

**MARYLAND DEPARTMENT OF THE ENVIRONMENT**

Water and Science Administration  
Wastewater Permits Program  
1800 Washington Boulevard, Suite 455  
Baltimore, MD 21230-1708



Response to Public Comments

for

**Industrial Stormwater Modification**

Application Number: 12SW0000A

NPDES Number: MDR000000

Last Revised: December 6, 2018

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## I. Introduction:

The introduction of the Chesapeake Bay Restoration Requirements in the current iteration of the General Permit for Discharges Associated with Industrial Activities (effective date: January 1, 2014; expiration date: December 31, 2018) (“hereinafter “General Permit”) was a critical step towards restoring Maryland’s river and streams, as well as meeting Chesapeake Bay and local Total Maximum Daily Load (TMDL) goals. The Department now proposes to authorize Maryland’s new nutrient trading regime (finalized in July 2018), see COMAR 26.08.11 (“Trading Regulations), as an alternative or equivalent measure to the General Permit’s Chesapeake Bay restoration requirements. In order to do so, MDE is modifying the General Permit to (1) authorize trading as an option for meeting restoration requirements; (2) extend opportunity for generating marketable credits to those facilities who otherwise have no restoration requirements; and (3) include specific reporting requirements when trading is occurring. The Department published notices and made drafts available via the Maryland Register, various newspapers statewide between the dates of June 18 and June 22, 2018, and through letters send to interested parties. The Department held a public hearing concerning the tentative determination on Tuesday, July 24, 2018 at 1 p.m. in the Terra Conference Room at the Maryland Department of the Environment, 1800 Washington Blvd., Baltimore, MD 21230.

Comments were accepted until Wednesday, September 19, 2018 (Note: This comment period was been extended after a request that was made pursuant to Section 1-606(d) of the Environment Article of the Maryland Annotated Code.) This documents contains the specific substantive comments, the Department's response, and the related changes made as a result to the tentative permit.

## II. Summary of Changes:

Listed below are the revisions to the tentative determination now included in the Department's final determination:

1. Language excluding an MS4 from generating credits under the permit has been added. *(refer to Comment and Response #12)*
2. The Department removed the language related to extending the deadline for restoration. *(refer to Comment and Response #16)*
3. The method for credit calculation has been revised to be consistent with the trading program regulation and is now referenced in the final permit. *(refer to Comment and Response #2)*
4. The original infeasibility requirement in the 12SW has been retained. *(refer to Comment and Response #8)*
5. The trading option is available only when on-site work is infeasible. *(refer to Comment and Response #9)*
6. A requirement to submit a copy of the comprehensive annual report to the Department has been added to Appendix G of the permit, and other non-significant edits were made for consistency. *(refer to Comment and Response #15)*
7. Deadlines for reporting have been reinstated as result of not extending the restoration deadline, however there is no connection of the deadline to administrative extension eligibility consistent with the tentative determination. *(refer to Comment and Response #16)*
8. The period of time for completing a trade and posting on the registry has now been limited to no longer than 3 months after the end of the applicable calendar year. *(refer to Comment and Response #18)*
9. Several cross reference errors were corrected, minor clarifications were provided and in several areas the original permit text was restored.

## III. Responses to Specific Comments:

The specific substantive comments received are detailed below. For those comments we've provided responses and verification if changes will be made, as a result, in the final permit.

## **Comment 1. Does the modification represent backsliding?**

“The anti-backsliding rule under Section 402(o), § 33 U.S.C. § 1342(o), may also prohibit the Department from modifying the existing General Permit in order to allow trading. The Chesapeake Bay restoration requirement is an effluent limitation <sup>(2)</sup> and its modification constitutes a rollback that weakens the General Permit through ... the replacement of firm requirements (to restore impervious surface) with an opportunity to purchase inherently uncertain “credits,” where the credits (a) are not generated in a way that complies with EPA expectations, (b) overestimate pollution reductions on the part of the credit generator, and (c) will therefore lead to a net increase in pollution loads.”<sup>1</sup>

### **Response 1. Does the modification represent backsliding?**

The modification does not represent backsliding, as it does not change the restoration requirement within the permit.

### **Change from Tentative 1. Does the modification represent backsliding?**

No change.

## **Comment 2. Request for alternative Credit Calculation Method.**

“.. it appears that the permit modification would allow facilities to purchase much fewer credits that would be necessary to actually offset the impact of their impervious surface. The 12SW permit claims that only 5.4 pounds of total nitrogen (TN) per year will be considered equivalent to the restoration of one acre of impervious surface. That is unacceptable and not supported by the modeled loading rates per acre. According to the Chesapeake Bay Model, an impervious urban acre contributes 15.3 pounds of TN per year.” “CBF strongly encourages the Department to specify that the industrial facilities must purchase nitrogen, phosphorus, and sediment at levels equivalent to the per acre contribution of these pollutants, namely: 15.3 pounds TN per acre; 1.69 pounds TP per acre; and 0.44 tons TSS per acre.”<sup>2</sup>

### **Response 2. Request for alternative Credit Calculation Method.**

Rather than specify the amount in pounds of nitrogen, the credit calculation is subject to the regulation requirements, which would be then for total nitrogen, total phosphorus and sediment based on the impervious acres treated. At this time the amounts would be 50% of 15.3 pounds

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<sup>1</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>2</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

of TN, 50% of 1.69 pounds of TP and 50% of 0.44 tons TSS per acre. These are laid out in the implementation of the trading regulation and not as part of the permit. However, the language is now clearly reflected in the Final Determination.

### **Change from Tentative 2. Request for alternative Credit Calculation Method.**

The method suggested is consistent with the trading program regulation and is now referenced in the final permit. (Change in Part III.A.1.d)

### **Comment 3. Request to perform a Gap Analysis prior to Modifying the Permit.**

The commenter provides background on a request by members of the Maryland Choose Clean Water Coalition (CCWC) and Phase I MS4 managers under the auspices of the Maryland Association of Counties to MDE. The request was to undertake a gap analysis to establish for each permittee the needed pollutant load reductions remaining after subtracting progress to date. This “gap” would be the target for the new Maryland Phase I MS4 permits. “The completion of the gap analysis before the trading modifications are finalized will assure that both permits achieve maximum alignment in the effort to reduce stormwater borne pollution.”<sup>(3)</sup>

“..we should see the completion by MDE of the gap analysis for the municipal permittees so that we have one indication of loads that need attention and we can compare that to the loads that need attention from our industrial brethren who need permits. And that that should all be in place so that we can look, as citizens and as regulators and as permittees, on the total picture of achieving Bay and local waterway restoration.”<sup>4</sup>

“..the trading mechanism should be postponed until we know for each permit in the overall volume of the municipal stormwater permits what are the loads that must be reduced. Then we have a picture of what the total effort must be in these aligned permits. They’re aligned. They’re supposed to be aligned. That’s the premise put forward in the second paragraph of the fact sheet in -- that accompanies this permit.”<sup>5</sup>

“It’s not inequitable for the larger sites that are contributing larger stormwater loads to have to do the equivalent fair share for their properties.”<sup>6</sup>

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<sup>3</sup> Bruce A. Gilmore on Behalf of the Audubon Naturalist Society and the Potomac Conservancy.

<sup>4</sup> Bruce Gilmore on behalf of the Audubon Naturalist Society and the Potomac Conservancy from the Public Hearing.

<sup>5</sup> Bruce Gilmore on behalf of the Audubon Naturalist Society and the Potomac Conservancy from the Public Hearing.

<sup>6</sup> Elaine Lutz verbal testimony at the public hearing on behalf of the Chesapeake Bay Foundation.

The commenter is concerned about the delay in compliance scheduling. “We therefore respectfully request that the trading related modifications to the 12 SW permits be set aside until the gap analysis is completed and that a further review of the modifications themselves take place.”<sup>7</sup>

### Response 3. **Request to perform a Gap Analysis prior to Modifying the Permit.**

A Gap Analysis maybe useful in evaluating what level of restoration to require in a renewal permit. However in this permit (12SW) the level of restoration has already been specified. This modification (12SW-A) is simply allowing another method for affected registrants to achieve their part of the permit’s already established goal. The modification does not establish a new goal. Thus it’s not necessary to delay this modification to wait for such an analysis. The restoration limits that the registrants have to achieve will be required whether or not this modification is issued.

### **Change from Tentative 3. Request to perform a Gap Analysis prior to Modifying the Permit.**

No change.

### **Comment 4. The Department Should Renew vs Modify the Permit.**

“THE CLEAN WATER ACT AND ITS IMPLEMENTING REGULATIONS MAY PROHIBIT MODIFICATION OF THE GENERAL PERMIT TO INCORPORATE TRADING As a threshold matter, Commenters are concerned about the legality of modifying the General Permit for the purpose of generating activity in the State’s new nutrient trading market. The terms and conditions in a Clean Water Act (CWA) permit cannot simply be changed at the discretion of either the permitting authority or the permit holder. Instead, Section 402(b)(1)(C) of the CWA, 33 U.S.C. § 1462(b)(1)(C), only allows permits to be modified “for cause,” generally reflecting the need for more protective standards in the modified permit. 1 Importantly, EPA’s implementing regulations, 40 C.F.R. § 122.62, enumerate the permissible grounds for modification “for cause.””<sup>8</sup>

“So if you’re going to ratchet up the permit, do the next permit where it’s a little bit more, then maybe you can think about putting in trading and using that as an opportunity to get to

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<sup>7</sup> Bruce A. Gilmore on Behalf of the Audubon Naturalist Society and the Potomac Conservancy.

<sup>8</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

that perfect water quality. But simply putting it in now, before they expire, doesn't make a lot of sense to us."<sup>9</sup>

"Finally, if the Department adopts this Draft Modification, it will cast significant uncertainty upon any business involved in the State's nascent trading market to the extent that credits are tainted by an invalid modification.<sup>5</sup> Several courts have found invalid any new permit terms imposed through an illegal CWA permit modification and held that the original, unmodified permit terms remain in effect and subject to enforcement. If the Draft Modification is finalized under the current proposal, hundreds of permit holders might no longer be certain of which terms and conditions a court will hold them liable for, including the compliance deadline, jeopardizing important environmental compliance and pollution control projects and other business investment decisions. Further, if a court found this modification to be legally deficient, it could also wreak havoc on the trading market and any credit purchasers holding voided credits."<sup>10</sup>

"CBF urges the Department to enforce the current permits and issue timely new permits that appropriately incorporate and apply Chesapeake Bay TMDL pollutant reductions for stormwater."<sup>11</sup>

"CBF recommends that the Department require compliance through the appropriate enforcement actions and issue a timely new permit with conditions consistent with the Chesapeake Bay TMDL."<sup>12</sup>

"To address the shortfall in stormwater sector pollution reductions, the state should enforce the current permit and issue a new permit that takes this shortfall into account and requires the appropriate stormwater reductions consistent with progress badly needed for the Chesapeake TMDL."<sup>13</sup>

"A timely new permit should be issued at the time of the current permit's expiration that contains updated assumptions and requirements that reflect the 2017 midpoint assessment and the Phase III WIP obligations. CBF would recommend other improvements in a new permit as well, such as incorporating more reliable monitoring and deadlines for polluters to take corrective actions when control measures fail to protect local water quality. Monitoring requirements should include Bay TMDL nutrients and sediments and any primary pollutants

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<sup>9</sup> Ben Alexandro of the Maryland League of Conservation Voters verbal testimony at the Public Hearing.

<sup>10</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>11</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>12</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>13</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

of concern from that facility. CBF can provide more detail on improvements to the General Permit during the development of the next generation permit.”<sup>14</sup>

“..we think that increased monitoring and data might be necessary to include in the Maryland industrial permit in order to make sure we are capturing the full impact and load of these facilities.”<sup>15</sup>

#### Response 4. **The Department Should Renew vs Modify the Permit.**

The option to continue to comply with the terms of the permit through trading, which is also relevant during any ongoing period of administrative extension, was not available until the recent adoption of Maryland's new water quality based trading regulations. For the authority supporting the modification's final determination, see 40 CFR 122.62 (a)(3). The Maryland Water Quality Trading Program, effective July 16, 2018 under COMAR 26.08.11, is now part of Maryland's approach to water quality standards, standards which are also expressed and implemented through TMDL requirements such as the Chesapeake Bay TMDL for nutrients and sediments. These standards and regulations have been approved by EPA.

A separate basis can be found at the permit reopener under permit condition VI.R, as the trading regulation and this permit modification both relate to changes involving TMDL requirements.

#### **Change from Tentative 4. The Department Should Renew vs Modify the Permit.**

No change.

#### **Comment 5. Trading should address local water quality considerations.**

“..these industrial facilities are really some of the most dangerous, because their run-off often flows untreated when it rains. So it's really unlike sewage treatment plants or other factories that discharge through a pipe, it could be equipped with pollution controls and monitoring.”<sup>16</sup>

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<sup>14</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>15</sup> Elaine Lutz verbal testimony at the public hearing on behalf of the Chesapeake Bay Foundation.

<sup>16</sup> Angela Haren, a Baltimore Harbor Waterkeeper with Blue Water Baltimore from the Public Hearing.



“MDE Would Eliminate Reductions of Toxic Metals in Stormwater Discharges if Permittees Were Allowed to Purchase Credits in Lieu of Restoring Impervious Surfaces.”<sup>17</sup>

“MDE must ensure that nutrient trading does not contribute to hotspots. One out of every four industrial facilities in Maryland are in the Anacostia or Baltimore harbor watersheds-pollution hotspots. In cases where the waterway downstream is already impaired, the trading must only happen with other facilities directly upstream of that segment of waterway into which that the facility is draining. This requirement will ensure the water coming by the waterway flowing closest to that particular facility is not further degraded.”<sup>18</sup>

The commenter provides background on an EPA Region III statement regarding local water quality considerations in the trading program. “By definition many trading regimes create local “hot spots” of pollution where communities are adversely affected by the impacts of one particular outfall when that laggard is able to buy credits from leaders elsewhere. With stormwater, the nature of the effluent is potentially more polluted than just the regulated stormwater pollutant load (i.e., nitrogen and phosphorous may be bound to more immediately toxic substances). Given the above, we believe that pursuing a trading regime within the 12SW permits is too premature at this time.”<sup>19</sup>

“The Department should not allow General Permit holders to trade restoration of impervious surfaces — through either generating or purchasing nitrogen credits — on the Registry. This is because:

- o Allowing permittees to trade nitrogen credits in lieu of completing their restoration requirements would eliminate important co-benefits, such as the reduction of toxic metals in stormwater discharged to Maryland waterways.....”<sup>20</sup>

“An additional legal question posing concerns for both regulated entities and concerned citizens centers on the issue of protecting local water quality. The CWA prescribes specific standards for industrial stormwater permits that are separate from similarly situated holders of municipal stormwater permits and directly implicate water quality standards. The recently adopted Trading Regulations for nutrients in Maryland imposes artificial geographic constraints on the concept of water quality standards under the CWA. By drawing trading boundaries for impaired waters based on only three pollutants – nitrogen, phosphorus, and sediment – the regulations deliberately sanction a potential transfer of pollution reduction obligations between facilities situated across real and actual watershed boundaries. Such an action would contribute to a violation of local water quality standards where the credit

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<sup>17</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>18</sup> Ben Alexandro of the Maryland League of Conservation Voters.

<sup>19</sup> Bruce A. Gilmore on Behalf of the Audubon Naturalist Society and the Potomac Conservancy.

<sup>20</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

purchaser is located in a watershed impaired by any number of other pollutants of concern. Modifying an otherwise valid CWA permit to introduce a legally deficient trading scheme would disrupt the regulatory certainty owed to current permit holders. This move would also worsen water quality for small sub-watersheds and local communities surrounding any permitted industrial stormwater facilities that might purchase credits following the modification.”<sup>21</sup>

**Response 5. Trading should address local water quality considerations.**

The comment suggests that allowing trading will impact the aspects of the permit that reduce the discharge of metals. The primary purpose of requiring restoration was to help achieve the goals of the Chesapeake Bay TMDL which relate to reducing loads of phosphorus, nitrogen and sediments going into the Bay. Some sites which reduce phosphorus, nitrogen and sediments in the storm water may also reduce the discharge of metals. However, reduction of metals was not the reason for inclusion of the limit in the permit. There are other aspects of the permit that are there to limit the discharge of metals or other site specific limits, in order to avoid creating hot spots of pollutants. The permit specifically targets likely pollutants, with benchmark monitoring. Subsector C1, Sector M, Sector M and Sector AA are selected industries that target metals and required pollution prevention. Metals control was never intended to be dependent on the restoration requirements of the permit. Instead it relied on the Benchmark requirements of the permit.

The Permit requirement to restore impervious surfaces is intended to address a regional impairment of the Chesapeake Bay. Section E of COMAR 26.08.11.08 is intended to protect to local water quality.

**Change from Tentative 5. Trading should address local water quality considerations.**

No change.

**Comment 6. Co-benefit of Flood Control.**

“MDE Would Eliminate the Co-Benefit of Flood Mitigation if Permittees Were Allowed to Purchase Credits in Lieu of Restoring Impervious Surfaces” “Urbanization allows for more stormwater runoff because impervious surfaces – by replacing vegetation and porous surfaces – reduce the area where stormwater can infiltrate the ground.” “Climate change increases the risk and severity of flooding, which makes this important co-benefit of impervious surface restoration requirements even more critical.” “By allowing industrial

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<sup>21</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

stormwater permittees to purchase credits instead of restoring impervious surfaces, MDE is allowing an increase in stormwater flow and flooding.”<sup>22</sup>

“... Allowing permittees to trade nitrogen credits in lieu of completing their restoration requirements would eliminate important co-benefits, such as ... the mitigation of floods and flooding hazards as climate change will continue to bring more frequent and heavier precipitation to the State.....”<sup>23</sup>

#### Response 6. **Co-benefit of Flood Control.**

As explained in Response 5, the purpose of the Restoration requirements was to address phosphorus, nitrogen and sediment as regards the Chesapeake Bay TMDL. While on any particular site there may be unintended benefits to restoration, those benefits were not the purpose for the conditions.

#### **Change from Tentative 6. Co-benefit of Flood Control.**

No change.

#### **Comment 7. Limit Trades to only Industrial SW.**

“If MDE goes forward with this modification, without conceding that the trading proposal is a good or defensible idea, Commenters strongly urge MDE:

o To only allow industrial stormwater sources to sell credits to or purchase credits from other industrial stormwater sources covered under the General Permit and within the same sectors (as defined by the General Permit) and in the same sub-watershed.....”<sup>24</sup>

“At a minimum, the Department should only allow permittees to purchase credits from other facilities that are subject to the General Permit and have restored impervious surfaces above the 20 percent of acreage required under the General Permit.”<sup>25</sup>

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<sup>22</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>23</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>24</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>25</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

“A one-for-one trade for nitrogen takes away the co-benefits of these restoration requirements.” “Stormwater discharges from these industrial sites may not only be contaminated by nitrogen, but also contain toxic metals and other dangerous pollutants, many of which bind to sediment.” “where the pollution profiles of buyers and sellers are vastly different, a one-for-one trade of nitrogen will not necessarily improve the environment or protect community health. In fact, such a trade could make matters worse for communities if the buyer is purchasing only a reduction of nitrogen in exchange for the permission not to control dozens, if not hundreds, of other toxic pollutants that would otherwise be captured.”<sup>26</sup>

“A pound of nitrogen pollution -- I guess what I’m trying to say is a pound of nitrogen pollution from an industrial facility comes mixed with far more dangerous toxins. It should not be traded for a pound of nitrogen from a farm or a highly regulated sewage treatment plant, which has far -- potentially could have far cleaner discharges.”<sup>27</sup>

“My very last point is that if trading were to move forward, it really should be made clear that it has to be in the same watershed, from the same type of facility, because again going back to my earlier comment, a pound of nitrogen from an industrial facility does not necessarily equal one from a farm. And it really needs to happen within the same watershed, otherwise we’re sacrificing local water quality for the sake of the Bay TMDL and I don’t think that’s really what it’s really intending to do.”<sup>28</sup>

“To adequately protect Maryland’s waterways, we strongly urge MDE to restrict any trading of restoration requirements to sites covered under the General Permit and belonging to the same sectors (as defined in the General Permit) and within the same sub-watershed. Allowing trading from other sectors in different watersheds would negatively impact local water quality and would be sacrificing co-benefit improvements such as toxics reductions and flood control in areas such as Baltimore City, Baltimore County, and Prince George’s County as discussed in sections above and below. The Trading Regulations allow the Department to do adopt such standards. As per COMAR 26.08.11.09-F, “[p]ermits may contain conditions on the use of certified credits, including:...(2) [w]hen, *and from what source*, certified credits may be acquired by the permittee” (emphasis added).”<sup>29</sup>

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<sup>26</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>27</sup> Angela Haren, a Baltimore Harbor Waterkeeper with Blue Water Baltimore from the Public Hearing.

<sup>28</sup> Angela Haren, a Baltimore Harbor Waterkeeper with Blue Water Baltimore from the Public Hearing.

<sup>29</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

## Response 7. **Limit Trades to only Industrial SW.**

The trading regulation addresses industrial stormwater, and allows trading amongst the various sources. The permit modification is not a proposal to change the regulation, but rather allows 12SW registrants to take advantage of the regulation to create or use credits. Allowing as many sites as possible to use trading furthers the goal of complying with the Chesapeake Bay TMDL.

### **Change from Tentative 7. Limit Trades to only Industrial SW.**

No change.

## **Comment 8. Eliminating Requirement for Infeasibility.**

“... should the Department go forward with a modification to include trading, it should do the following things: (1) explicitly replace the current allowance for “offsite restoration” with the regulatory trading scheme under COMAR 26.08.11; ...”<sup>30</sup>

“... should the Department go forward with a modification to include trading, it should do the following things: ...; (2) retain the showing of infeasibility before trading can replace the facilities’ onsite restoration requirement...”<sup>31</sup>

“Allowing offsite restoration or pollution reductions without consideration of what can be done onsite also represents an environmental injustice. A disproportionately large number of facilities are located in the Baltimore Harbor watershed (approximately 15% of total statewide facilities), and other overburdened areas in the state also have clustered industrial facilities. These facilities have a large impact on local waters and local communities, and should have to do their part in those areas to offset their impact where feasible.”<sup>32</sup>

“...we oppose moving the required showing of infeasibility for on-site restoration before moving to the other options. All stormwater is not created equal, there are a lot of loads in the industrial stormwater setting that the reason we did impervious surface reduction, in my understanding, is to capture a lot more contaminants that come in industrial loads that might not be in other loads. Also, the permit conditions itself explain the value of doing on-site restoration, in terms of efficiency, cost effectiveness, improved recharge and benefits to local water by on-site restoration. So we would encourage the requirement to show infeasibility before moving off-site or moving into trading to any other permit.”<sup>33</sup>

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<sup>30</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>31</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>32</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>33</sup> Elaine Lutz verbal testimony at the public hearing on behalf of the Chesapeake Bay Foundation.

“Proposed Permit Modifications are Contrary to Stormwater Pollution Reduction Goals”  
“...removing the requirement to show that onsite restoration is infeasible before moving offsite is damaging to local waters and local communities.” “CBF opposes the modification proposal to remove the requirement of showing that onsite restoration is “infeasible” before being allowed to seek restoration off-site. Removal of the “infeasible” requirement for onsite work is detrimental to local receiving waters and overburdened communities.” “Requiring industrial facilities to demonstrate that onsite restoration is infeasible before seeking offsite credits would be an appropriate condition given the impact to local waters.”<sup>34</sup>

“However, as stated above, should the Department go forward with a modification to include trading, it should do the following things: ... (2) retain the showing of infeasibility before trading can replace the facilities’ onsite restoration requirement...”<sup>35</sup>

#### Response 8. **Eliminating Requirement for Infeasibility.**

The Department agrees that permittees should first evaluate onsite treatment before considering trading.

#### **Change from Tentative 8. Eliminating Requirement for Infeasibility.**

The original infeasibility language in the 12SW will remain in the final 12SW-A. (Change in Parts III.A.1.c and III.A.1.d)

#### **Comment 9. Replace “off-site” with COMAR 26.08.11 trading scheme.**

“Proposed Trading Raises Conflicts with Trading Regulations” “First, CBF recommends that the amendment is drafted to be clear that the regulatory trading scheme under COMAR 26.08.11 entirely replaces the current permit’s allowance for off-site restoration.” “the current General Permit essentially allows de facto trading that should be completely eliminated and replaced with the regulatory trading framework under COMAR 26.08.11. The current General Permit’s allowance to purchase or provide reductions off-site could run afoul of the trading regulation’s prohibition on purchasing credits from outside of an impaired watershed, and open facilities to citizen suit litigation for failure to comply with the trading restrictions. Allowing de facto trading would also expose the trading program to inconsistencies and create a lack of public faith in the program. To clarify that trading is meant to completely replace the current allowance of seeking “restoration” or any kind of

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<sup>34</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>35</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

pollution reduction offsite, explicit language should be added to the proposed modification's language."<sup>36</sup>

"However, as stated above, should the Department go forward with a modification to include trading, it should do the following things: (1) explicitly replace the current allowance for "offsite restoration" with the regulatory trading scheme under COMAR 26.08.11...."<sup>37</sup>

".. if trading is included, these facilities should be required to obtain the necessary amount of credits before the permit's expiration."<sup>38</sup>

#### Response 9. **Replace "off-site" with COMAR 26.08.11 trading scheme.**

To fully address the concerns expressed, the Department has clarified that trading is only an available option when on-site restoration is infeasible. However, performing the work off-site may still be a viable option that the permittee has already worked out, either by putting a practice in the ground, by providing street sweeping, etc. Trading is merely a new way to implement work off-site. Refer to Response 8.

#### **Change from Tentative 9. Replace "off-site" with COMAR 26.08.11 trading scheme.**

The Department has clarified that trading is only an available option when on-site restoration is infeasible.

#### **Comment 10. Compliance with Permit must be Pre-requisite for any Trade and Within Same Sub-Watershed.**

"If MDE goes forward with this modification, without conceding that the trading proposal is a good or defensible idea, Commenters strongly urge MDE:

- o To only allow industrial stormwater sources to sell credits to or purchase credits from other industrial stormwater sources covered under the General Permit and within the same sectors (as defined by the General Permit) and in the same sub-watershed.
- o To verify the compliance status (through site inspections) of any General Permit holder wanting to participate in the trading marketplace, and prohibiting any sites found to be in "noncompliance" from placing or purchasing credits on the Registry."<sup>39</sup>

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<sup>36</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>37</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>38</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>39</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

“And as I mentioned earlier when we were off the record, I just took a quick look at some of the facilities that might be impacted from this extension in the Baltimore region and we found some that we know have been subject to other enforcement actions for violating other conditions of their permit, and we are concerned that giving them more time to comply with this restoration requirement is really just rewarding their disregard for the permit requirements and, you know, them lagging behind.”<sup>40</sup>

“MDE needs to increase the staff commitment and have added budget in place to ensure this new trading program is administered properly. Oversight is particularly valuable when there is a perverse incentive for both the generators of the credits and the permitted industrial facilities to cheat in counterfeit credits. MDE must closely police not only both the credit buyer and generator, but also oversee and inspect the third-party validators. If the BMP is not installed or not removing the required level of pollution, the facility buying counterfeit credits is also allowed to pollute more and maintain compliance. Diligent enforcement is particularly important since Maryland did not use the uncertainty ratio of 2:1 for all nonpoint source pollution as Virginia does with their trades<sup>1</sup>. We are especially worried about this aspect because Maryland Department of the Environment Water and Science Administration took only 771 enforcement actions in FY2017. That’s a 46% decline from the number reported the previous year, and the fewest since fiscal year 2008.<sup>2</sup> MDE must increase enforcement of industrial facilities and all involved in trading to ensure the integrity of the entire infant trading program.”<sup>41</sup>

“MDE Should Not Allow Trading in Lieu of Meeting Restoration Requirements, or at a Minimum, Should Not Allow Permittees to Place Credits on the Registry until MDE Verifies that the Permittee is in Compliance” The commenter goes on to compile information on compliance of operators to the permit. Out of the 132 permittees that have completed restoration requirements, “only 18 percent of these facilities have “satisfactory/compliance” status”. “Over half of the sites have not been inspected by the Department, and thus their compliance status have not been determined (75/132).” “If the Department decides to allow trading, then at a minimum, the Draft Modification should not allow permittees to place credits on the Registry, and thus be valid or tradable, until MDE performs a site inspection that verifies that the permittee is in compliance with all provisions of the General Permit and the CWA.” “if MDE cannot commit to conducting site inspections before a permittee is allowed to generate credits on the Registry, then we urge MDE to forego trading”<sup>42</sup>

“The Trading Regulations only explicitly allow MDE to prevent permittees in noncompliance with permit terms from *generating* credits. The Trading Regulations do not explicitly prohibit

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<sup>40</sup> Angela Haren, a Baltimore Harbor Waterkeeper with Blue Water Baltimore from the Public Hearing.

<sup>41</sup> Ben Alexandro of the Maryland League of Conservation Voters.

<sup>42</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.



noncompliant permittees from *purchasing* credits. This deficiency presents a potentially greater negative impact if trading were allowed as proposed in the Draft Modification, as each facility covered under the General Permit is not required to measure or otherwise calculate flow in order to determine the site's actual nitrogen loads."<sup>43</sup>

"As you're creating all of this, it's really important to make sure that you have enforcement, you have monitoring, you have more than just enforcement, but boots on the ground to actually get this done smoothly, effectively, and correctly. It's particularly valuable when you're thinking about -- not only you have the generators, you have the buyers, but you also have the third parties that also need to be enforced and validated."<sup>44</sup>

"While we believe it is the intention of the language in the final trading regulations released this summer to reduce the number and severity of hotspots, we think this language could be made clearer, and MDE should affirm this commitment in dealing with industrial facilities in impaired watersheds."<sup>45</sup>

"By failing to require compliance on the part of credit purchasers, MDE would be allowing noncompliant sites to discharge dirtier stormwater runoff, in greater quantities, since they would not be restoring impervious surfaces. In order to prevent this scenario from occurring, Commenters recommend that if MDE moves forward with the proposed Draft Modification to allow for trading, MDE should only allow facilities to participate in the trading marketplace, as either buyers or sellers of credits, if they are affirmatively shown to be in compliance with the rest of the terms in the General Permit. Sites that have not yet been inspected should not be presumed to be in compliance, and sites that have been issued notices of noncompliance should not be allowed to trade."<sup>46</sup>

"MDE Should Not Allow Trading in Lieu of Meeting Restoration Requirements, or at a Minimum, Should Not Allow Permittees to Purchase Credits until MDE Verifies that the Permittee is in Compliance"<sup>47</sup>

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<sup>43</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>44</sup> Ben Alexandro of the Maryland League of Conservation Voters verbal testimony at the Public Hearing.

<sup>45</sup> Ben Alexandro of the Maryland League of Conservation Voters.

<sup>46</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>47</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

Response 10. **Compliance with Permit must be Pre-requisite for any Trade and Within Same Sub-Watershed.**

The Department agrees that trading to achieve compliance with the restoration requirement should invoke the same trading region constraints as those applicable to MS4 trading under COMAR 26.08.11. In fact, the permit states specifically that trades must be “authorized under, and in accordance with the Maryland Water Quality Trading Program regulations (COMAR 26.08.11).” The permit is consistent with the Department’s Accounting Guidance, which is based on the Chesapeake Bay Program modeling tools and uses impervious acres to translate to nutrients and sediment loads and not based on flow for a specific site or location.

The permit relies on the regulatory trading program under COMAR 26.08.11, which contains compliance and verification requirements. Trades in this permit will be implemented in conformance with the regulation.

**Change from Tentative 10. Compliance with Permit must be Pre-requisite for any Trade and Within Same Sub-Watershed.**

No Change.

**Comment 11. Generation of Credits should be predicated on Permit Compliance.**

“Third, CBF encourages the Department to disallow the generation of credits from any facility that is in noncompliance with any part of the General Permit No. 12SW or any other permit applicable to the facility, including failures to monitor or submit reports.”<sup>48</sup>

Response 11. **Generation of Credits should be predicated on Permit Compliance.**

The permit contains the required controls in order to minimize pollution discharging from the facility. An additional requirement to provide the annual comprehensive report has been added in response to a Comment 15. The trading regulations address compliance requirements in order to trade. When a facility enters into the trading market, additional scrutiny of that facility will occur, which may or may not include site inspections, depending on the history of the facility and other factors.

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<sup>48</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

**Change from Tentative 11. Generation of Credits should be predicated on Permit Compliance.**

No change.

**Comment 12. An MS4, under this permit, should not be allowed to Generate Credits.**

“Second, it is not clear how the trading requirements would be applied to facilities that are owned by MS4 permittees.” “CBF believes that any MS4 permittee that is not in compliance with the MS4 permit’s 20% impervious restoration requirement should not be permitted to generate credits under the General Permit No. 12SW either. This should be explicitly stated in the permit or the accompanying documents such as fact sheets or response to comments.”<sup>49</sup>

**Response 12. An MS4, under this permit, should not be allowed to Generate Credits.**

The modification was not intended to circumvent requirements or options by the MS4 permit. We agree with this comment.

**Change from Tentative 12. An MS4, under this permit, should not be allowed to Generate Credits.**

We have added language to exclude an MS4 from generating credits under this permit. (Change in Part III.A)

**Comment 13. Credit Generation Baseline.**

“..we are unclear why or how permittees without the Chesapeake Bay restoration requirement would access the trading market. The stormwater point source permits in the trading regulations set a baseline, a base on the restoration requirements and if you don’t have those requirements, we are not clear on how you would access the trading market, since that Chesapeake Bay restoration section is the only one in the industrial stormwater permit specifically focused on nitrogen, phosphorous, and sediment in the Bay TMDL.”<sup>50</sup>

“MDE SHOULD NOT ALLOW FACILITIES WHO OTHERWISE HAVE NO RESTORATION REQUIREMENTS TO GENERATE MARKETABLE CREDITS” “MDE proposes to allow

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<sup>49</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>50</sup> Elaine Lutz verbal testimony at the public hearing on behalf of the Chesapeake Bay Foundation.

permittees without a restoration requirement to generate credits, but it is unclear from the Draft Modification how the Department will determine the baseline for facilities not subject to the General Permit's Chesapeake Bay restoration requirements." "MDE would need to establish baselines for each of the facilities attempting to sell marketable credits, and not assume that restoration of any impervious surfaces at these sites generates such credits."<sup>51</sup>

#### Response 13. **Credit Generation Baseline.**

For the 12SW registrants subject to the restoration requirements, the baseline is set in the permit. The baseline is simply the level of restoration that the permit prescribes that the site would have to complete to stay in compliance. Any improvements over that acreage (or loadings) would be able to be traded. In the case of sites with no restoration requirement, establishing the baseline would be addressed by the permit. COMAR 26.08.11.05C states "[t]he baseline for a stormwater point source is the restoration requirement of the stormwater point source's current NPDES discharge permit." Thus essentially for sites not required to complete restoration, any restoration that they did could generate a credit and be traded.

#### **Change from Tentative 13. Credit Generation Baseline.**

No change.

#### **Comment 14. Training is Required for Implementation.**

"PUBLIC NUTRIENT TRADING IMPLEMENTATION TRAINING IS NEEDED. There is an assumption that the private sector will participate in the new State Nutrient Trading initiative. Yet Maryland has developed a unique approach from surrounding, contiguous states and offers no public training to allow the private sector to learn the details of the implementation program." "I support the proposed regulations and request that MDE include Nutrient Trading Certified Verifier Training to the public."<sup>52</sup>

"Restricting the Nutrient Trade Verifier Certificate to PE's the cost of the credit transaction could exceed the value of the credits traded."<sup>53</sup>

#### Response 14. **Training is Required for Implementation.**

This comment does not pertain to the 12SW-A. The 12SW-A is not the trading program. It simply allows 12SW registrants to participate in trading. However, we have shared this comment with the staff in charge of the trading program. They agree that as part of the

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<sup>51</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>52</sup> Aaron M. Keel, of EnviroProjects, LLC.

<sup>53</sup> Aaron M. Keel, of EnviroProjects, LLC.

Department's introduction of trading outreach efforts could be made to those wishing to aid in its implementation.

#### **Change from Tentative 14. Training is Required for Implementation.**

No change.

#### **Comment 15. Reporting Requirements Concerns.**

“THE REPORTING REQUIREMENTS IN THE DRAFT MODIFICATION DO NOT ADEQUATELY ALLOW FOR PUBLIC TRANSPARENCY AND ACCOUNTABILITY”  
“According to proposed Appendix G of the Draft Modification, facilities covered under the General Permit that are seeking to generate marketable nitrogen credits by restoring impervious surfaces at their sites “must use assessment tools consistent with the Chesapeake Bay Program modeling tools and accepted by the Department.” However, “[a]ny assumptions or backup data used in the calculations of credits must be maintained on-site.”” “Commenters recommend that MDE require permittees to submit their methods of calculations and data to the Department, and for MDE to proactively place these records on its website for citizens to access. For example, these records should be made available through the Department’s Wastewater Permits Interactive Search Portal, accessible through <http://mes-mde.mde.state.md.us/WastewaterPermitPortal/>. At a minimum, these records should be made available through Maryland Public Information Act requests to MDE.”<sup>54</sup>

“To be successful, trading and a new market require observable, transparent, and strong enforcement of the program. The first step to this is making sure that every facility is in compliance before it can take part in trading. Permitted facilities already have to complete an annual report and have it onsite every year. In order to partake in trading, the facility should have to submit this annual report to MDE, and MDE should evaluate this report and if appropriate certify that this annual report is in compliance. MDE must ensure the facility does not have any outstanding issues or pose any significant pollution dangers before it allows the facility to trade. This report should also be available to the public to aid in increasing transparency of the program.”<sup>55</sup>

#### **Response 15. Reporting Requirements Concerns.**

The tentative determination draft permit required that sites seeking to trade would have enhanced reporting requirements. These new requirements are contained in the new Appendix

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<sup>54</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>55</sup> Ben Alexandro of the Maryland League of Conservation Voters.

G. For those generating or using credits, transparency is achieved through the public infrastructure of the Trading Registry.

To provide additional transparency the annual report suggestion has merit. It is already a permit requirement to complete an annual report and have it available onsite. However to better address the concerns stated in the comments, the Department is requiring operators involved in trading to submit this annual report to MDE. The Department will work toward making such documents easily accessible to the public.

### **Change from Tentative 15. Reporting Requirements Concerns.**

We have added language to require submission of the annual report as part of any trade, to Appendix G of the permit. (Change in Parts III.A.4.c and Appendix G Additional Requirements for Facilities Generating a Marketable Credit: (5) and Additional Requirements for Facilities Satisfying their Restoration Requirements via a Trade: (3))

### **Comment 16. Concern Related to December 1, 2020 Deadline.**

“...the regulations specifically prohibit permit modifications that propose, as here, to extend a compliance schedule beyond the statutory deadlines for NPDES permits”<sup>56</sup>

“The anti-backsliding rule under Section 402(o), § 33 U.S.C. § 1342(o), may also prohibit the Department from modifying the existing General Permit in order to allow trading. The Chesapeake Bay restoration requirement is an effluent limitation and its modification constitutes a rollback that weakens the General Permit through (1) the two-year compliance extension, and (2) .....”<sup>57</sup>

“..would the proposed 12SW modification allow a facility to maintain compliance by purchasing credits for CY2019 and finalizing construction by the end of the year?”<sup>58</sup>

“... should the Department go forward with a modification to include trading, it should do the following things: ... and (3) retain the current compliance deadline.”<sup>59</sup>

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<sup>56</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>57</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>58</sup> Amber (DiDominic) Kara of ERM.

<sup>59</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

“Modification Does Not Meet Regulatory Standards” “... Federal regulations specifically prohibit modifications that extend a compliance schedule beyond the statutory deadlines for NPDES permits. ... The proposed modification to extend the compliance deadline is not authorized under the Clean Water Act. As discussed below, extending the deadline is also detrimental to the state’s efforts to reduce stormwater pollution.”<sup>60</sup>

“Extending the compliance deadline for facilities that failed to comply also presents an economic disadvantage to competing facilities that invested the appropriate time and resources into complying with the permit by the deadline.”<sup>61</sup>

“However, as stated above, should the Department go forward with a modification to include trading, it should do the following things: ... and (3) retain the current compliance deadline.”<sup>62</sup>

“..we are not entirely clear on the justification for extending, instead of enforcing, the current permit requirements.”<sup>63</sup>

“EXTENSION OF THE DEADLINE TO MEET RESTORATION REQUIREMENTS IS UNFAIR TO PERMITTEES WHO HAVE TAKEN TIME AND UTILIZED RESOURCES TO COMPLY WITH SUCH REQUIREMENTS” “The extension of the deadline is unfair to these permittees, rewards noncompliance, and disincentivizes future compliance.”<sup>64</sup>

“A trading program should improve water quality by incentivizing new real world projects that would not happen otherwise. Trading should only be allowed in a case where the overall treatment requirements to meet the permit are increased. Using it instead to administratively extend the permit two years, as MDE is proposing here, is inappropriate.”<sup>65</sup>

“..we also have the same question about why is this modification happening right now. The permit is about to expire and it could potentially be addressed in the new permit. So it seems as though MDE is in a bit of a rush to make the modifications to extend the deadline, so that facilities who are not in compliance are given an extension. And we’re really concerned that this would send a signal to facilities who are not in compliance with their permit, that MDE is not interested in enforcing them. And, really, just could embolden the

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<sup>60</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>61</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>62</sup> Alison Prost on behalf of the Chesapeake Bay Foundation.

<sup>63</sup> Elaine Lutz verbal testimony at the public hearing on behalf of the Chesapeake Bay Foundation.

<sup>64</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>65</sup> Ben Alexandro of the Maryland League of Conservation Voters.

facilities to continue to delay and potentially not comply. As you know, in order for our environmental laws to work, they need to be enforced.”<sup>66</sup>

“The Department should not allow General Permit holders to trade restoration of impervious surfaces — through either generating or purchasing nitrogen credits — on the Registry. This is because: ...

o Allowing permittees that have yet to restore 20 percent of their impervious surfaces to purchase credits by an extended two-year deadline is unfair to those sites that have complied with these restoration requirements, rewards noncompliance, and dis-incentivizes future compliance.”<sup>67</sup>

“administratively extending these permits for three years -- for two years, excuse me, we find that is really inappropriate.”<sup>68</sup>

“We’re really concerned that the modifications that are being proposed could weaken protections for local waters and those communities surrounding those industrial facilities, by just extending these deadlines to comply and essentially allowing the facilities to buy their way into compliance, rather than actually reducing pollution.”<sup>69</sup>

#### Response 16. **Concern Related to December 1, 2020 Deadline.**

The Department has decided to remove the language associated with the proposed December 1, 2020, extended deadline for restoration and return it to the current permit deadline without conceding the Department’s authority to revise or extend a compliance date. Likewise, the original deadline for reporting was also reinstated. The Department is not reinstating the reporting deadline’s connection to the eligibility for administrative extension, as the connection is not related to the specific 2020 deadline. Furthermore, the Department received no comment on this provision.

#### **Change from Tentative 16. Concern Related to December 1, 2020 Deadline.**

The Department removed the language related to extending the deadline for restoration. Also, the deadline for reporting has been reinstated.

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<sup>66</sup> Angela Haren, a Baltimore Harbor Waterkeeper with Blue Water Baltimore from the Public Hearing.

<sup>67</sup> Sylvia Lam of the Environmental Integrity Project in coordination with Center for Progressive Reform, Waterkeepers Chesapeake, Baltimore Harbor Waterkeeper, Potomac Riverkeeper Network, Anacostia Riverkeeper, Clean Water Action, and the Environmental Action Center.

<sup>68</sup> Ben Alexandro of the Maryland League of Conservation Voters verbal testimony at the Public Hearing.

<sup>69</sup> Angela Haren, a Baltimore Harbor Waterkeeper with Blue Water Baltimore from the Public Hearing.



### **Comment 17. Request for Clarification.**

“Currently the deadline is December 2018, do you see the extension to 2020 being made sometime in September or October 2018?”<sup>70</sup>

“If I am reading the proposed modifications correctly, the deadline to have implement measures to meet the Chesapeake Bay Restoration requirements has been extended to December 31, 2020. Is this correct?”<sup>71</sup>

“How long after the close of the comment period do you anticipate announcing the decision on whether the compliance term will be extended?”<sup>72</sup>

“the deadline to have implement measures to meet the Chesapeake Bay Restoration requirements has been extended to December 31, 2020. Is this correct?”<sup>73</sup>

### **Response 17. Request for Clarification.**

The restoration deadline will not be extended under this modification. The existing permit includes ongoing annual responsibilities which continue during the administrative extension of the permit and then as required under the terms of a renewal permit.

### **Change from Tentative 17. Request for Clarification.**

No change.

### **Comment 18. Delay in Compliance based on When Trades Take Place.**

“We are also most concerned that if the permit modifications are approved, there is a planned delay in compliance scheduling for the current permit requirements. This delay will take place even if no facility indicates interest in trading. We do not understand how the delay proposed will comport with the permit alignment premise set forth in the Fact Sheet.”<sup>74</sup>

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<sup>70</sup> Daniel Hockman of Bowman Development Corporation.

<sup>71</sup> Thomas K. Cook of P.G.GEOS Environmental, Inc.

<sup>72</sup> Michael Higgins of Arcadis.

<sup>73</sup> Thomas K. Cook of P.G.GEOS Environmental, Inc.

<sup>74</sup> Bruce Gilmore on behalf of the Audubon Naturalist Society and the Potomac Conservancy from the Public Hearing.

**Change from Tentative 18. Delay in Compliance based on When Trades Take Place.**

To avoid any prolonged ambiguity regarding the compliance status of a facility who may implement water quality based trading options to comply with their permit, the period of time for completing a trade and posting on the registry has now been limited to no longer than 3 months after the end of the applicable calendar year for which the credits are to apply. (See COMAR 26.08.11.09F)