMDL, AMSA believes that in the absence of a TMDL, there exists no accurate understanding of the amount of pollutant removal necessary to achieve water quality standards (WQS) or of the relative amount each waterbody source is contributing to the impairment. In the trading setting, a completed TMDL enables each source to examine their ability to afford or achieve their wasteload or load allocations, and to explore the possible advantages of trading those responsibilities with other sources. It is only when each source is equipped with this quantifiable pollutant reduction responsibility that it may begin to understand the financial and technical implications of implementing treatment versus exploring a trade. The TMDL also encourages trading by placing each watershed pollutant source on a level playing field in the sense that all sources are now included within the regulatory bubble of the TMDL.

2) **Priority Issues Of Concern To Publicly Owned Treatment Works (POTWs)**

▪ *Trading Must Be Voluntary For All Participants*

AMSA supports EPA's emphasis on the "voluntary" nature of trading. We believe that any market-based approaches must encourage free and open negotiations, and avoid any semblance of required participation. Beyond providing baseline principles, the program should work entirely on market-like incentives. In this sense, any pollutant source that engages in trading does so at their own discretion and as an optional way to achieve pollutant reductions.

▪ *Nonpoint Source Trades Must Result In Specific, Required Control Actions*

Where nonpoint sources are the recipient source of the trade, the resulting agreement should specify the actions that must be taken to achieve the expected pollutant removal. Our knowledge of BMP effectiveness is still rudimentary, and precise removal efficiencies resulting from BMPs are not yet known. While we can expect BMPs to reduce nonpoint source pollution, the amount of the reduction can only be roughly estimated. For this reason, EPA should provide that any trade agreement with a nonpoint source must delineate the specific implementation activities that must take place as part of the trade. Realistically, the only way for the trading partners to be assured that the trade is working is to examine whether or not the nonpoint source has implemented these specific actions, the BMPs or other identifiable controls.

▪ *Each Trade Must Occur On A 1:1 Basis*

EPA must ensure that each trade involves equal pollutant reduction levels between each source. If a point source agrees to trade 10 pounds per year of a nitrogen removal requirement to a nonpoint source, this trade should occur on a 1:1 basis. EPA must resist the temptation to require point sources to search for greater reductions from the recipient sources. Any other trading ratio would ultimately discourage trading between sources.

▪ *Recognize Ancillary Benefits Of Nonpoint Source Controls*

EPA should acknowledge that for many pollutant parameters, nonpoint source controls result in many secondary water quality benefits. For instance, if a farm operation agrees to plant riparian forest buffers adjacent to the water's edge to control sediments or nutrients, the resulting benefits will also include flow control, increasing habitat and shading, and bank stabilization. These benefits should be called out in each trading document in order to give proper credit to the nonpoint source and to account for all advantages of a successful trade with that source.

▪ *Address Timing Challenges In Permit Process That Discourage Trading*

The reality for POTWs is that once a permit is issued which requires a treatment upgrade, implementation schedules minimize opportunities to explore alternatives to building and installing the new technology. Essentially, this means that most POTWs, upon permit issuance, will need to immediately begin initiating the financial and construction planning necessary to comply with the permit. If trading is to be encouraged, EPA should explore ways to provide flexibility in the permit process so that the POTW can reasonably explore the potential for trading.

▪ *Provide Flexibility In The Reasonable Assurances Doctrine*

In the TMDL context, EPA should provide further mechanisms in the revised "reasonable assurances" doctrine to ensure that point sources will not bear the pollutant reduction burden for failures by other sources to achieve their removal responsibilities. It has not been clear in the past what happens if or when nonpoint source or legacy pollutant reductions fail to occur. AMSA believes that the reasonable assurances doctrine is an appropriate place to provide guarantees that once a watershed trade is made, if the reduction fails to occur, the load reduction responsibility is not shifted back to the trading source.

▪ *Banking Of Pollutant Removal Credits Should Be Authorized*

EPA should enable pollutant sources to "bank" reductions achieved above and beyond permit limits. The bank would authorize POTWs or other point sources to store any extra pollutant removal, and would allow them to use these credits at a later date. The banked credits could be used to facilitate further growth in the service area or to trade with other sources in need of additional loading potential. In addition, AMSA believes that banking should be used to credit non-traditional water quality improvement activities, such as wetlands mitigation, riparian habitat enhancements, or other types of environmental projects conducted by the POTW. The banking concept was supported in the Clean Air Act, and has similar potential for application under the Clean Water Act.

▪ *Costs Should Be Stable And Related To Implementation Expenditures*

There are many ways to set up pollutant offset programs, as illustrated by other programs such as the Clean Air Act program, wetlands mitigation, water banks, and supplemental environmental projects, for example. It is imperative to POTWs that the costs associated with offsets be stable, because a very important criterion for using limited public funds responsibly is to take relatively low risks in spending those funds. Wagering in an open market for offsets where wide price fluctuations prevail may simply preclude POTWs from participating altogether. The annual budgetary process in the public sector makes it very difficult for most public entities to adjust to rapidly changing market conditions. In addition, the

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public would only support an offset program if the cost of offsets are commensurate with the actual cost of implementing reductions.

▪ *Flexibility Should Be Provided For Cross-Pollutant And Cross-Media Transfers*

EPA should consider the concept of cross-pollutant trading, which would include, for a simple example, trading three dioxin credits for two mercury credits. While this approach may be more controversial than trading the same pollutant, there may be a place in an offset program for setting up alternative programs if demand and supply exists.

In addition, in some circumstances, habitat is more important to aquatic life viability than toxicity in the receiving water. For that reason, POTWs are interested in exploring the trading of an increased pollutant load with the creation or improvement of aquatic life or wildlife habitat. While significant regulatory hurdles exist, such as how to address the long term goal of removing a waterbody from the 303(d) list, POTWs recognize that this approach may be the right thing to do in some situations -- for example, for legacy pollutants such as DDT and PCBs, which have long since been banned, but are unlikely to be removed from the 303(d) list within the next century.

Thank you again for the opportunity to provide you with early feedback on water quality trading. We look forward to further discussions as the project develops. Please do not hesitate to contact me anytime to discuss these issues or to elicit AMSA's assistance in crafting a workable trading program. Please feel free to contact us at any time to discuss AMSA's comments or this initiative further.

Sincerely,

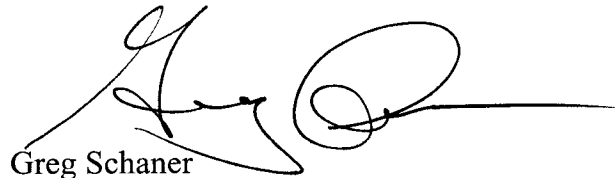


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cc: Lynda Hall Wynn