

WATER QUALITY TRADING: LEGAL HURDLES AND SCIENTIFIC CHALLENGES

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Congress set a lofty goal when it amended the Federal Water Pollution Control Act (Clean Water Act) in 1972. 33 U.S.C. § 1251(a) required that the discharge of pollutants be eliminated by 1985 and all waters be “fishable/swimmable” by 1983. Although significant progress has been made, these goals have yet to be obtained and a lot of work remains to be done. Traditional “end-of-pipe” pollution-control measures must be supplemented with new policies and initiatives that address diffuse sources of pollution like stormwater and agricultural runoff.

One new policy, heavily promoted by the U.S. Environmental Protection Agency (EPA), is water quality trading. In its 2003 *Water Quality Trading Policy*, the EPA stated “that market-based approaches such as water quality trading provide greater flexibility and have potential to achieve water quality and environmental benefits greater than would otherwise be achieved under more traditional regulatory approaches.” Water quality trading programs create a market for the buying and selling of pollution “credits.” Once a market is up and running, facilities facing higher pollution control costs have the option of meeting regulatory obligations by purchasing pollution reductions (credits) from another source at lower cost. Currently, most credits are generated by farmers through the implementation of best management practices and purchased by sewage treatment plants.

In December 2006, the state of Pennsylvania approved a policy to allow point sources of pollution to offset pollution discharges by purchasing “credits” from other facilities or farmers. In August 2008, the Florida Department of Environmental Protection proposed regulations to establish procedures for water quality trading in the state. Ten states currently have some type of water quality trading program in place and trading programs are in development in Minnesota, West Virginia and Maryland. Despite the growth in trading programs around the country, it is unclear whether such trading is permissible under the Clean Water Act.

Courts currently disagree about whether the CWA allows point sources to offset discharges into impaired waterbodies, or waters failing to meet state water quality standards. In *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007), environmental groups challenged the EPA’s issuance of a permit to Carlota Copper Company for discharges of copper from an open-pit mine into Pinto Creek, an impaired waterbody. EPA authorized Carlota’s discharges with the condition that the company offset this new source of copper loading through the remediation of an upstream inactive mine. The Ninth Circuit ruled that Carlota’s discharge of dissolved copper into an impaired waterbody violated the Clean Water Act. While this case did not involve a water quality credit trade, trading that involves impaired waterbodies would be

impermissible under this precedent. The EPA has appealed this decision to the U.S. Supreme Court.

This presentation will provide information on the existing state water quality trading programs and examine the legal and scientific issues that may arise as states begin trading. The *Pinto Creek* case and others will be closely examined to provide guidance on how trading programs could be designed to comply with the CWA.

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