

NORTHWEST ENVIRONMENTAL ADVOCATES



February 20, 2015

Dan Opalski, Director
Office of Water and Watersheds, Region 10
U.S. Environmental Protection Agency
1200 Sixth Ave.
Seattle, WA 98101

Via email only: opalski.dan@epa.gov

Re: Request that EPA Region 10 Withdraw its Endorsement from the Regional Recommendations for the Pacific Northwest on Water Quality Trading

Dear Dan:

Northwest Environmental Advocates (NWEA) and the Northwest Environmental Defense Center (NEDC) are writing to request that EPA Region 10 withdraw its endorsement from the guidance document entitled *Regional Recommendations for the Pacific Northwest on Water Quality Trading* (Draft, Aug. 2014) (hereinafter “Recommendations”).

As you know, our organizations were very disappointed with EPA Region 10’s decision to engage in an extensive closed-door negotiation with the Willamette Partnership, The Freshwater Trust, and staff from the water quality agencies of Idaho, Oregon, and Washington to produce the Recommendations. Region 10 referred to itself as a “key participant” in this process and is listed on the title page as an advisor. In addition, the Region made clear that it supported the awarding of the grant to produce a regional guidance document, despite its organizers’ unprecedented plan to shut out the public, other than themselves. *See* Letter from Michael Bussell, Director, Office of Water and Watersheds, Region 10 EPA, to David White, Office of the Chief, Natural Resources Conservation Service, U.S. Department of Agriculture, Re: Support for CGI Proposal: Multi-State Regulatory Agency Guidance for Water Quality Trading: State agencies building shared trading policies and tools for the Pacific Northwest and beyond (undated) (“this project could result in the creation of a regionally consistent and robust guidance for water quality trading . . . that our states could adopt and follow.”).

We continue to believe that EPA’s involvement in a closed-door process with vested interests was highly inappropriate. Moreover, EPA Region 10’s support for the grant award, its extensive involvement in the document’s development, and its being listed as an advisor, all give the guidance EPA’s official imprimatur. Worse, in so doing, the Region has endorsed guidance that is inconsistent with federal law and with EPA’s national policy on water quality trading. For this reason, we ask that Region 10 remove the agency’s name from the Recommendations and cease to participate in its finalization, scheduled for September 2015.

Discussion

The Recommendations document is 168 pages. It is neither our desire nor our intent to describe

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all the ways in which it fails to meet federal law and policy. Instead, we have chosen a key example to demonstrate the inconsistencies to which we refer.

The role of TMDLs in trading cannot be understated because TMDLs establish wasteload allocations that are the basis for water quality-based effluent limits (WQBELs) in NPDES permits and the wasteload allocations are based on expected reductions of pollutants by nonpoint sources. *See* 40 C.F.R. § 130(i). This trade-off between point and nonpoint sources constitutes the fundamental algebra underlying the issuance of subsequent NPDES permits. Therefore, just as NPDES permits must use the wasteload allocation to set the water quality-based effluent limits, the load allocations must be used to establish the baseline of nonpoint source controls used for trading. While the Recommendations give some passing lip service to the important regulatory role played by TMDLs,¹ more typically the Recommendations explain that it can be “difficult” or “challenging” to determine how to translate a load allocation “into a control requirement specific to an individual nonpoint source.” *See, e.g.*, Recommendations at 49. The Recommendations place a heavy emphasis on the purported ambiguity in TMDL load allocations because many “are set for entire nonpoint sectors and regulatory requirement might only provide general guidelines (i.e., they are not clear on what individual nonpoint sources are required to do, or by when, prior to selling credits).” *Id.* at 8. TMDLs are also dismissed as not self-implementing, *id.* at 51, as if that fact alone negates their regulatory role under the Clean Water Act.

As a result of this critique, the Recommendations assert that “states may need to derive site-specific trading baseline thresholds from existing regulatory requirements, TMDL LAs, TMDL implementation plans, and/or general nonpoint source control authority.” *Id.* at 8-9. The guidance makes this a matter of state prerogative, not federal law:

In some states, baseline may be based directly on TMDL LAs. In others, TMDL LAs need to be translated into state, local or tribal statutes, rules, regulations or orders to become a baseline requirement. It is therefore necessary to consult with the water quality agency in each state to determine how each respective TMDL program interacts with trading requirements.

Recommendations at 8, fn. 7.²

The problem with this description of TMDLs’ role in setting nonpoint source baselines is that it

¹ *See, e.g., id.* at 23 (trading should not “cause the combined point source and ‘nonpoint source’ loadings to exceed the cap established by a TMDL”); *id.* at 49 (“The 2003 U.S. EPA Trading Policy states that ‘pollutant reductions [should be] greater than those required by a regulatory requirement or established under a TMDL[.]’”).

² The legal appendix to the Recommendations oddly cites the definition of a TMDL for the proposition that “so long as LAs to nonpoint sources are “practicable,” such as where supported by BMPs and other reasonable assurances, more load can be allocated to point sources.” *Id.* at 147. This is an incorrect statement of law as there is no requirement that load allocations be practicable or supported by BMPs and if EPA has approved a TMDL, its action stands for the proposition that there is reasonable assurance that nonpoint sources will be controlled to meet load allocations.

is not an accurate description of TMDLs' role in permitting. As we have noted previously, water quality-based effluent limits must be "consistent with the assumptions and requirements of any available wasteload allocation for the discharge[.]". 40 C.F.R. § 122.44(d)(vii)(B). Quite simply, if point sources are allowed to meet their wasteload allocations by taking actions that the nonpoint sources are already assumed to be doing when the point sources were given a wasteload higher than zero, the sources collectively will be reducing pollution less than required by the TMDL. Thus, allowing a trade that is inconsistent with the TMDL load allocations is not legal because those load allocations are an assumption that is used to establish wasteload allocations. And if this is allowed, the goal of the TMDL, and the Clean Water Act in general, will not be met because the permitting system will fail to restore the waterbody. So, for example, when a TMDL allocates a small fraction or zero of the allowable heat load to nonpoint sources,³ an assumption underlying the associated wasteload allocations is that the nonpoint sources will be contributing not more than that small fraction or zero to the waterbodies covered by the TMDL.

The Recommendations simply muddy the water by asserting that the only TMDL load allocations that *must* be taken into account for NPDES permitting are those that establish a specific load allocation for each individual land owner or an allocation that has been translated into a rule.⁴ TMDL load allocations do not need to be turned into anything at all in order to have legal significance for permitting. *See* 40 C.F.R. §§ 122.44(d)(1)(vii)(B); 130.2(i). It is quite inconceivable that EPA believes that the Recommendations accurately reflect the law in this regard. For this reason it is not surprising that the Recommendations are inconsistent with EPA's national trading guidance. *See, e.g.*, EPA, Water Quality Trading Policy (Jan. 13, 2003) ("The term pollution reduction credits ("credits"), as used in this policy, means pollutant reductions greater than those required by a regulatory requirement or established under a TMDL."); EPA, Water Quality Trading Toolkit for Permit Writers (Aug. 2007) Water Quality Trading Scenario, 7 ("An LA established under a TMDL defines the nonpoint source load reductions necessary to achieve water quality standards. EPA would not support a trading program that allows nonpoint sources to sell credits if the discharge is contributing to water quality impairment; therefore, *nonpoint sources should meet their portion of the LA before generating credits to sell on the trading market.*") (emphasis added); *id.* at 5 ("The Trading Policy's intent is that each nonpoint source participating in trading under a TMDL make reductions consistent with the LA before they can generate credits (additional reductions) for sale.").

Conclusion

Although EPA has no water quality trading regulations upon which states can base water quality trading programs, there are strict permitting regulations to implement the requirements of the statute. We may not agree with every aspect of EPA's national trading guidance but it does

³ Many Oregon temperature TMDLs establish load allocations of zero. Others provide for a very small allocation to nonpoint sources but state that this allocation is to address landscapes that are not likely to achieve a natural condition, such as levees on which trees are not allowed to grow.

⁴ In addition, the Recommendations blur the lines between EPA-approved TMDLs and so-called TMDL implementation plans, plans that have no regulatory significance.

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attempt to give credence to these legal requirements. In contrast, EPA Region 10's endorsement of this Regional Recommendations guidance—crafted by vested interests and states with a history of illegal trades—will likely encourage states to establish trading rules and to issue NPDES permits that fail to comport with the law. The result will likely—predictably and inevitably—be litigation, litigation EPA could have prevented.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell". The signature is fluid and cursive, with a large initial "N" and a long, sweeping underline.

Nina Bell
Executive Director

cc: Ken Kopocis, Deputy Assistant Administrator IO
Michael H. Shapiro, Principal Deputy Assistant Administrator IO
Benita Best-Wong, Director OWOW
Christine Psyk, Region 10
Claire Schary, Region 10