

December 18, 2019

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The Honorable David P. Ross
Assistant Administrator, Office of Water
Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

RE: Docket ID No. EPA-HQ-OW-2019-0415
Water Quality Trading Under the National Pollutant Discharge Elimination System
Program, 84 Fed. Reg. 49,293 (Sept. 19, 2019)

Dear Assistant Administrator Ross,

The undersigned organizations appreciate the opportunity to comment on the U.S. Environmental Protection Agency's ("EPA") request for comment on policy approaches for addressing "baseline" issues in watersheds with EPA-approved total maximum daily loads ("TMDLs"), where policy makers seek to pursue water quality trading as a regulatory option for National Pollutant Discharge Elimination System ("NPDES") permit compliance.¹

The undersigned organizations, or their members, own, operate, or have an interest in lands and facilities that produce or contribute to the production of the row crops, forests, livestock, and poultry that provide safe and affordable food, fiber, and fuel to Americans all across the United States. Many of their members hold individual and/or general Clean Water Act ("CWA") permits for the discharge of pollutants into water, as well as those that undertake voluntary actions to control nonpoint source runoff of pollutants from their lands. The undersigned, or their members, are directly affected by regulatory and non-regulatory policy decisions under the CWA, particularly those aimed at controlling nutrients using CWA tools. Any proposed policy approaches that are designed to address nutrient pollution in water bodies under the CWA or state laws are of interest to the undersigned organizations.

EPA wisely continues to explore different ways to achieve water quality improvements through a combination of regulatory and non-regulatory approaches, including market-based programs such as water quality trading. Of particular relevance to the undersigned groups, trading between point and nonpoint sources has the potential to result in greater water quality improvements than what EPA and states can expect to achieve from regulatory approaches alone. One of the key challenges, as EPA notes, is that existing guidance (*e.g.*, EPA's 2003 guidance²) may be acting as a barrier to realizing the full potential of water quality trading.³ We support policy changes,

¹ See 84 Fed. Reg. 49,293 (Sept. 19, 2019).

² EPA Office of Water, Water Quality Trading Policy (Jan. 13, 2003) ("2003 Trading Guidance").

³ See 84 Fed. Reg. at 49,295.

namely, revising or revoking portions of existing guidance, that would provide for increased flexibility in effectuating point-nonpoint trading and that would help remove barriers to putting more nutrient management practices in place. The undersigned groups understand that EPA seeks to provide for more flexibility in trading and to remove obstacles to trading by issuing the current proposal, as well as the February 2019 memorandum on updating EPA's existing trading policies and promoting market-based mechanisms.⁴ The current proposal takes another step in the right direction by targeting baselines in particular. Above all, we agree that it is important to unbundle credit generation and related water quality improvements from non-enforceable load allocations in TMDLs.

As explained in more detail below, EPA's existing policy on baselines in watersheds subject to TMDLs is unduly restrictive and warrants reconsideration. The undersigned groups also offer additional comments on other aspects of EPA's proposal.

I. Water Quality Trading and TMDL Implementation Are Matters of State Law.

At times, EPA's proposal refers to information that, to the extent it exists, would be documented in a TMDL implementation plan. For example, EPA's proposed definition of "baseline" assumes that documentation exists as to what pollution control measures are expected to achieve nonpoint source load allocations.⁵ EPA should clarify explicitly in any future guidance document that such control measures and implementation plans are matters of state law. This clarification would be consistent with longstanding TMDL policy, which proclaims that EPA "does not approve TMDL implementation plans."⁶ If, in the context of trading, TMDL implementation plans need to be reexamined and revised for any reason, including increasing flexibility in credit generation, such decisions are governed by state law.

The same can be said of trading programs in general. EPA's 2003 Trading Guidance implicitly recognizes that water quality trading programs are matters of state law in setting forth recommendations for how states and tribes should develop trading programs and how they might try to quantify and track credit generation.⁷ To be sure, EPA envisions that states and tribes will consult the agency in developing trading programs, but any EPA oversight role with respect to trading is constrained by the limits Congress placed on EPA's authority under the Clean Water Act.⁸

⁴ Memorandum from David Ross, Assistant Administrator, to EPA Regional Administrators, Region 1-10, Updating the Environmental Protection Agency's (EPA) Water Quality Trading Policy to Promote Market-Based Mechanisms for Improving Water Quality (Feb. 6, 2019).

⁵ See 84 Fed. Reg. at 49,295.

⁶ See EPA, Guidelines for Reviewing TMDLs under Existing Regulations issued in 1992, at Part 10 (May 20, 2002) ("2002 TMDL Guidance").

⁷ See generally 2003 Trading Guidance.

⁸ See *id.* at Part III.H.

This clarification is important because the establishment of trading baselines should be a matter of state law. If a particular state wishes to tie trading baselines to load allocations in a TMDL, that is the state's prerogative, but EPA should not be dictating that policy outcome. Indeed, if another state wishes to establish baselines using a practice-based approach, regardless of whether a watershed is subject to a TMDL, that should be acceptable, so long as it is consistent with state law. Simply put, load allocations in a TMDL should not tie states' hands, and they need not be unyieldingly adhered to. States should remain free to pursue approaches that depart from what they originally envisioned in crafting a TMDL implementation plan.

II. EPA's Proposal Correctly Recognizes that TMDL Load Allocations Are *Not* Legally Enforceable Requirements and that Baselines Should Not Be Based on Them.

EPA's 2003 Trading Guidance and 2009 Water Quality Trading Toolkit for Permit Writers⁹ outline an overly restrictive approach to trading in watersheds subject to a TMDL. In those watersheds, the baseline for nonpoint sources to generate tradeable credits is the load allocation in the TMDL. EPA's current proposal appropriately backs away from that approach by defining "baseline" instead as existing pollutant control practices that were included in the assumptions that support the TMDL load allocation.¹⁰ We support this proposed change, and we believe that increased flexibility has the potential to lead to more point-nonpoint source trading.

A. Load Allocations Are Not Legally Enforceable Requirements.

In prior guidance, EPA has defined "baseline" to mean "the pollutant control *requirements* that apply to a buyer and seller in the absence of trading."¹¹ On its face, this definition suggests that one should look to enforceable permit terms and applicable statutes and regulations to determine what those requirements are. For nonpoint sources, any pollution control "requirements" come from state laws, as it is well established that EPA lacks regulatory authority over nonpoint sources. Congress has explained in the past that the 1972 Act drew a "clear and precise distinction between point sources, which [are] subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments through the section 208 process."¹² Not surprisingly then, courts of appeals have made it clear that "EPA lacks the authority to control non-point source discharges through a permitting process"¹³ and that the CWA does not provide a "direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task."¹⁴ Simply put, nonpoint sources are "generally excluded from CWA regulations, except to the

⁹ EPA, Water Quality Trading Toolkit for Permit Writers (June 2009) ("2009 Trading Toolkit").

¹⁰ See 84 Fed. Reg. at 49,295.

¹¹ EPA, Water Quality Trading Scenario: Point Source-Nonpoint Source Trading, at 6 (undated), available at https://www.epa.gov/sites/production/files/2016-04/documents/wqtradingtoolkit_ps-nps.pdf (emphasis added).

¹² S. Rep. No. 95-370, at 8 (1977).

¹³ *Defenders of Wildlife v. EPA*, 415 F.3d 1121, 1124 (10th Cir. 2005).

¹⁴ *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998).

extent that *states are encouraged* to promote their own methods of tracking and targeting nonpoint source pollution.”¹⁵

Regardless of whether a TMDL is established for a watershed in which sources wish to engage in trading, state laws applicable to nonpoint sources are the appropriate basis for determining baselines for trading. This is because neither TMDLs nor load allocations are self-implementing. Only state laws can establish enforceable requirements for nonpoint sources, which is a matter of TMDL *implementation* that EPA lacks direct regulatory authority over.

The proposal rightly acknowledges that nonpoint source load allocations in a TMDL are not legally enforceable pollution control requirements and thus, they should not be considered “requirements” for purposes of defining baselines for water quality trading.¹⁶ The undersigned organizations strongly support this clarification, and EPA should revise (or rescind) portions of existing trading guidance documents to make this point explicit. There is no statutory or regulatory requirement to implement, much less achieve, nonpoint source load allocations. As one federal district court cogently explained:

Under the Act, California must ‘incorporate’ the TMDL in its planning. Nothing, however, requires that the TMDL be uncritically and mechanically passed through to every relevant parcel of land. *California is free to select whatever, if any, land-management practices it feels will achieve the load reductions called for by the TMDL. California is also free to moderate or to modify the TMDL reductions, or even refuse to implement them, in light of countervailing state interests.* Although such steps might provoke EPA to withhold federal environmental grant money, California is free to run the risk.¹⁷

On appeal, the U.S. Court of Appeals for the Ninth Circuit similarly explained that the TMDL at issue did not raise federalism concerns because, rather than specifying load allocations for “particular parcels of land or describe what measures the state should take to implement the TMDL,” it recognized that these are implementation and monitoring responsibilities that fall to the State. Indeed, California had the freedom to choose “both *if* and *how* it would implement” the TMDL.¹⁸

More recently, in defending against a challenge to the Chesapeake Bay TMDL, EPA underscored that nonpoint source load allocations are not regulatory requirements or otherwise enforceable limits. Specifically, EPA stated that TMDL load allocations “do not bind the States or sources. They do not establish enforceable ‘pollutant limits’ for

¹⁵ *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008).

¹⁶ *See* 84 Fed. Reg. at 49,295.

¹⁷ *Pronsolino v. Marcus*, 91 F. Supp. 2d 1337, 1355 (N.D. Cal. 2000) (emphasis added).

¹⁸ *Pronsolino v. Nastri*, 291 F.3d 1123, 1140 (9th Cir. 2002).

sources and sectors . . . or ‘set control measures’ for nonpoint sources.”¹⁹ Because load allocations are not enforceable requirements, states are free to revise or reapportion the allocations however they see fit or even ignore them altogether. As such, it makes no sense to define baselines for nonpoint sources with reference to load allocations.

Finally, it is noteworthy that EPA has in the past recognized the inherent inaccuracy of—and therefore the need for states to remain free to depart from—load allocation schemes in a TMDL, which further calls into question the wisdom of using such allocations as baselines for nonpoint sources.²⁰ EPA acknowledged that a TMDL may not represent the most accurate or reliable information about nonpoint source loading within a watershed. Under such circumstances, a state can use something else, *e.g.*, a set of minimum best management practices, as the baselines for credit generation. Allowing for such flexibility makes sense considering that many TMDLs only establish gross allocations²¹ and require further refinement at the state level if any meaningful progress is to be made toward achieving water quality.

B. The Undersigned Organizations Endorse EPA’s Proposal to Allow Credit Generation Simultaneously with the Adoption of Practices Consistent with the Load Allocation.

The proposal wisely attempts to bridge the gap between trading in impaired watersheds that are subject to TMDLs and trading in impaired watersheds that are not yet the subject to TMDLs. It does this by signaling that credits could be generated from practices implemented by nonpoint sources contemporaneous to the implementation of other practices that a state has assumed are to be adopted by nonpoint sources in the effort to attain the non-binding TMDL load allocation.²² We support this change, although we are concerned that it does not go far enough to make trading a truly attractive and effective option in watersheds subject to a TMDL. The key is for trading to “achieve a net reduction in loadings of the pollutant traded and, thus, progress toward attainment of water quality standards.”²³ If EPA could support a baseline in a TMDL watershed that is consistent with how EPA defines baselines in pre-TMDL watersheds, but without altering the wasteload allocation that point sources would otherwise receive, we believe that would clear the way for substantially more credit generation to help the watershed meet applicable water quality standards.²⁴ We note that this would be consistent with existing policy guidance whereby

¹⁹ See EPA Response Brief, *Am. Farm Bureau Fed’n v. EPA*, No. 13-4079, Dkt No. 003111577209, at 22 (3d Cir. filed Apr. 2, 2014).

²⁰ See EPA, Water Quality Trading Scenario: Point Source-Nonpoint Source Trading, at 6-7.

²¹ See 84 Fed. Reg. at 49,297 (recognizing that TMDL load allocations are generally “identified very broadly, covering entire sectors or even having a single load allocation for all nonpoint sources in the watershed”).

²² See 84 Fed. Reg. at 49,295-96.

²³ See 2009 Trading Toolkit at 22.

²⁴ Importantly, under EPA’s existing policy, the baseline for nonpoint sources in pre-TMDL waters is the level of pollutant load associated with existing land uses and management practices (Continued...)

EPA has never viewed attainment of water quality standards to be a prerequisite for credit generation. EPA has acknowledged that load allocations in a TMDL are not binding regulatory requirements. Ideally the definition of baseline also should not be binding so as to possibly preclude effective credit generation and other forms of collaboration between point sources and nonpoint sources that would improve water quality.

The undersigned organizations further urge EPA to omit any reference to “reasonable assurance” when defining or discussing baselines in revised trading guidance documents. There is no statutory or regulatory requirement for states to provide reasonable assurance that load allocations in a TMDL will be achieved.²⁵ In fact, codifying the concept of “reasonable assurance” in EPA’s regulations was one of the more controversial aspects of the failed 2000 TMDL rule.²⁶ EPA should not be relying on guidance documents to impose this requirement.

Revising the definition of baseline and omitting references to reasonable assurance should have the potential to lead to increased trading and water quality improvements moving forward. This would also reward nonpoint sources that have gone above and beyond what is required under applicable law to begin generating credits immediately, or even retroactively as EPA envisioned in its February 2019 memorandum. In short, water quality improvements are water quality improvements, and EPA should be trying to incentivize them in *all* watersheds.

III. Comments on Other Aspects of EPA’s Proposal

In addition to the preceding comments, the undersigned organizations offer some additional suggestions on the current proposal:

- Although we support policy changes that would remove existing barriers to point-nonpoint source trades, we caution EPA to avoid doing anything, *e.g.*, putting compliance schedules in NPDES permits that include schedules to arrange for nonpoint sources to install BMPs, that could be wrongly interpreted as providing for regulatory authority over nonpoint sources. Again, the CWA does not provide for regulatory authority over nonpoint sources.

that comply with applicable state, local, or tribal regulations. *See* 2003 Trading Guidance at Part III.D. Any nonpoint sources that implement pollution reduction practices above and beyond those existing practices can generate tradeable credits. Baselines in pre-TMDL impaired waters are therefore *identical* to baselines in watersheds where water quality fully supports designated uses. *See id.*

²⁵ *See* 2002 TMDL Guidance at 4-5 (conceding that EPA “cannot disapprove a TMDL for nonpoint source-only impaired waters, which do not have a demonstration of reasonable assurance that [load allocations] will be achieved, because such a showing is *not required by current regulations*”) (emphasis added).

²⁶ *See* Steven Miano & Kelly Gable, Total Maximum Daily Loads: Section 303(d), in *THE CLEAN WATER ACT HANDBOOK* 207, 218 (Mark Ryan ed., 3d ed. 2011) (quoting 65 Fed. Reg. 43,586 (July 13, 2000)).

- The undersigned organizations would support allowing NPDES permitted facilities to pay into an in-lieu fee program that is allocated for nonpoint source pollutant loadings, which could help implement nonpoint source BMPs in particular areas. This could be a useful tool to incentivize water quality trading and achieving water quality improvements.
- EPA should modify existing trading guidance to allow NPDES permitted facilities to receive credit in upcoming permit renewals for previous load reductions that they have helped achieve through collaboration with nonpoint sources. There are a number of collaborative projects that point and nonpoint sources have implemented to date, and successful efforts should be rewarded in some way.

IV. Conclusion

The undersigned organizations appreciate the opportunity to comment on EPA's trading baselines proposal. We agree that EPA must revise, or even rescind, existing guidance on trading because the policy on credit generation in watersheds subject to TMDLs is too restrictive. To help reduce barriers to trading, EPA must make policy changes so that nonpoint source credit generation is not linked to TMDL load allocations, which are not legally enforceable requirements. We support point-nonpoint source trading as one potential tool in the broad-based effort to address nutrient pollution, and more generally, we support policy changes that help incentivize the adoption of more practices aimed at minimizing nutrient losses.

American Farm Bureau Federation
 American Sugarbeet Growers Association
 Agricultural Retailers Association
 Illinois Farm Bureau
 Illinois Corn Growers Association
 Missouri Agribusiness Association
 Mid America Croplife Association
 National Cattlemen's Beef Association
 National Corn Growers Association
 National Cotton Council
 National Council of Farmer Cooperatives
 National Pork Producers Council
 National Milk Producers Federation
 The Fertilizer Institute