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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

### (A) 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.

(B) 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.

(C) 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.

(D) Baselines for Water Quality Trading

1. EPA should allow agricultural nonpoint sources to generate credits as they work to achieve baseline requirements. This would better incentivize nonpoint sources to meet baseline

requirements and encourage reductions that go above and beyond the baseline. With that said, a key consideration should be to ensure that reductions that are funded by point sources but occur in the agricultural sector are not double counted, meaning they are not claimed by both the point source and the agricultural sector.

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.

#### (E) 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.

#### (F) 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.

(G) 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](mailto:hmellman@nacwa.org).

Sincerely,

A handwritten signature in black ink, appearing to read "K Kirk".

Ken Kirk  
Executive Director  
National Association of Clean Water Agencies

Cc: Ellen Gillinsky, EPA Office of Water  
Bob Rose, EPA Office of Water  
Amelia Letnes, EPA Office of Water