

Trading: What the Courts Have To Say

May 2006

Libby Ford, QEP, CHMM

Richard M. Cogen, Esq.



NIXON PEABODY LLP
ATTORNEYS AT LAW

NIXON PEABODY LLP

Overview

- Main focus on Court and Administrative cases directly or indirectly addressing trading.
- If time permits, brief discussion of the cases before the Supreme Court.



Not All Courts Are Equal – But Even Lower Courts and ALJs Can Send A Message

- **Supreme Court (green)**
- **Federal Appeals Court (red)**
- **Federal District Court (black)**
- **State (orange)**
- **Administrative (pink)**

Water Quality Trading Provision in WV Anti-Degradation Procedures (1)

Case Background: Challenge of EPA approval of W. Virginia's Anti-Degradation (AD) procedures, which included WQT provisions.

Outcome:

- (1) EPA approval vacated on other grounds.**
- (2) WQT approval was reasonable.**

West Virginia's AD WQT Provisions:

- **Trading allowed without AD review if upstream PS or NPS actions sufficient to offset WQ effects and insure WQ improvement.**
- **Between segment trade allowed if actions in one segment “directly result in improved WQ in another segment.”**

Court Analyses

- **Compliance w/ other applicable regulations.**
- **AD Procedure did not have to specify NPS trade monitoring.**
- **Trading between PS and NPS without quantifying NPS reduction = violation.**
- **Between segment trading w/o AD review is allowable if net improvement.**

Implications For Trading:

- Trading must “fit” within other applicable requirements.
- General procedures did not have to deal with specifics of implementing.
 - Permit or other verifiable instrument should address implementation issues.
- Trading/offsets must be specific to the pollutants/causes of the impairment.

Can a PS Undertake a NPS Action To Offset Increases in TMDL Water? (2)

Case Background: Permit authorized new discharge (Carlota) into an impaired water with a TMDL. It required Carlota to partially remediate a closed mine to offset increases in Cu. Permit challenged.

Outcome: Petition for review denied, permit upheld. “Record adequately supports the Region’s technical judgment that reductions in Cu loadings ... are sufficient to offset the water quality effects” of the permit-authorized discharge.

EAB Analysis – Offset of PS Increase Through NPS Actions

- Carlota had Cu allocation in TMDL.
- New discharges contingent upon partial remediation of abandoned mine.
- Permit required submittal of remedial workplan prior to remediation.
 - no permit needed for mine work unless a discharge.
- § 122.4(a) prohibits permit to new source/discharger if it will “cause or contribute” to a violation of WQS.
 - Permit will lead to improvement of WQ, so it will not contribute to WQS violation.

Implications For Trading:

- **Within a TMDL water, trading may be most defensible when all sides have allocation.**
- **Permit should spell out framework/ mechanism for tracking progress.**

Can Trades Create Pollutant Capacity in An Impaired Water? (5)

Case Background: Can a permit be issued to a new source to an impaired water when increase is off-set by reductions in other sources?

Outcome: If the new discharge would contribute to the continued impairment, no permit may be issued.

Can Trades Create Pollutant Capacity in An Impaired Water?

No Permit may be issued: [t]o a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.

•The owner or operator of a new source/new discharger must demonstrate that:

1. There are sufficient remaining pollutant load allocations to allow for the discharge; and
2. The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

Court Analyses:

- TMDL does not have to be in place
WQS \neq “pollutants load allocation.”
- Key is whether new source will “cause or contribute to a violation of WQS.”
- Despite 22 fold reduction, the offset would not lead to WQS compliance.

Implications For Trading

- Trading on impaired waters with approved TMDL is allowable.
- If no TMDL is in place, an “allocation” for a new source cannot be created by trading or other “offsets” which don’t rectify the WQS violation.

What Does Time Have To Do With It? (3)

Case Background: Can TMDLs, and assumedly subsequent WQT, be based on a total load and other than daily allocations?

Outcome: The approval of the TMDL for the Anacostia River, which established annual average load on oxygen depleting substances and seasonal loads on turbidity, reversed and the TMDL remanded.

TMDL Time Units – Court’s Analysis:

- **Nothing in 303(d) CWA “hints at the possibility” that EPA can approve total maximum “seasonal” or “annual” loads.**
- **“Daily” connotes “everyday.”**
- **EPA, in its TMDL regulations found that “all pollutants ... are suitable for calculation of [TMDLs].”**
 - **Nothing forecloses EPA from reconsidering this position in its regulations.**

Implications For Trading:

- Confirmation monitoring/tracking for trades should quantify in the same time units as the TMDL or the WQS which drove the trade.
- Decision is at odds with other Circuits.

Geographic Proximity For Trades (4)

Case Background: Approval - fecal coliform TMDL which set a basin-wide reduction target rather than water segment specific target challenged.

Outcome: TMDL remanded to set segment specific loads.

Court's Analysis:

TMDL must ensure WQS compliance in each impaired water.

- **MOS must take into account lack of knowledge.**
- **“Straight pipe” septic systems are point sources.**

Implications for Trading:

- Out of segment WQT must insure compliance in “Tradee’s” segment.
- Septic systems as PS may open up new “class” for trading.
 - Sewering of unsewered areas
 - Septic System O&M programs
 - Etc.

If TMDL Allows Trading -- Does NY Have To Allow It? (6)

Case Background: NYC challenged various provisions of modified SPDES Permits for 14 plants meant to implement the Long Island Sound Nitrogen TMDL.

Outcome: NY law and regulations do not require trading, so the issue of whether the TMDL nitrogen trading ratio will be in effect for the permit duration does not rise to the level of a “dispute over a substantial term or condition” and hence can not be adjudicated in a permit challenge.

ALJ Analysis:

- Implementation of trading program within State's discretion.
- NY does not have law, regulation or guidance on WQT.
- Prior to permitting a "Trade," State would need guidance, rulemaking or law.
- Permit appeal is not appropriate forum.

Implications For Trading:

- ALJ's analysis overly restrictive.
- Probably best if permittee/ permitting agency agree in advance that permit will contain trading provisions.
- If State does not have explicit authorization to allow trading, try for explicit language allowing trading in TMDL, other water quality plan, or CA.

NY – Bubble Limits Reflect Defacto Trading

(7)

Case Background: In response to LIS N TMDL, NYC and Westchester County negotiated trading-like limits in their SPDES permits covering multiple POTWs through Consent Agreements.

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NY – Bubble Limits

- **“Bubble Limits” apply to the combined N discharges from all their POTWs.**
- **NYC + County only dischargers within their respective “segments.”**
- **Compliance by the last TMDL compliance date.**

NY – Bubble Limits

- NYC discharges in two “segments” TMDL’s Trading Ratios will apply if TMDL allocation not reached within a segment.
- “Bubble” Limits also set for other NY segments with multiple dischargers.
 - If bubble limit is exceeded, each discharger **immediately** subject to individual limit (= TMDL WLA).

Implications For Trading

- In New York, “Trading” allowed between point sources which received a WLA if owned by the same entity.
- Separate Consent Agreements needed if TMDL timing is not met.
- Individual PSs in segments with multiple dischargers are **immediately liable** if bubble limit is exceeded, unless permit or CA addresses.

NY LIS TMDL “Trading” -- Different Dischargers Same TMDL Segment (8)

Case Background: Small LI sewer district refused to accept modified SPDES permit which, among other things, included a “bubble” limit for the entire segment but imposed the TMDL WLA for the District as an immediately enforceable permit limit.

Outcome: District and State signed CA allowing trading under very tight constraints. District given until 2012 to meet its limit, less than the TMDL date for full WQS compliance, but significantly later than specified in the initial draft permit.

Implications for Trading:

“Verifiable Water Quality Trade” defined

“a nitrogen trade in accordance with the approved LIS TMDL. All Point Source to Point Source Trades will be verified using the monitoring data for the SPDES permitted entities involved in the Trade. Verification of Point Source to Non-Point Source Trades is to be done to the same level of “Reasonable Assurance” as was established in the LIS TMDL for the non-point source Load Allocations.”

Documenting PS to PS Trading -- Engineering Report Phase

- Document trading partner's
 - “Willingness”
 - Estimation of additional N reduction
 - Ability to meet the lower N effluent limit.
- State DEC must agree to the lower N limit prior to submission.

PS to NPS Trading – ER Documentation

- **Detailed description of the specific NPS.**
- **Detailed description of verification of reductions**
- **How current NPS N loading determined.**
 - **Analysis of determination of actual reduction in N loading.**
- **Explanation of how reductions are in excess of the TMDL mandated NPS reductions.**
- **Documentation from**
 - **NY & CT they will initiate revision of the TMDL and USEPA that it will solicit public comment on the revision of the TMDL or**
 - **USEPA that the proposed trading program is consistent with the TMDL.**

Availability of Underlying Data (9)

Case Background: Petition to the National Heart, Lung, and Blood Institute (NHLBI) “seeking correction of information disseminated.

- Alleged that the studies do not meet the standard for data quality set out in the federal Information Quality Act (IQA).
- Requested that NHLBI “make publicly available” the raw data that supported the studies findings.

The Petition was denied.

Outcome: Appellants lacked “standing” because they had not “suffered” an “injury in fact.” IQA does not mandate making data available.

Court's Analysis

- **No common law right to information**
 - from agencies
 - Correctness.
- Unless specified by law, withholding raw data and incorrect public statements create no legal rights.
- According to the **SC in another case**, data generated by a privately controlled organization which received a grant ... but which data has not been obtained by the agency, are not “agency records” accessible under the federal Freedom of Information Act.

Implications For Trading:

- **No direct implications.**
- **Data collected using “private” resources may not be disclosed, even if it’s the basis of a TMDL or impairment classification.**
 - **CWA establishes “right to know” in many other areas.**
 - **Whether right carries over to 303 (d) classifications, TMDLs and Trading has not been tested.**

US Supreme Court (10-12)

Case Background:

U.S. Supreme Court has heard 3 cases involving the interpretation of the CWA.

- 2 concern scope of the CWA's jurisdiction over intrastate wetlands.
- 3rd centers on the term “discharge” for purposes of CWA § 401's state water quality certification requirements. (Decided 5/15/06)

Rapanos and Carabell

- Could clarify *SWANCC* “significant nexus” test for isolated, intrastate wetlands.
- May also clarify CWA’s jurisdiction over non-navigable tributaries to waters of the US.
 - The Sixth Circuit interpreted *SWANCC* narrowly. Held that CWA jurisdiction extends to non-navigable waters having a hydrological connection or some other “significant nexus” to traditional navigable waters.
 - In both cases, the Court found that ditches which connected the wetlands to the navigable water were “tributaries” to navigable waters.

S. D. Warren (Dam)

(Decision 5/15/06)

- Does flow of water over a dam constitute a “discharge” under CWA § 401?
 - Court said plain meaning of ‘discharge’ includes “flowing out” which is what water does from a dam.
 - Dam discharges are subject to CWA 401 Certification.
- Could clarify whether the “addition of a pollutant” test for defining a “discharge” under CWA § 402 similarly applies to CWA § 401.
 - Court did not address this saying, CWA § 401 and 402 are not interchangeable.
- Based on CWA objectives and because alteration of WQ is an “inherent risk” in limiting water flow and releasing water through turbines, “changes in the river flow, movement, and circulation fall within a State’s legitimate legislative business.”

Supreme Court Cases --Implications For Trading

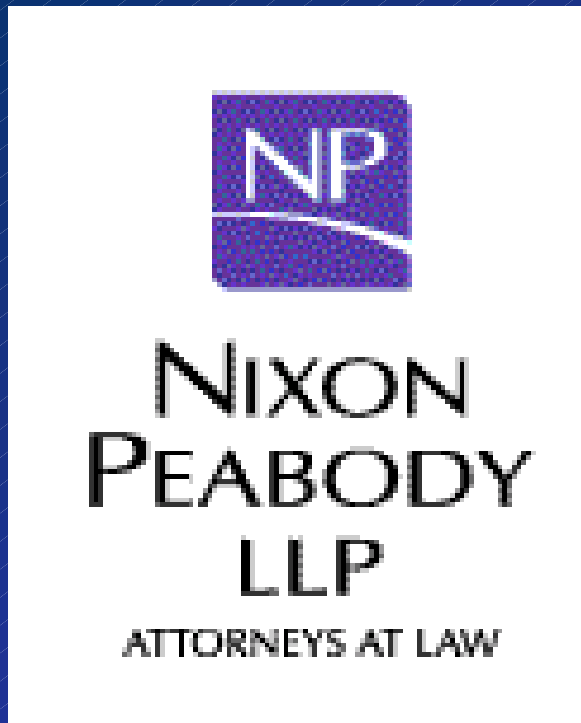
- Stronger consequences in other CWA areas than for WQ trading.
- If drainage ditches are tributaries to navigable waters, then the universe of PS and the universe of possible trading partners will significantly increase.
- Decisions could lead to regulation of discharges solely to groundwater.
- Narrow S.D. Warren decision does not have significant WQT implications.

Listing of Cases, Orders, Etc.

See listing at the end of the handout.

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Questions?



Libby Ford, QEP
Sr. Env. Health Engineer
585.263.1606
lford@nixonpeabody.com

Rich Cogen Esq.
518.523-2665
rcogen@nixonpeabody.com