



Maryland

Department of the Environment

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor

Ben Grumbles, Secretary
Horacio Tablada, Deputy Secretary

February 6, 2018

The Honorable Roger P. Manno
Senate Chair, Joint Committee on
Administrative, Executive, and Legislative Review
James Senate Office Building
11 Bladen Street, Room 102
Annapolis, MD 21401

The Honorable Samuel I. Rosenberg
House Chair, Joint Committee on
Administrative, Executive, and Legislative Review
365 House Office Building
6 Bladen Street
Annapolis, MD 21401

Re: DLS Control No. 17-199
Department of the Environment: Water Pollution:
Maryland Water Quality Trading Program: COMAR 26.08.11.01 - .14

Dear Senator Manno and Delegate Rosenberg:

Thank you for your letter dated January 22, 2018 to the Maryland Department of the Environment (the Department) regarding proposed regulations under COMAR 26.08.11.01 - .14. In the letter the Joint Committee on Administrative, Executive, and Legislative Review (AELR) requested the opportunity to examine more closely the statutory authorizations for the regulations and the Department address concerns raised by the stakeholders.

Regarding statutory authority and legislative intent, the record is abundantly clear that Congress, the U.S. Environmental Protection Agency, the General Assembly and Maryland State Agencies support the use of nutrient credit exchange programs to accelerate water quality improvements. At the Federal level, critics of nutrient trading have consistently failed to convince courts and regulatory bodies that general authority is lacking. Courts have consistently affirmed the legality of trading under the Clean Water Act as a flexible tool for states to achieve water quality standards, including the Chesapeake Bay TMDL. In fact, the federal district court in *Food & Water Watch v. EPA* affirmed the concept of trading, rejecting Food & Water Watch's challenge to the Bay TMDL that supported the states' use of such programs. *Food & Water Watch v. U.S. EPA*, 5 F. Supp. 3d 62, 77-78 (D.D.C., Dec. 13, 2013) (court dismissed case for lack of standing while affirming state authority to adopt offset and trading programs to implement Bay TMDL) ("... offset programs have been authorized and supported by the EPA since at least the 1980s.")

When proposing the regulations, MDE cited authorities in both the Environment Article and the Agriculture Article. Md. Code Ann., Envir. § 9-319 authorizes MDE to "develop comprehensive programs and plans for the prevention, control, and abatement of pollution of the waters of this State" and grants MDE the authority to adopt rules and regulations to carry this out. Md. Code Ann., Envir. §§ 9-313(a), 9-315. Additionally, Md. Code Ann., Envir. § 9-325 authorizes MDE to "adopt rules and regulations that relate to application for, issuance of, revocation of, or modification of discharge permits." So, to the extent that nutrient credits are part of discharge permits, MDE has the authority to adopt regulations to govern them. In Md. Code Ann., Agriculture § 8-901, the General Assembly "finds and declares that: (1) Voluntary nutrient trading and sediment trading programs provide an innovative and cost effective approach to enhance water quality and achieve additional water and air quality benefits . . ." Additionally, in § 8-904 the General Assembly acknowledges the "authority of the Department of the Environment to establish eligibility and other requirements for use of nutrient or sediment offset credits under any State or federal permit or other regulation program."

To ensure a broad and successful collaboration, in 2016 MDE and the Maryland Department of Agriculture reconvened the Water Quality Trading Advisory Committee (WQTAC), which acts as an ongoing consultative group to provide direction to the State's overall nutrient trading program and to oversee further enhancement of the nutrient trading infrastructure. WQTAC is composed of 32 members, providing comprehensive representation of the interested stakeholders. Membership includes but is not limited to members of the Maryland General Assembly, the University of Maryland, several counties and municipalities representing both urban, suburban and rural jurisdictions, environmental and agriculture organizations, and other State agencies. The WQTAC met 14 times between January of 2016 and November of 2017, with a public hearing on the regulations on December 18, 2017. All of these meetings were open to and attended by the public.

To ensure transparency and accessibility for all interested parties, MDE created a dedicated webpage for WQTAC on MDE's website (<http://mde.maryland.gov/programs/Water/Pages/wqtac.aspx>). All of the meeting dates and agendas were advertised in advance. The meeting minutes and presentations have been posted to the webpage as well. This webpage contains additional, useful information such as Aligning for Growth – Guiding Principles, a timeline for adoption of the regulations, draft guidance on Bay Restoration Fund credit purchase, drafts of the regulations, proposed nutrient trading maps, press releases, and news articles along with many other relevant pieces of information.

In the letter, the AELR Committee also requested copies of correspondence received by MDE during the public comment period for COMAR 26.08.11.01-.14. From December 8, 2017 to January 26, 2018, MDE received comments from 29 organizations. Comments from the individual organizations can be viewed on the WQTAC website under the section titled "Regulations – Maryland Water Quality Trading Program." The Department is developing our response to the comments received and will provide a copy of the responses to the committee when finalized.

Throughout the process of developing the regulations, the Department worked to balance the diverse positions promoted by the 32 members of the WQTAC and all of the interested parties who were engaged in the process. The proposed regulations are a product of a highly collaborative process and

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attempt to reconcile numerous differences of opinion. These regulations represent considerable effort to strike a balance among disparate interest groups. The Department recognizes that the nutrient trading program is a new program in Maryland and will require the Department to continue to work with stakeholders to resolve issues identified through the implementation of the program. The Department is committed to continued stakeholder engagement to ensure the program is a success.

The Department would appreciate the opportunity to meet with both of you and the members of the AELR Committee so that we might answer any questions in the course of your “constructive review” of these important regulations.

If you have any additional comments or questions, please contact me or Assistant Secretary Lynn Buhl by telephone at 410-537-3084 or by email at lynn.buhl@maryland.gov.

Sincerely,



Ben Grumbles
Secretary

cc: President Thomas V. Mike Miller, Jr.
Speaker Michael E. Busch
AELR Committee Members
Patrick H. Murray, Senate Chief of Staff
Alexandra M. Hughes, House Chief of Staff
Lee Currey, Director, MDE, Water & Science Administration
Gail S. Klakring, Administrator of State Documents