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Sent via Electronic Mail  
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January 8, 2018

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Dear Mr. Setzer,

Thank you for the opportunity to comment on the proposed draft regulations to enact a Maryland Water Quality Trading Program under COMAR 26.08.11. The Chesapeake Bay Foundation (CBF) is the largest independent conservation organization dedicated solely to saving the Chesapeake Bay, with offices in Maryland, Virginia, Pennsylvania, and the District of Columbia and 15 field education centers across the watershed. Through education, advocacy, litigation and restoration efforts, CBF has been integrally involved and invested in the development and implementation of the Chesapeake Bay Total Daily Maximum Load (TMDL).

Pursuant to TMDL implementation, CBF has reviewed EPA guidance for nutrient trading programs, advised on trading programs in neighboring Bay states, developed exploratory trading pilots at the local government level, and served as a member of MDE's Water Quality Trading Advisory Committee (WQTAC). CBF sincerely appreciates the consideration that the Department has given to our recommendations and those of the WQTAC. We believe the draft regulations as currently proposed reflect many improvements based on the stakeholder process and, in conjunction with adopted MDA regulations for the certification of agricultural credits, constitute a viable water quality trading program.

CBF recognizes the potential value of a water quality trading program if done transparently and in accordance with both sound science and existing federal and state law.<sup>1</sup> Nutrient credit trading is recognized as an important part of the Chesapeake Bay TMDL's success and as a measure to retain pollution reductions once achieved in accordance with the TMDL. Nutrient credit trading in the Chesapeake Bay watershed could help make meeting the reductions required in the TMDL more readily and cheaply achievable by 2025, and provide a framework to offset new pollution loads that are not accounted for in the TMDL baseline. However, improperly managed programs increase the chances of local water quality degradation and could ultimately fail in meeting water quality goals. The success of any water quality trading program relies heavily on

<sup>1</sup> Applicable laws include the federal Clean Water Act at 33 USCS 1311 and 33 USCS 1313; implementing federal regulations at 40 CFR 131.12; Maryland law under Md. Code Environment Art. Titles 4, 5 and 9 and all implementing regulations, and Md. Code Agriculture Art. Title 8 and all implementing regulations.

transparency and rigorous oversight, verification, and enforcement. CBF strongly encourages the Department to devote sufficient resources and staffing to ensure proper oversight of the program.

Overall, CBF believes these draft regulations would provide an adequate degree of transparency and water quality protection. However, as noted below, there appear to be a few areas where drafting errors or inconsistencies must be corrected in order for the regulations to function as CBF believes is intended. CBF appreciates the inclusion of a public registry for tradable credits; the restriction of trading in locally impaired watersheds to practices located in that watershed; and the requirement that wastewater treatment plants must operate below enhanced nutrient reduction (ENR) levels to generate tradable credits.

However, there are a few critical areas that require clarification for these regulations to be functional. The issues that CBF is most concerned about appear to be non-substantive drafting errors or drafting oversights that would likely be correctable without republishing draft regulations. These issues can be summarized as follows, with a detailed discussion below:

- The draft regulation's definition of enhanced nutrient removal (ENR) must be changed to set concentrations of 3 milligrams per liter for nitrogen to be consistent with existing statutory law and the rest of the draft regulations. Currently the definition sets concentrations of 4 milligrams per liter for nitrogen, which is inconsistent with state law. This definition also impacts the definition for "floating cap" and for "performance based benchmark," both of which incorporate the term ENR.
- "Wastewater point source" includes industrial NPDES permits but it is unclear how the calculations for credit generation in the draft regulations would apply to the metrics found in industrial NPDES permits. Industrial NPDES permits should be separated from wastewater treatment plants due to the vast differences in permit structure and pollution limits.
- Baseline limits should be revised to reflect consistency between the stated limits and the calculation of credits. Currently, the stated baseline limit and the basis for calculating credits for certain wastewater sources is inconsistent and confusing.
- The calculation of credits for wastewater treatment plants appears to eliminate the possibility of generating credits from minor wastewater treatment plants that have made voluntary reductions beyond permitted levels, but that have not obtained ENR levels.
- The requirements for persons serving as verifiers must be clarified to indicate the same criteria regarding the lack of a financial interest and other safeguards apply to all allowed verifiers.

## **Detailed Comments**

### **Section 26.08.11.03(19) – Definitions**

One of the most critical pieces in ensuring additional pollution reductions in the proposed Water Quality Trading Program involves credit generation by wastewater treatment plants (WWTPs). Through the Bay Restoration Fund, the state has paid for all major WWTPs to be upgraded to

discharge concentrations of 3 mg/L of nitrogen or less. Because of the success of this program and the potential for additional reductions through further enhancements to WWTP performance, WWTPs are widely recognized as potentially one of the most prolific credit generators in the Maryland trading program. However, it is critical that any credits generated by these WWTPs go beyond what was already planned and paid for by the State. Otherwise, the Water Quality Trading Program would fail the basic trading test of additionality, which requires that any pollution credits that are traded must reflect actual new pollution reductions.<sup>2</sup> During the stakeholder negotiations, the Department agreed that upgraded WWTPs must reduce pollution down below the 3 mg/L ENR concentration in order to generate credits.

However, while the draft regulations correctly set the performance-based benchmark at 3 mg/L for nitrogen, the draft regulations incorrectly identify ENR as 4 mg/L. This is inconsistent with existing statutory definition of ENR as 3 mg/L for nitrogen at Maryland Code Ann. Environment Article §9-1601. It is unclear whether this is an oversight or drafting error, but in addition to being inconsistent with state law, we believe it would also violate the additionality principle that is necessary for a successful trading program. A rough estimate of the difference between using a credit-generation standard of 3 mg/L versus 4 mg/L at a WWTP the size of the Back River facility, presented by MDE officials at a recent stakeholder meeting, demonstrates that at least 500,000 pounds of nitrogen “credits” could be certified without generating any actual additional pollution reductions over existing conditions. This could slow or stall progress towards full TMDL implementation and could potentially place credit buyers at risk for non-compliance with permitted discharge limits as trades would be based on credits that reflect no underlying pollution reductions.

The ENR definition inconsistent with state law impacts several other definitions in the draft regulations, including “floating cap” and “performance based benchmark,” which both incorporate the term ENR. This also makes the definition of “performance based benchmark” internally inconsistent, as the definition references ENR but also sets a baseline of 3 mg/L.

In order to make these regulations consistent with statutory law and to ensure credits are only generated for actual pollution reductions, the definition of ENR must be amended to reflect the maximum nitrogen concentration of 3 mg/L.

#### 26.08.11.05(55) – Wastewater point source

The draft regulations define “wastewater point source” to include an “industrial waste discharger that has applied for and received a NPDES or other State discharge permit issued pursuant to COMAR 26.08.04.” However, it is unclear how an industrial NPDES permittee could calculate or apply credits, given the draft regulation’s focus on the performance-based benchmark in the “credit calculation” section that governs wastewater point sources. Specifically, since performance-based benchmark is defined as a 3 mg/L nitrogen concentration, it is unclear how an industrial source with a different kind of pollution metric would use the calculation. For

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<sup>2</sup> Manale, Andrew, et al.; U.S. Environmental Protection Agency. *Offset Markets for nutrient and sediment discharges in the Chesapeake Bay Watershed: Policy tradeoffs and potential steps forward*. (“If the offsets are not additional, then emissions are exactly the same as what they would have been without the trade...While money may change hands, it is a mere ‘paper trade’; loading is not reduced”).

example, General Permit No. 12SW, *Stormwater Associated with Industrial Activities* requires a 20% impervious surface restoration requirement. It is unclear how the performance-based benchmark or the credit calculation section in .06 would apply to the General Permit No. 12SW.

Due to the difference between WWTP and other industrial dischargers, CBF would recommend separating out the two sources. Industrial NPDES permit sources should be given their own definition and the permit baseline, rather than the credit calculation that applies to WWTPs. This would also help address some of the inconsistencies noted below regarding the baseline limits.

#### 26.08.11.05 – Baseline Limits

The section on Baseline Limits for wastewater point sources found in .05 appears to be inconsistent with several other definitions and calculations found in the draft regulations. Many WWTPs have permits that include a 4 mg/L nitrogen concentration limit. The draft regulations set the “baseline” in section .05 as “determined by the Department based on an annual loading limit wasteload allocation estimated in the wastewater point source’s NPDES discharge limit.” However, the next section, .06 Calculation of Credits, states that the calculation for wastewater point sources is based on the performance-based benchmark which is defined as 3 mg/L. Therefore, WWTPs potentially have a baseline of both 4 mg/L while the credit calculation is based on 3 mg/L, which is inconsistent and confusing. CBF suspects the baseline section is applicable to the industrial dischargers while the credit calculation section was meant to apply to WWTPs, but because the two different sources are included under one definition, the effect is very unclear. As mentioned above, CBF recommends creating two categories out of the current definition for “wastewater point source” to distinguish between WWTPs and other industrial point sources. Industrial sources would then use their NPDES permit as the baseline and WWTPs that have been upgraded to ENR would use the 3 mg/L performance based benchmark calculation.

#### 26.08.11.06 – Calculation of Credits

As explained in the previous sections, the inconsistencies among the definitions of ENR, floating cap, and performance based benchmarks, and the inconsistency between baseline and the credit calculations, makes this portion of the draft regulations very uncertain.

In addition to the uncertainty of how the baseline and credit calculations would jointly apply to WWTPs and industrial point sources, it is also unclear whether minor WWTPs that have made some improvements but have not been upgraded to ENR will be able to trade. Under the current draft regulations for credit calculation, it would appear that minor wastewater treatment plants that are operating at lower pollution concentrations than their permit limits, but that have not reached ENR, will not be able to trade. If that was a purposeful policy decision, CBF does not object. However, due to some of the other identified problems, it is currently unclear whether that was a purposeful decision or a drafting error.

As stated above, CBF recommends separating WWTPs from other industrial wastewater sources and clarifying how the credit calculation and baseline applies to each source. If a minor WWTP

reduces nutrient loads below their permit limit but not to ENR levels, the regulations should clarify if, when and how credits would be calculated for those sources.

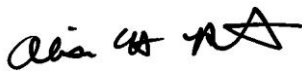
#### 26.08.11.11 – Verification

CBF would like to confirm or clarify our understanding that the criteria for verifiers, such as “the appropriate education, expertise, and training...”, “does not hold an interest in the operation or entity generating the credit,” and “was not involved in the original application,” is applicable to all three listed verifiers. As currently drafted, it appears that this section could be read as applying those qualifying criteria only to the third listed authorized verifier category, namely the Department-approved verifiers. Obviously, these criteria speak directly to the ability of a verifier to perform the work in an unbiased manner and therefore should explicitly apply to all persons authorized to verify credit generating practices. The draft regulations must specify that the criteria applies to all would-be verifiers.

#### **Conclusion**

In conclusion, CBF reiterates our appreciation for the many months of stakeholder dialogue leading up to these draft regulations. We believe that, if adequately resourced and implemented by the Department in a manner consistent with representations made to the WQTAC, these regulations present a sound framework for nutrient pollution trading. However, the inconsistencies noted in this comment letter could undermine critical parts of the program and CBF urges amendments to fix these errors. To summarize the previous comments, CBF recommends the following changes: (1) amending the definition of ENR to be consistent with state law defining ENR as 3 mg/L concentration of nitrogen; (2) separating WWTPs sources from other industrial wastewater sources; (3) clarifying that industrial sources use permit limits as a baseline while ENR WWTPs use the performance based benchmark calculation; and, (4) clarifying that any and all verifiers must have the appropriate expertise and have no financial interest in the trade. Some, if not all, of these changes may simply reflect the correction of drafting errors. CBF urges the Department to make these simple changes to ensure the clear, transparent, and consistent operation of the Maryland Water Quality Trading Program.

Sincerely,

A handwritten signature in black ink, appearing to read "Alison Prost". The signature is stylized and cursive.

Alison Prost, Esq.,  
Interim Vice President of Environmental Protection and Restoration