

Great Lakes Trading Network

Conference Call Summary

November 23, 1999

List of Participants:

- Susan Austin, San Francisco Tradable Loads Program
- Dave Batchelor, Michigan DEQ
- Allison Wiedeman, U. S. EPA
- Cy Jones, Chesapeake Bay
- Jim Klang, Minnesota Pollution Control Agency
- Mike Tenenbaum, Kieser & Associates
- Jonathan Kleinman, ECT
- Richard Woodward
- Robin Finch, City of Boise
- Mary Anne Lowndes, Wisconsin NR
- Bruce Johnson
- Sally _____? (with Jim in MN)

GLTN Conference Call

I. Welcome

Several participants joined in the first few minutes of the call, between 1:30-1:40 p.m. Self-introductions of nine early participants were made and the agenda set forth for today. Materials that Dave expected had been e.mailed out to members for use in today's meeting apparently never left the server. Dave will try to follow-up and get these out for all network participants ASAP. Jonathan Kleinman agreed to walk the group through his comments in lieu of everyone having a copy.

The intent today and near-term will be for all to review these and all other comments that have been prepared in hopes of putting together a set of final comments that reflect a very high consensus for the network. These comments will be a response to what Chuck Fox asked of the group in an effort to assist EPA in finalizing these regulations.

Agenda:

- **Administrative "stuff"**
- **Trading conference**
- **Discussion of trading comments to EPA**
- **Project Updates**

II. Trading Conference

Dave provided a summary of where we are today. He expects to finalize a contract this week. We appear to be on budget. Many of the speakers are in-place. The brochure has been drafted and critiques have been forthcoming. We are close to the final proof of the brochure. Now we are exploring printing costs and methods of advertising the conference.

Chuck Fox remains an unconfirmed speaker. It was too early for him to commit so far in advance. Confirmed speakers include Roberta Savage, Executive Director of the State and Interstate Water Pollution Control Administrators, Paul Faeth, WRI, Richard Sandor, Chairman and CEO for Environmental Finance, Inc. and board member of the Chicago Board of Trade (Keynote Speaker), Kari Dolan, National Wildlife Federation plus several network participants. Still looking for national level speaker to represent agriculture and speak to what does and does not work for agriculture, especially how trading can leverage some of the more traditional agricultural subsidy programs to improve water quality.

Bruce has been working with Claire and Mary Ann to put exhibitors together and ask that they provide a list of needs. Requests have also been received from several others.

General Motors has agreed to flexible sponsorship of an as yet undefined nature. The Colorado law firm of Jean Boyer (sp?), one of the exhibitors, has also agreed to be a sponsor. We need to finalize arrangements for publicity and we should be in good shape for an excellent conference.

Bruce reported on six current exhibitors. In addition to himself and, as noted above, Jean Boyer, Colorado, he noted Dave Batchelor and Mark Kieser from Michigan (two separate booths), Suzanne Wade from Rock River Basin in Wisconsin, Susan Austin, California, Cherry Creek, and Chesapeake Bay (opportunity to present structure and preview prior to project actually starting). Allison (Chesapeake) will need to check on how much she will need to spend for the presentation, but is very interested in doing one. Brief discussion ensued on what booths “look like” and typically what types of materials are included, from very simple to very complex (i.e., power point computer presentations, brochures, poster displays, enlarged and mounted photographs, handouts, beer and brats in Wisconsin, etc.) Most people have requested space but are not interested in manning the booth all the time since they want to participate in the conference too.

Claire Schary may also provide a booth if all goes well. _____ has been asked to present in April in Wisconsin, so something will likely be together for Claire to use presuming briefing at EPA Headquarters goes OK. Randy Smith, Region 10, Office of Water Director was at an all-day meeting in Kansas City recently focused on trading framework, where all the Office of Water Directors nation-wide had met. Trading was a profile topic, one of the top two issues they focused on. Would be wise to get this group informed about our conference. Claire has been keeping him up to speed on this. Dave B. will contact Claire and then perhaps contact each of these directors.

In reviewing booths, Dave B. noted that perhaps National Wildlife Federation and EPA should have the same opportunity. All agreed. Follow-up should now be to Bill Painter at EPA for trading; Maheesh seems to be moving onto other issues. Network members agreed that EPA should be there. Mary Ann will contact Bill to pursue this.

Apparently the EPA Office of Water Directors are setting up a Task Force to look at the issue of trading and NPDES permits since a lot of the trades are with non-point sources. Dave can not participate but others in the network will.

One large room was not available for all displays. We now have the two largest rooms available that are next to each other but not connected. A deadline was set of November 30, 1999 for those desiring a booth. Bruce will send an e.mail to appropriate contacts.

Network members will receive both hard copies and electronic versions of the brochure. Hard copies will be limited in number and network members are encouraged to communicate details to their constituents in whatever means are available to them. Members decided they would prefer to wait until the brochure is completed before receiving them. Total number to be printed came up for discussion. Maybe sixty per participating member is acceptable? A total of 2000 may be reasonable. No final number was determined. Dave's web page will have the brochure/conference information but will not allow you to register since it is in Word. Mike will work with Dave to incorporate the brochure and form in Adobe Acrobat rather than Word. This will make it smaller sized for viewers to handle and it will print more easily. Folks could then download and print the form to register.

III. Discussion of Trading Comments to EPA

Trading comments Dave sent to all were part of a larger package addressing TMDL and NPDES permit issues. Support was expressed, personally and professionally, for the approach taken by EPA on soliciting input from sources (such as this Network) on rule making that will affect programs being developed in many states. Such efforts will no doubt make those programs more successful. We should support these efforts which are timely, appropriate and needed in the environmental arena.

Dave introduced Jonathan Kleinman, a consultant with Environmental Consulting Technology, Inc., now in Northville, MI, formerly with EPA Headquarters, Permits and Water Quality Standards Programs. He has offered Dave constructive comments on how, as a group, we can package our collective comments so they are easier and most favorable for EPA to accept and incorporate. He is now working on watershed development plans for Rouge River. Jonathan's work with EPA Headquarters was to figure out how to make the regulations more flexible to accommodate watershed planning and follow local objectives on uses and making permits work. Jonathan believes more in bottom-up, market-based approaches rather than a top-down regulatory perspective.

One of his initial reactions to materials Dave had previously shared with him was based upon his experience at EPA. It was always appreciated when commentators formatted recommended language in such a way that showed exactly where it should be inserted, what the language

changes should be and an explanation as to why the changes were being recommended. Such approaches were consistently more likely to become part of the agenda for discussion. Jonathan provided suggestions to Dave as well as how red-line strike-through language could be used on comments to be forwarded to EPA.

In looking at the proposed package, Jonathan focused on the proposed changes to the NPDES Program in the belief that there will lie the greatest problem for the implementation of a water quality trading program. The proposed changes have two elements likely to impact trading that stick out. First, regulations would require the point source receiving a trade or offset to be legally responsible for that trade. EPA is trying here to exercise “command and control” approaches. (Under the proposed regulations in Michigan, the person *providing* the credit is liable for the accuracy of the control measure.) Second, EPA is trying to maintain its enforceability on trades through their standard NPDES Program. However, any trade has to be appropriately modified in an NPDES Permit, otherwise a regulatory agency does not have an actual permit to use as a potential enforcement tool.

Jonathan has two approaches for consideration. One is to incorporate water quality trading programs into state water quality standards. While this has not been thought through completely, if trading programs are to be consistent with water quality standards themselves this approach might simplify some of the requirements. For example, in Michigan, nutrient trading might be included by rule in the water quality standards. Establishing different mechanisms by which trading might occur is not out of the question, such as saying that the approval or purchase of sale of credits would automatically add them to your NPDES Permit *under the water quality standards governing regulations*. The program would then be considered another part of the NPDES Permitting Program. This could satisfy some of the EPA concerns that have been expressed or at least become a starting point for further discussions.

When asked, Jonathan acknowledged that he would not be personally commenting on the proposed regulations. Rather he has provided Dave with general comments that will be distributed to members of the GLPF Network along with comments prepared by others willing to submit them to Dave. Rhonda, Dave, and Cy will take all of these submitted comments and work them into a cohesive document that will be returned to members for final comment on what should be included, what approaches are people satisfied with, and so on. This draft generic comment will then be prepared on behalf of the Network for submission once final approval by members is completed. The final must be broad enough to accommodate each of the programs on the Network.

Jonathan continued with another possible option; that EPA keep its proposed regulations, but allow the states out if they have a water quality trading program. The bottom line for EPA is improved water quality and water quality standards. If a state has put together a water quality trading program that goes in that direction EPA may want to see the program adopted as part of the State Water Quality Standards. In so doing, the standards, including the trading component, would have had to go through a public review process. If the state has done this, an NPDES permit can be written in accordance with that trading program. Otherwise, you follow what EPA is proposing now. Dave commented that two years ago, Michigan put a “placeholder” provision into their last approval of water quality standards for water quality trading to occur within the

anti-degradation section. Dave used this later example for the group to better understand how a mechanism for trading can take place with an approach that used trading rules in the context of water quality standards.

Michigan has actually looked at incorporating trading three different ways: 1) a “placeholder” (now in place) in water quality (anti-degradation) standards; 2) once trading rules are promulgated, submitting those to EPA as amendments to the NPDES permit delegation, and; 3) watershed management planning under Sec. 131.

Robin in Boise and others have thought about this also and agree very much with the approach that has been outlined today. Idaho has a similar placeholder in the state regulations that allows trading, particularly with regard to some “no net-increase” language that was added to the rules a few years ago, in the TMDL section. The legislature wanted to incorporate some watershed-based planning, TMDL development processes. They also believe that trading does need to be included in the water quality standards. Another potential vehicle would be through 303 e, water quality management plans as well as the Continuing Planning Process (CPP). Jonathan noted that he had included both of these approaches in his memo to Dave as well. A guidance document could be developed that EPA would periodically review as part of the process. The concept of water quality trading could be suggested as a tenth element for EPA to include with the nine each they are currently proposing for both the CPP and 303 e.

Dave would like to include Robin in the loop of additional comments to be pursued.

With regard to TMDLs, one recommendation that could be made is to try and pull waste-load allocations and load allocations out of the elements of an approved TMDL. Another would be to add the caveat that, if you do establish those wasteload and load allocations, and if shifting goes back and forth across from them through an EPA approved water quality trading program, that a revision of the TMDL would not be require.

Jim, in Minnesota asked to go back to incorporating trading into water quality standards since they did not take this step at their last revision. They implemented their trades in a permit base since they thought they already had the authority to do so. Jim’s question addressed non-point to non-point trading that could come out of the TMDL. Would having trading in water quality standards be beneficial where traditional NPDES processes do not exist? Jim has watersheds where 98% of the load is from non-point sources. Jonathan noted that Dave has commented asking why offsets were set in the anti-degradation area rather than the NPDES section. Reasoning was that: 1) TMDLs and plans in general are geared toward the attainment of standards, so they (EPA) wanted to see it in a standards section as opposed to an NPDES section, and 2) anti-degradation within the standards section seemed like a logical place to put it.

Jonathan noted that Minnesota likely *has* the authority to establish a non-point source to non-point source trading program outside the context of TMDLs and NPDES permit authority; however, once you are in the Clean Water Act you get “muddled” into EPA authority. But, as long as you remain outside CWA/EPA authority you pretty much have the authority to establish whatever you want to do. People view the point source to non-point source trades as one of the important mechanisms necessary to provide the financial incentives to get loading reductions

from non-point sources. During many discussions within EPA, one of the potential funding sources to get nutrient or manure management practices in place, especially on smaller farms are point sources seeking to accomplish water quality effluent-limit relief by funding such agricultural practices in a trading program.

Jim summarized Jonathan's points to which Jonathan replied with the following. First of all, states can try and work on non-point / point trades and second of all, they have the proposed TMDL regulations which are starting to look to increase the number of things in the point source category. Phase II stormwater regulations and case-by-case designation authority of point sources may be falling into this arena. Largely because EPA is concerned about the implementation aspects of the TMDL you might find that more types of applications are falling into the non-point and point arena.

Dave agreed with the foregoing and offered the following perspectives. For watersheds that are primarily non-point sources the TMDL that is developed, according to the EPA regulations provide some guidance and requirements as far as what must be included. He has been told that how a TMDL is defined is extremely important. In an NPS TMDL you might establish an NPS categorical requirement that will allow NPS sources within that category to trade as long as that categorical requirement was met. That approach would NOT require a formal TMDL modification. If, however, there are a number of NPS sources, and each comes up with a specific load allocation, and then trading was desired, that probably would be interpreted as requiring a formal TMDL modification. The point here is that if a watershed or basin has mostly NPS sources and they want to trade between each other, the states probably have authority to allow this. But, if there is a TMDL within the same reach of river, and the same trades are to take place, they would likely fall under the need for a formal TMDL modification by EPA. How a TMDL is written and how you define load allocations for NPS sources is critical. If you do it right, EPA has indicated that trading can take place without a formal TMDL modification. Going the other way, from NPS to point source, is more involved and complicated.

Jonathan commented that if your trading program is in your EPA approved (water quality) standards and you succeed in getting them to include the comment, "if trading occurs according to an approved water quality trading program a revision to the TMDL is not required", then you could be a little less concerned as to how the TMDL is put together. The suggested comment in writing is a key.

Jim noted a logistics concern with this. In Minnesota they have had several environmental groups involved in approval of standards and they do not change the standards one-by-one. They open their 70-50 Minnesota Rule Law every 3-5 years and then have a collaborative effort to adopt new standards all at the same time with as much citizen involvement as possible. What is happening is that Minnesota is being boxed into a quick time frame in a process where the time frame has intentionally been extended to involve greater participation. It is hard to meet both wants at the same time. It would be at least three years before a change could occur to the Minnesota WQ Standards.

Dave noted that there has to be some mechanism to connect and integrate water quality standards, trading, permitting and TMDLs. In MI the approach was sequential putting a

“placeholder” in the standards that allows for it, but consistent with rules that are promulgated. Now the burden is on the State to approve the rules and then submit them for approval under the permit and WQ standard and TMDL regulations. Once done, MI should have something that will work. Dave also shared that if Minnesota wanted to put a trading program together it would likely take the two to three years intervening before the next renewal of water quality standards. This would allow time for stakeholder buy-in and so forth but the process should start soon.

Robin in Boise offered that the TMDL is mostly watershed driven in his area. The agricultural community chose equal allocations for ten drains based upon using trading at a later date to let economics dictate where those reductions would be met using a least-cost approach to meet the water quality goal. This was the basis of the TMDL going ahead. So far, agriculture has not filed lawsuits or complained much at all.

The discussion closed at this point.

Dave’s intent will be to take information provided by all so far and, with Jonathan and any others interested, put it into a draft document to be circulated to all on the network for review prior to discussion and comment during our next call. This will be the focus of the next conference call so that final comments can be submitted by January 20 to EPA.

Beside Dave and Jonathan there were no others wanting to participate in this revision.

No project updates offered today.

Next call will be Tuesday, January 11, 2000 from 1:30 –3:30

Tentative Agenda:

- Update on the Spring Conference
- Draft Great Lakes Trading Network Comments to EPA (likely to take most of call)
- Project Updates

Call terminated at approximately 3:00 p.m.

Prepared by: Michael Tenenbaum

