LEGAL CONSIDERATIONS FOR TRADING

BOB ROSE, USEPA
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Helpful Definitions

- **TMDL (Total Daily Maximum Load)**
  - Total pollution cap
  - A portion of the cap is federally regulated (point source)
  - A portion is not federally regulated (non-point source)

- **NPDES Permit (National Pollutant Discharge Elimination System)**
  - Points Sources must have an NPDES permit to discharge set level of pollution
    - e.g., industrial or municipal wastewater treatment plant; large urbanized areas

- **Non-point Source**
  - Everything else not subject to federal permits
Clean Water Act Permitting
Legal Framework

- Clean Water Act 301(b)(1)(C) requires “point sources” to have effluent limitations sufficient to meet water quality standards -- we call these water quality based effluent limits (WQBELs).

- Water quality trading as defined by EPA, and most others, centers around permitted point sources meeting their WQBELs by using offsite credits, under defined circumstances (see later slides).

- Neither the CWA or its regulations reference trading, however EPA has a 2003 policy and 2007 toolkit that describe how water quality trading can fit into our existing regulatory framework (see later slides).

**EPA views trading as allowable and that neither EPA or states require additional regulations to trade.**
Water Quality Trading

- Permit compliance option
- Discretionary option between the permitting authority and the permitted entity
- The permit writer is principally looking to see that the seller’s credits as purchased by the buyer provides the same overall water protection as would on-site installation of control technologies.

Many examples

- “Point-to-point” trades under separate permits
- “Point-to-point” trades under one “watershed permit”
- Purchase credits from non-regulated (at federal level) non-point sources (e.g., agriculture)
- Large or small trading programs, simple or complex

* Other sessions at this workshop describe how this is done
2003 Water Quality Policy: Section III, A through H

http://water.epa.gov/type/watersheds/trading/tradingpolicy.cfm

A. Consistent with the CWA
B. Within a watershed, or, within TMDL area if exists
C. Nitrogen, Phosphorus, Sediments, others case-by-case
D. Baseline – Permit limit for point source. For non-point sources use state regulations or TMDL, whichever more stringent
E. Trading can be used pre-TMDL, or post-TMDL
F. Uphold all requirements of permitting (too detailed to list)
G. Elements of trading programs (See next slide)
H. EPA’s oversight role is to review permits that use trading.
2003 policy: Section III, G. Common Elements of Credible Trading Programs

See 2003 Water Quality Trading Policy for full text

1. Legal Authority and Mechanisms. EPA believes the CWA provides authority. Additional state provisions for trading may include legislation, rule making, incorporating provisions for trading into NPDES permits.

2. Units of Trade. Clearly defined units of trade are necessary for trading to occur.

3. Creation and Duration of Credits. Credits should be generated before or during the same period specified in an NPDES permit.

4. Quantifying Credits and Addressing Uncertainty. Such as accounting for uncertainty.

5. Compliance and Enforcement Provisions. May include a combination of record keeping, monitoring, reporting, inspections, compliance audits. Clear enforceable mechanisms consistent with NPDES regulations.

6. Public Participation And Access To Information. EPA encourages states and tribes to make electronically available to the public information on the sources that trade, the quantity of credits generated and used on a watershed basis.

7. Program Evaluations. Periodic assessments of environmental and economic effectiveness should be conducted and program revisions made as needed.
Some Key Points

- EPA does not require any specific approach to water quality trading. e.g., market based, not market based, simple, complex...

- EPA encourages trading as it best serves the larger public and stakeholders working together

- EPA approves or disapproves individual permits and enforces compliance

- To date EPA has expanded on water quality trading with its 2007 Water Quality Trading Toolkit for Permit Writers
For More Information

- Bob Rose
  - Rose.bob@epa.gov
  - (202) 564-0322

- EPA Website (URLs are not shown since they will change soon)
  - Water Quality Trading Policy
  - Water Quality Trading Toolkit for Permit Writers