



## HOWARD COUNTY DEPARTMENT OF PUBLIC WORKS

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Gary Setzer, Senior Advisor  
Maryland Department of the Environment  
1800 Washington Boulevard  
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(Via U.S. Mail and E-mail, [gary.setzer@maryland.gov](mailto:gary.setzer@maryland.gov))

Re: Comments on Proposed Nutrient Trading Regulations

Dear Mr. Setzer:

Howard County appreciates the opportunity to comment on the proposed nutrient trading regulations published in the Maryland Register on December 8, 2017. The County is in support of trading as a cost-effective means to achieve water quality improvements but the County is not in support of the regulations as drafted. There are several provisions that are not clear and require clarification to allow for some of the most beneficial trading, which MDE has previously indicated would be authorized. The County would support the trading regulations with the amendments described below. Incorporating these changes would result in greater pollutant load reductions than could otherwise be realized, and at less cost to the public.

The County is specifically concerned about provisions controlling the ability of Municipal Separate Storm Sewer System ("MS4") permittees to utilize pollutant load reduction credits produced by the significant and ongoing financial investments in wastewater treatment plants ("WWTP"). It is undisputed that WWTP are capable of achieving pollutant load reductions far more efficiently than stormwater BMPs.<sup>1</sup> These are real, quantifiable, and verifiable pollutant load reductions that are not otherwise legally required. Forcing the County to reduce funding for WWTP to perform stormwater projects that would result in less pollutant reduction, at greatly increased cost, would result in increased pollutant loads and adverse effects on water quality.

The County should be allowed to manage its resources to achieve the greatest pollutant reductions possible. A pound of nitrogen that reaches the Chesapeake Bay creates the same harmful impact regardless of where it originated. Stopping the flow of pollutants should be the primary goal of State and local efforts.

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<sup>1</sup> The Chesapeake Bay Foundation estimates that while stormwater only accounts for 16-17% of nutrient loads, the estimated cost for complying with the Bay TMDL is 67% of the total TMDL restoration costs, "dwarfing the costs of other sectors." *Nutrient Trading by Municipal Stormwater Programs in Maryland and Virginia: Three Case Studies* (February 2017).

## Requirements For Generating Credits Should Be Clarified

The proposed regulations are not clear on who can generate credits and appear to prohibit the County from generating credits at all through its WWTP. 26.08.11.04C(2)(a) prohibits a “person” from generating credits if they do not meet baseline requirements. See also 26.08.11.04C(2)(a) and 26.08.11.03B(7), which prohibit credit sellers from engaging in a trade unless the credit seller meets baseline requirements. Based on these proposed requirements, it is not clear that a “person” such as the County, which holds several NPDES permits, would be able to generate credits if any one of its permits did not meet a baseline.

An MS4 permittee’s baseline is defined as “the restoration requirements of the stormwater point source’s current NPDES discharge permit.” DRAFT 26.08.11.05D. Under this definition, an MS4 permittee will *never* meet the baseline as defined in the proposed regulations. The MS4 baseline is the goal the MS4 is supposed to meet at the *end* of its permit term. Thus, as currently drafted, the regulations would prohibit a person who holds an MS4 permit from ever being able to generate credits in any form. There is no rational basis for prohibiting local government from generating credits at their WWTP simply because they hold another permit whose baseline will effectively never be reached.

The regulations should clarify that an individual permit may generate credits if the baseline requirements of the permit are otherwise met. This would allow MS4 permittees to temporarily use credits generated by WWTP to meet part of their permit requirements. By doing this, while also continuing to require the MS4 to implement capital projects to permanently meet impervious surface restoration (“ISR”) requirements, ultimate pollutant load reductions *over and above what is currently legally required will be achieved*. It should be noted that MDE could facilitate this type of trading without enacting regulations.

Local governments should be allowed to allocate resources to the most effective pollutant removal technology. Without clarification, one of the greatest possible benefits of trading could be prohibited. The argument that there is no “additionality” by using WWTP credits fails to understand the reality of WWTP operations. WWTP do not operate at a set fixed rate of nutrient removal. In fact, there is considerable variation. Staff, equipment, and chemicals are used to operate plants efficiently, which all costs money. Any deficit in any area can result in increases in pollutant loading while still complying with permit terms. If the County is forced to reallocate expenditures to less efficient stormwater BMPs, overall pollutant loads will increase. The argument that excess capacity at WWTP will be “traded away” is false. That capacity will always remain because the regulations require a generator to meet its permit baseline. The County believes the temporary nature of such trades, their greater cost-efficiency, and the increase in ultimate pollutant load reductions justifies their use as outlined here.



## **Procedures For Credit Certification Should Be Clarified**

Proposed 26.08.11.07A(2) should be struck. WWTP should be treated equally with other credit generators. Proposed 26.08.11.06 is sufficient for calculating and certifying credits from WWTP.

WWTP credits should be certified on a calendar year basis. This will provide the predictability and certainty local governments need in order to efficiently plan and implement water quality improvements.

## **All Pollutant Load Reductions That Are Not Legally Required Should Be Creditable**

The proposed regulations appear to prohibit BMPs that have already been implemented, from generating credits, even if the pollutant load reductions generated by those BMPs are not legally required. The regulations should not prohibit the use of BMPs that are not legally required, simply because they were installed prior to the adoption of the regulations. Proposed 26.08.11.04D(3) prohibits BMPs from generating credits if they have already been “implemented to satisfy regulatory requirements.” However, some BMPs, like WWTP operations, may have been implemented to satisfy regulatory requirements, but are operated in a way that goes beyond those requirements.

Furthermore, just because a BMP may have been implemented “to satisfy regulatory requirements” does not mean it is legally required to be maintained. MDE should not ignore the significant benefits of these BMPs by failing to provide any incentive for their efficient use. Previously installed BMPs that are not legally required should be allowed to generate credits. Otherwise, functioning BMPs may be removed only to be replaced with the same device, simply to generate credits. Given the particularly difficult mandate imposed on the County to accomplish stormwater restoration on privately owned property, MDE should protect existing BMPs that are not legally required.

26.08.11.04D(3) should be revised to allow for credits from BMPs that have already been implemented but are generating more pollutant load reductions than are legally required, and also to allow for credits from BMPs that may have arguably been implemented to satisfy regulatory requirements, but are not legally required to be maintained.

## **A Reserve Ratio is Not Appropriate**

Proposed 26.08.11.08C(3) should be struck. There is ample authority in the proposed regulations to impose accountability where a credit project fails. 26.08.11.04E(3) and 26.08.11.08B require that a credit buyer “remains responsible” for its permit obligations.

## **There Should Not Be A Prohibition On State and Federal Funding**

There is no reason why public funding should be banned as a source of funds to generate agricultural BMP credits as required by 26.08.11.04D(5). Public funds have long supported the most innovative and cost-effective approaches to water quality improvements and it will continue to be an important source of capital for projects that provide examples and leadership for a young industry. A blanket prohibition is not necessary as the State and federal government control their own budgets and can determine what projects are appropriate for funding.

## **Other Necessary Changes**

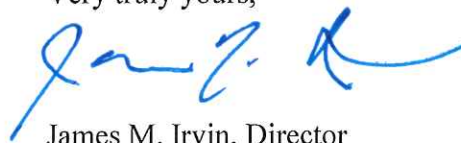
At 26.08.11.04C(2)(b), “install” should be replaced with “implement” to acknowledge the broad range of BMP types that may be used to generate credits. This is already done in other places in the proposed regulations, for example at 26.08.11.04D(3). 26.08.11.12A should be deleted. It is not necessary because it is merely restates existing law and could be used to argue that additional requirements to existing law are required.

## **Conclusion**

Nutrient credit trading in Maryland is long overdue. Trading in the manner described here will result in pollutant load reductions that would not otherwise be achieved, and at a cost savings. WWTP credits are real, quantifiable, verifiable, and enforceable pollutant load reductions that the County is not required to perform. These reductions are efficient and cost-effective, but they are not guaranteed. The proposed regulations as drafted will force the County to reallocate limited financial resources to inefficient and expensive stormwater retrofits, much of which cannot even be performed by the County because it is located on private property. Local governments have been charged with achieving pollutant load reductions and must be allowed to manage their resources in the most cost-effective manner to accomplish the task. For these reasons, the County urges the adoption of the regulations with the amendments described here.

If there is any additional help or assistance needed on my part, please do not hesitate to contact me at your convenience.

Very truly yours,



James M. Irvin, Director  
Department of Public Works