

NATIONAL WATER QUALITY TRADING ALLIANCE

January 2, 2014

Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460
Attention: Docket ID No. EPA-HQ-OW-2010-0606

Re: Comments on EPA Water Quality Standards Regulatory Clarifications
Proposed Rule, 78 Fed. Reg. 54518 (Sept. 4, 2013)

Dear EPA Staff:

The National Water Quality Trading Alliance (Trading Alliance) appreciates this opportunity to comment on EPA's proposed clarifications to the federal water quality standards regulation. As described in more detail below, we believe that this rulemaking presents a unique opportunity for EPA to affirmatively endorse the implementation of water quality trading programs by states as part of their general policies under 40 CFR §131.13.

The Trading Alliance is being formed to advance the science, law and policy underlying water quality trading. We intend to achieve these objectives by supporting comprehensive and coherent rules and policies on trading; promoting consistency, integrity, scientific rigor and defensibility in the application of such rules and policies; providing a platform to advance the science and ecological effectiveness of trading; and serving as a catalyst and champion for the new strategic partnership between EPA and USDA to enhance trading opportunities.

The Trading Alliance believes that water quality trading has the potential to accelerate the scope and pace of restoration in impaired watersheds throughout the United States, and thus is inextricably bound to the goals and objectives of the Clean Water Act. We see a direct nexus between water quality trading and EPA's proposed regulatory clarifications, both of which seek to improve the effectiveness of federal and state regulations geared toward restoring and maintaining the chemical, physical and biological integrity of the nation's waters.

As EPA's existing regulations make clear, water quality standards serve the dual purposes of establishing water quality goals and providing a regulatory basis for imposing water quality-based treatment controls and strategies. 40 CFR §131.2. With new monitoring techniques, more precise data, more stringent standards, more sophisticated modeling tools and more comprehensive water quality assessments, we are confronted with a growing list of impaired waters involving myriad diverse and diffuse sources of pollution. The water quality continuum established by Congress, implemented by the states, and overseen by EPA will help to ensure that these impairments are addressed, first through regular monitoring and assessment,

second through impairment listings, priority rankings and TMDLs, and third through implementation strategies that include water quality-based effluent limits for point sources and cost-effective and reasonable best management practices for nonpoint sources. But our shared restoration goals will not be achieved overnight, and cannot be achieved without reasonable, practical, flexible, scientifically-sound and legally defensible state implementation policies that include trading to promote reductions from both point and nonpoint sources of pollution.

In the preamble to its proposed regulatory clarifications, EPA discusses a variety of tools that are available to states and dischargers to provide the time needed to meet water quality-based regulatory requirements, including variances and permit compliance schedules. 78 Fed. Reg. at 54532 col. 1. We respectfully request that EPA add water quality trading to this discussion, since trading is a tool that not only helps to phase-in new requirements, but also to accelerate progress at lower cost (not to mention provide ancillary environmental benefits).

We are grateful for EPA's strong and longstanding support of water quality trading, which dates back to a draft framework in 1996, a national policy in 2003, and significant technical assistance, guidance and grant support over the past decade. We agree with EPA that trading is fundamentally a state implementation tool, not a federal one. But in recent years, the legality of trading has come under attack in both federal and state proceedings involving water quality-based permitting actions and TMDLs. In the face of these threats, we believe that the current rulemaking presents EPA with a unique and immediate opportunity to reinforce the value and appropriateness of trading as a regulatory tool for states to use when implementing their water quality standards. And we believe that EPA can fulfill this opportunity by amending 40 CFR §131.13 as follows (new text set off in bold):

§131.13 General policies.

States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows and variances. **In addition, States may implement water quality trading programs between and among point and non-point sources on a local, state or interstate basis to attain water quality standards. Trading is permitted for water quality-based effluent limitations (WQBELs) so long as data and ecological modeling confirm that the proposed trade would not result in adverse localized impacts or contribute to an exceedance of any applicable water quality standard.** Such policies are subject to EPA review and approval.

In offering these suggestions, we do not intend to preclude the use of trading for technology-based effluent limitations (TBELs). Rather, we anticipate that authority for such trades would be made in the relevant effluent guidelines rulemaking. By way of example, we are aware of multiple comments supporting TBEL trading in EPA's pending steam electric effluent

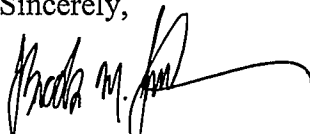
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guidelines. And we support such trading where there is an appropriate, supporting technical record.

We commend EPA for seeking to improve the effectiveness of the federal water quality standards regulation, and for providing additional clarification and specificity to states on the implementation of their own water quality standards programs. We hope that EPA will find these comments to be helpful, and we look forward to working with the Agency and other interested stakeholders to advance the science, law and policy underlying water quality trading.

Please feel free to contact me at 804-697-1414 or brooks.smith@troutmansanders.com with questions or for more information.

Sincerely,

A handwritten signature in black ink, appearing to read "Brooks M. Smith", with a long horizontal flourish extending to the right.

Brooks M. Smith
Organizer and Common Counsel