

# **Gaining Ground**

## **The Power, Potential and Occasional Perils of Water Quality Trading**

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## Water Quality Trading

**Innovative market-based approach that “provides greater flexibility and has potential to achieve water quality and environmental benefits greater than would otherwise be achieved under more traditional regulatory approaches.”**

- EPA 2003 Policy

## Key Dates



THE WALL STREET JOURNAL

## U.S. News: Trading System Tackles Waste — New Plan Pays Farmers to Curb Agricultural Runoff That Pollutes the Gulf of Mexico

By Mark Peters

20 February 2014

The Wall Street Journal

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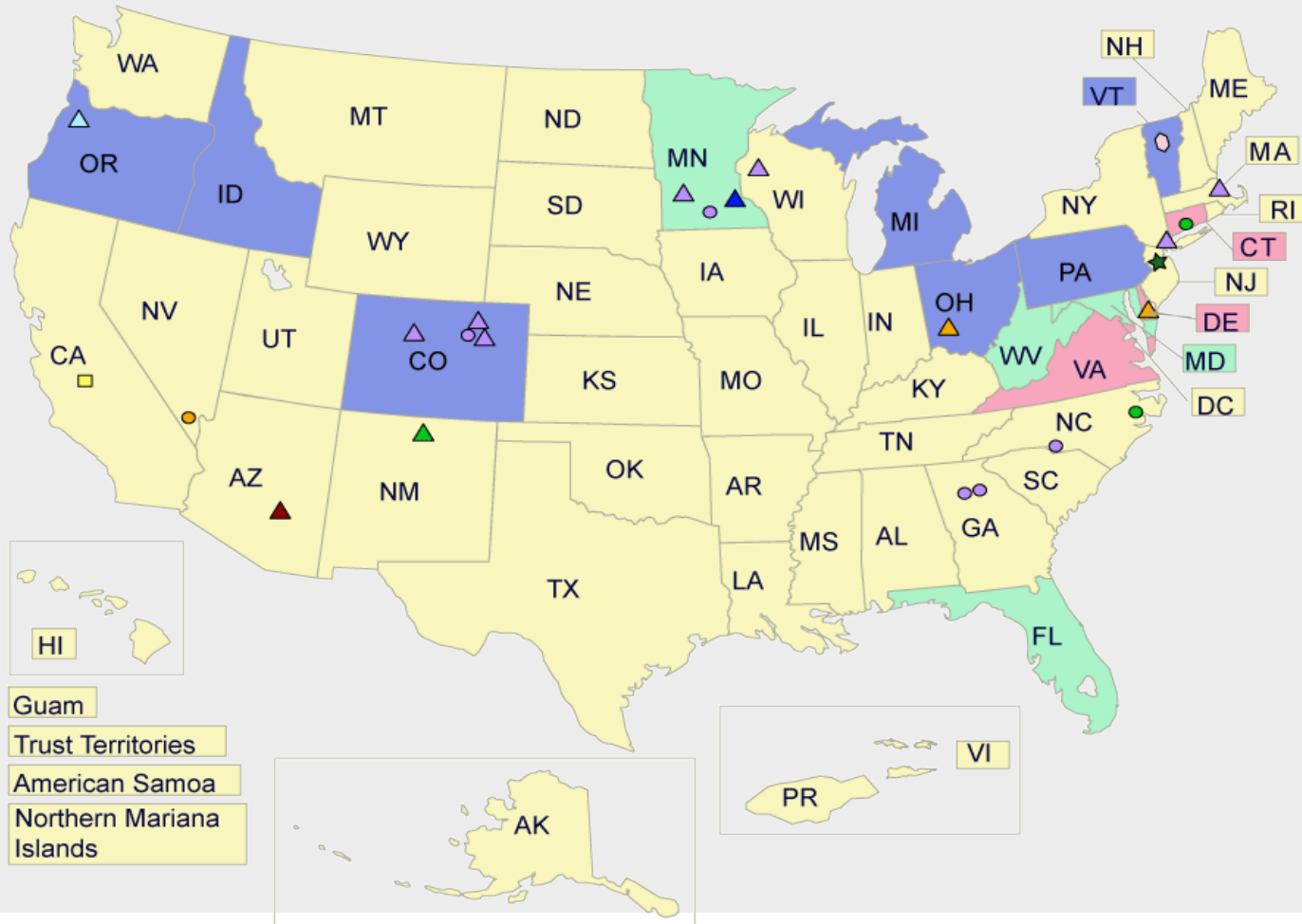
## Why the Interest?

**More cost-effective compliance - sources within the watershed have significantly different costs to control the pollutant of concern.**

**Uplift from ancillary environmental benefits.**

**Opportunity to accelerate and scale-up watershed restoration efforts.**

# State WQT Programs





# Notable Programs

State	Description (Program, Permits, Rules, etc.)	PS/ PS	PS/ NPS	NPS/N PS	Trading Activity (Relative)
Minnesota	Permits, Draft Rules	✓	✓	✓	High
North Carolina	Bubble Permits, WQ banks	✓	✓	✓	High
Maryland	Guidelines (some draft)	✓	✓		None
Montana	Policy		✓		None
Colorado	Rules, watershed programs		✓		Low
Virginia	Rules	✓	✓	✓	High
Connecticut	Legislation	✓			High
Oregon	Guidance	✓	✓		Low
Pennsylvania	Rules	✓	✓	✓	High
California	Permit		✓	✓	Low
Idaho	Internal Guidance Doc.	✓	✓		None
Michigan	Rule ?	✓	✓	✓	None
Wisconsin	P rule/guidance		✓		Low
Ohio	Rule, watershed programs	✓	✓	✓	High

Sources of  
Authority for  
WQT

**CWA 303 Continuum**

**EPA National WQT  
Policy**

**State Laws, Rules  
and Guidance**



## Case Law Affecting WQT

### ***Arkansas v. Oklahoma***

- 503 U.S. 91 (1992)

### ***In re Cities of Annandale & Maple Lake***

- 731 N.W.2d 502 (Minn. 2007)

### ***Friends of Pinto Creek v. U.S. Env'tl. Prot. Agency***

- 504 F.3d 1007 (9<sup>th</sup> Cir. 2007)

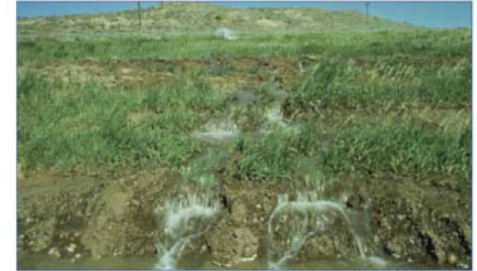
### ***Food & Water Watch v. U.S. Env'tl. Prot. Agency***

- 2013 U.S. Dist. LEXIS 174430 (D.D.C. Dec. 13, 2013)

## Threats to WQT

# BAD CREDIT

How Pollution Trading  
Fails the Environment



The uncertainty that the GAO cites is especially true in proposed water trading systems. The Clean Water Act does not regulate polluted agricultural runoff as carefully as it does other sources, since it excludes most row crops.<sup>40</sup> Additionally, even the agricultural runoff that is regulated under the Clean Water Act has been subject only to weak and ineffective regulation.<sup>41</sup> This makes it an attractive market as an offset to regulated point sources of water pollution. However, since the runoff is unregulated, it is also unmeasured. Establishing a trade market would require quantifying all runoff from a farm and the overall agriculture sector. But there are over 22 million farms in the United States.<sup>42</sup> Currently, because of weather effects and farm management practices, there is no way to trace pollution back to a specific farm.<sup>43</sup> Establishing a trading regime between point source polluters and non-point source polluters would require a massive infrastructure investment to ensure that the offsets are real.

Offsets are also setting up a new market for actual fraud. The Christian Science Monitor and the New England Center for Investigative Reporting did an investigation of the \$700 million carbon offset mar-

ket and found widespread abuse. From forests that were never planted to false claims of certification, the new market for carbon offsets and "greenwashing" was proving too lucrative for scams to ignore.<sup>44</sup> The temptation of selling something that is never physically delivered has proven strong.

Offsets are unscientific and do not lead to sufficient pollution reductions. They are subject to abuse and do not represent a realistic approach to pollution abatement. Any program relying on them is suspect.

### Credits and Distribution

In any cap-and-trade scheme, one of the most important parts of the system is determining who will receive credits and at what price. Because cap-and-trade credits are a very valuable part of the system, they are subject to stresses that make the system unfair.



When a cap-and-trade system is implemented, there are two main options for distributing permit allocations. The initial allocation can be either given to polluters or auctioned.<sup>45</sup> Both have inherent difficulties.

Food & Water Watch • www.foodandwaterwatch.org

## FW/W Press release

**“While we consider appealing the court’s decision, we will continue to bring water pollution trading case in to the courts and find other ways to achieve our broader goal of having this inherently harmful practice declared illegal.”**

Victory! Veolia Water drops proposal to consult St. Louis water division. [more wins »](#)

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FOOD & WATER WATCH > PRESS RELEASES > COMMON RESOURCES > POLLUTION TRADING > D.C. DISTRICT COURT FAILS ON POLLUTION TRADING: CLEAN WATER ACT TRADING LAWSUIT DISMISSED DUE TO BURDEN OF PROOF

December 16th, 2013

### D.C. District Court Fails on Pollution Trading: Clean Water Act Trading Lawsuit Dismissed Due to Burden of Proof

**Statement from Food & Water Watch Executive Director Wenonah Hauter**

Washington, D.C.—“Last Friday, a Washington, D.C. District Court dismissed a lawsuit brought by Food & Water Watch and Friends of the Earth that challenged the legality of water pollution trading under the Clean Water Act (CWA). The groups filed the lawsuit after the Environmental Protection Agency (EPA) sanctioned water pollution trading in its December 2010 Chesapeake Bay Total Maximum Daily Load (TMDL) as a mechanism for polluters to avoid meeting CWA permitting requirements. The legal action sought to have the practice declared illegal. Food & Water Watch is now considering an appeal of the court’s ruling.



“The CWA requires point sources of pollution, including waste water treatment facilities and manufacturing plants, to limit their discharges based on strict, technology-based and water quality-based standards. EPA’s trading scheme turns that approach on its head, instead granting these facilities the right to purchase credits in lieu of meeting these standards.

“Unfortunately, instead of addressing the legality of this “pay-to-pollute” system, the court dismissed the case on non-substantive grounds, claiming that Plaintiffs have not met their burden of showing that pollution trading has yet resulted in harm to people who live and recreate near facilities that purchase pollution credits.

“The decision, if it stands, forces plaintiffs to challenge pollution trading on a case-by-case basis as

## More Threats

### NWQTA Recommended Rule Language:

#### §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.**

**Absence of enabling and/or harmonizing national rules**

**Absence of drivers in key watersheds, like Ohio and Mississippi River Basins**

**Confusion over TMDLs as sources of authority and/or guideposts for WQT**

**Inconsistencies among state approaches**





# With first major deal set, water quality trading hits prime time

**NATIONAL WATER QUALITY TRADING ALLIANCE**  
*Founding Member Pledge*

### Overview of the Alliance's Mission and Goals

The National Water Quality Trading Alliance seeks to advance the science, law and policy underlying water quality trading (WQT) and to develop and enhance related market opportunities, while serving as a practical resource for WQT managers and practitioners.

...als are to enhance and promote informed communication, coordination, certainty and the application of WQT at all levels. We intend to achieve these goals by supporting existing and coherent government rules and policies on trading; promoting the development of existing state and regional trading markets and the establishment of new trading platforms to advance the science and ecological effectiveness of WQT; and acting as catalyst and champion for the new strategic partnership between EPA and USDA.

fits

will provide the following core areas of service and leadership to its members:

or, report on, and provide incisive commentary regarding federal and state WQT  
pments; [redacted] USDA, USDA and key state partners on WQ

maintain high-level, ongoing dialogue with EPA, USDA and key state partners on WQI. The members in this dialogue, and provide regular updates on developments, trends and issues; and

ge and provide access to a repository of WQT information (i.e., federal and state laws and policies, key project documents, lawsuits and decisions);  
an annual meeting of members; and  
an annual report on the state of WQT in the U.S.

to these core benefits, the Alliance may pursue additional opportunities and needs, including model state trading legislation and/or regulation, providing testimony to commenting on federal or state rules, at the direction of members in the "advocacy" (described below).

### Committee Structure

**Committee Structure**

We anticipate forming the following member committees to target key areas of our mission and goals:

## NATIONAL NETWORK ON WATER QUALITY TRADING

## NATIONAL NETWORK OVERVIEW

*Last Updated January 10, 2014*

### Why a National Network on Water Quality Trading?

The purpose of the National Network ("Network") is to establish a national dialogue on how water quality technology can best contribute to clean water goals. That includes providing options to improve consistency, innovation, and integrity in water quality

WQT programs continue to emerge across the country as permittees seek cost-effective and interested stakeholders seek to accelerate the pace and scale of efforts to meet the goals of the Clean Water Act. WQT programs are still in their infancy, but a solid base of experience has been assembled on how to build trading programs, gain support from multiple stakeholders. Successful WQT programs use a variety of methods, ensure real and verifiable pollutant reductions, track and verify reductions throughout their lifecycle, rely on sound science, and establish clear lines of

unity of WQT practitioners to articulate shared principles, core trading recommendations for implementing and operating trading programs, and price, will help improve consistency and integrity across WQT programs. The effort to establish WQT programs, provide greater transparency about what to establish, and help WQT programs meet their clean water goals.

ork do?

information on WQT programs into a form that new and evolving start-up costs and inform ongoing management decisions. The Network will transform existing programs into a range of options for designing, operating, and maintaining WQT programs over time. The Network is structured as a facilitated dialogue between stakeholders to make WQT programs work (agriculture, permitted point sources, state

on point-nonpoint trades. The Network will discuss trades with urban (construction) and NPDES-permitted wastewater facilities. Trades include both against current discharges. Future effort may turn to point-point or other