

**DRAFT**  
**Accounting for Growth Work Group Summary**  
**Meeting #8: 6/28/2013**

**In Attendance:**

Work Group Members: Tom Ballentine, Bevin Buchheister, Yates Clagett, Valerie Connelly\*, Sandy Coyman, Cathy Drzyzgula, Stephen Harper, Lynne Hoot, Jon Laria, Katie Maloney, Erik Michelson, Shannon Moore, Mike Powell, Alison Prost, Dru Schmidt-Perkins, Josh Tulkin

\*for Pat Langenfelder

Support Team: Dan Baldwin, Darrell Brown, George Chmael, Jeff Corbin, David Costello, Kate Culzoni, Jim George, Brigid Kenney, Les Knapp, Doug Lashley, Susan Payne, Julie Pippel, John Rhoderick, Dusty Rood, Helen Stewart, Steve Stewart, Joe Tassone

**Absent:**

Work Group Members: Pat Langenfelder, Mary Ann Lisanti

Support Team: Vimal Amin, Meg Andrews, Lee Currey, Candace Donohoo, Dave Goshorn, Roger Venezia

**Public Attendees:**

Dinorah Dalmasy (MDE), Brenda Dinne (Carroll County Government), Andrew Gray (Department of Legislative Services), James Hearn (WSSC), Melissa Schreiber-Stahl (1000 Friends of Md), Phillip Stafford (StateStat), Matt Warne

**Welcome and Overview**

Facilitator George Chmael welcomed everyone to the eighth Accounting for Growth (AfG) Work Group (WG) meeting and reminded the WG that the hours for the current meeting and the next scheduled meeting are extended to six hours (9AM – 3 PM). The remaining tentative meeting was scheduled for July 11<sup>th</sup>, at the same time and place (9 AM – 3PM in the Maryland Department of the Environment Conference Rooms). The ninth meeting will be used as a wrap-up, review, and organization of the final report. He directed the WG's attention to the materials received since the last meeting, and noted their relevance to the final report and the day's agenda of discussion topics, which included offset permanency and trading, one presentation on credit verification and transparency practices, and comments from Mr. Lashley on credit stacking. Mr. Chmael requested that the WG review the materials summarizing the work and viewpoints of the WG which will become part of the draft report and provide comment to him and Ms. Culzoni before the ninth meeting. Ms. Moore noted that the WG had not completely discussed the stakeholders' positions (support or not support) on the forest load baseline.

**ACTION:** The WG will review the materials distributed by Council Fire summarizing the work and viewpoints of the WG which will become part of the draft report. Comments will be provided to Mr. Chmael and Ms. Culzoni before the next meeting.

**Trading Discussions**

*Permanency*

The WG discussed various methods of meeting the requirement that the post-development load be permanently offset. It was agreed that the new, unaccounted for loads (loads from new development that are not in the TMDL) must be permanently offset. It was also agreed that offsets do not need to be permanent to address the permanent loads. The WG considered the two offset options - either a permanent best management practice (BMP) functioning in perpetuity or a permanent obligation of addressing the load for perpetuity, which may be met by a series of short-term BMPs. An example cited by EPA of the first option (a permanent perpetual BMP), is that of Virginia, where marginal acreage is

converted with a 100-year deed restriction. In Maryland, under the current draft trading policy, only stream buffers are available as a permanent conversion. The area of these conversions is based on slope and water quality protection requirements and the area varies from 25 to 100 feet wide. Permanent stormwater BMPs might also be considered a permanent conversion. A Maryland Association of Counties (MACo) representative noted the difficulty with the second option (permanent load offset obligation) is the potential for the obligation to transfer to the counties, which most counties cannot financially support.

A WG member suggested that a wealthy landowner might convert lawn acreage to forest. Maryland Department of Agriculture (MDA) responded that such a conversion is outside of their credit certification jurisdiction. The WG has not yet discussed if Maryland Department of the Environment (MDE) would certify urban practices such as green infrastructure and land conversion. MDE responded that permanent land conversions are more expensive than a suite of mid to short-term BMPs. A WG member replied that, based on Mr. Kelley's presentation at the last meeting, when including producers' incentive and the broker's risk into the cost analysis, permanent BMPs are produced and sold more easily than annual practices. Another WG member noted that Maryland is not the same as other states. Agricultural stakeholders noted that most farmers lease the land they work and the concern is that landowners who may be paid more for land conversion than with rent will permanently retire productive land and/or artificially inflate rental rates. MDE agreed that a permanent BMP market would incentivize such a trend. Agricultural stakeholders and MDE agreed that the trading market should be composed of mixed permanent and short-term load offset BMPs. A public interest stakeholder cautioned the WG that the North Carolina market which Mr. Kelley discussed may not be comparable to Maryland conditions, that a functioning market and credit verification is a priority over the permanency of the individual BMPs; and the market should not be setup with restrictive conditions for credit generation, nor should conversion be encouraged. MDA stated that the Maryland Assessment Scenario Tool (MAST) considers 35- to 100-foot buffers around a stream as one BMP and any converted land less or greater than that range to be a separate land conversion BMP. A local government stakeholder stated that a market with the maximum choices would benefit everyone and asked if annual practices are considered cheaper based on thirty years or infinite years of costs. It is improper for the State to compare a specific number of years of short-term BMPs to a permanent BMP unless there is a plan in place for the State to take on the load offset after the specified number of years. MDE stated that currently the taxpayers are responsible for the load. If developers are required to address the offset for a specified time, brokers will likely use a portfolio of contracts on five-year terms (for example) in order to ensure the required load is addressed. The market will choose the most efficient (greatest load reduction for the cheapest cost) BMPs. Agricultural BMPs are less costly to install than urban BMPs. Another local government stakeholder noted that in his rural jurisdiction, the issue of a wealthy landowner converting lawn to forest is rare. He also noted that the WG's major concern is the permanency of the offset. He suggested a secondary market like a fund or mitigation bank which would ensure the installation of BMPs to offset new loads if an aggregator is unable to find a supply to fulfill part of the committed offset time period. A public interest stakeholder stated that the fee-in-lieu could be used to simultaneously pay for cheap annual BMPs and save for permanent BMPs. A developer stakeholder noted that the developer's requirement is like a bond with a specific risk and lifetime. This is a check on developers. A third local government stakeholder reminded the WG that some county governments would like to voluntarily take over the offsets while others do not. MDE believes that the local jurisdictions are the most effective level of government to address these issues. Local jurisdictions will have some time and need to plan in order to reduce cost for the eventual responsibility, which is why the State has required the stormwater utility fee of large jurisdictions. A MACo representative stated that the long-term obligations of the local governments need to be known up-front.

Mr. Lashley discussed two types of permanent BMPs: easements and stream restoration. He stated that a permanent easement is final and may require the title to be transferred to a land trust. Restoration is different. He said that the amount of risk which persuades aggregators to argue against annual practices is

good business sense – it is risky to invest in something that expires in one year. He added that the WG should not disincentivize landowners from instituting environmentally beneficial BMPs. He encouraged MDE to verify that process, since MDA has too much interest in agricultural lands and does not want to verify credits other than agricultural ones. In response to a question about costs, Mr. Lashley replied that annual BMPs must be bought every year, while permanent BMPs require a single payment. These two methods will likely cost the same in the end. MDA added that annual BMPs are also more administratively-intensive than permanent BMPs. A development stakeholder asked what market would exist without annual practices, when MDA has stated that they are 80% of the tradable commodities. He also asked if the US Environmental Protection Agency (EPA) would certify a mutual fund of annual practices. EPA stated that is not yet decided. EPA also stated that the Clean Water Act (CWA) does not allow additional loading to an impaired water body. The TMDL only allows additional loads if they are offset. EPA needs assurance of a permanent offset for a permanent increase in load. A lump of money should not go to a governmental fund, since they are vulnerable during economic downturns. EPA will review the program as a whole; a program with a conservative baseline would not require a 2:1 trading ratio. Mr. Lashley asked why the 17 years of work on trading regulations around Section 404 of the CWA have not been applied to the TMDL. EPA replied that its preference is to allow the States flexibility. MDE replied that although there is a desire for guidance from EPA, the State would prefer to be unconstrained in crafting a policy both acceptable to EPA and more flexible and beneficial in the long-term to the watershed.

A public interest stakeholder stated that with a permanent offset requirement, the long-term responsibility for the load must be resolved as part of the complete offset plan supplied by the developer for their specified time of responsibility (likely thirty years). What form would the agreement take of the local or state government to take on the load? He also queried the WG if permanency in thirty years could legitimately be guaranteed by anyone now. A developer stakeholder stated that there is difficulty in planning for the future – the viability of the market should not be sacrificed for the unknown. Future stakeholder representatives will have more science, technology, and experience related to the TMDLs to make decisions and adjust policy. The environmental non-governmental organization (ENGO) stakeholders disagreed that the future should be left without resolution by the WG.

The WG requested formal written guidance from EPA that there is a requirement to offset a permanent load and that it may be achieved through practices that are not permanent.

An ENGO stakeholder reminded the WG that the impairment of a segment (there are 92 segments of the Bay) triggers the CWA and prevents new loads. The impairment listing is the priority and drives the need for offsets.

Mr. Chmael reminded the WG of the suggestion at the last meeting that the policy require regular programmatic review/adaptive management. MDE affirmed this.

#### New Fee-In-Lieu Usage Proposal

Considering the WG consensus on fee-in-lieu as an agreed-to component of the policy (and as it relates to permanency), an ENGO stakeholder proposed that there be a choice offered to the developer:

EITHER

- Install a permanent BMP or use an aggregator/broker to purchase a permanent BMP, OR
- Pay a fee-in-lieu to government, which will fund a portfolio of properly bonded short-term (annual) and/or permanent practices.

This would create two separate entrances to the trading market. Developer stakeholders liked the idea, since it encourages the portfolio approach and a one-time commitment. It also encourages annual and permanent BMPs to have niches within the marketplace to the maximum benefit of the Bay. In the case of a developer choosing to pay the fee-in-lieu, the responsibility shifts to the public with receipt of the

money. The fee-in-lieu and responsibility for offsets would be offered first to the local government, as was already agreed to by the WG. If the local government voluntarily accepts the fee and responsibility, it would then either supply the offset themselves or contract with an aggregator, perhaps via a quasi-State agency or non-profit – which may bond. MACo expressed approval of the proposal contingent on the optional obligation and the fee-in-lieu covers the full cost to the county. An ENGO stakeholder expressed that the cost should be higher than the other option. If a local government does not want the responsibility of the offset, it would transfer to the State with the money. If responsibility was transferred to the State, the State would determine how best to fulfill the responsibility and it is not necessary for the WG to determine the mechanism. The proposal was retained for consideration during the fee-in-lieu discussion and will be judged by the outcome of the baseline discussion. Stakeholders will present it to their constituents and receive feedback before the next meeting.

The formulation (or “setting”) of the fee-in-lieu is no longer agreed to by the WG since its purpose has changed. Formerly it was agreed to be based on the fully loaded average cost of urban BMPs. Basing the cost on a fully loaded average permanent BMP is now under consideration, as well. It was suggested that if the fee-in-lieu is meant to be a functional component of the trading program and not a disincentive (as it was originally conceived) or tool for when the market is not functioning, the cost might be based on a variety of BMPs. The stakeholders will discuss formulation criteria and application of a fee-in-lieu with their constituents as well as any criteria. MDE agreed that the State favors permanent practices and the market would be setup to do so, as well. The WG remarked that there would be a need for assurance that the money would be used and there are places to invest it, since payment removes the responsibility from the developer. Mr. Lashley suggested using the policy associated with [Section 404 of the CWA](#) as a guideline. It is extensive and has been substantially reviewed by the country. He also urged that design, maintenance, approval, monitoring, and long-term stewardship be included in the one-time cost of a permanent BMP. An ENGO stakeholder asked if this is really a ‘fee-in-lieu’ concept if it is an alternate compliance tool – it seems more like a mitigation bank. A local government representative responded that it is a fee-in-lieu of trading for credits – the developer has the responsibility to meet the offset either by purchasing BMPs (either directly or via a broker) or paying the fee; paying the fee offers the responsibility to local governments which may either purchase BMPs or transfer the fee; transfer of that fee and responsibility to the State ends with the State ensuring the offsets via the State’s mechanism. Mr. Lashley commented that credits have only been sold by an aggregator once cost of construction and long-term maintenance and monitoring have been bonded (two bonds). Typically once the fee-in-lieu pot of money is substantial, private entities will submit proposals to do restoration work with a bonding capacity. He advised counties collecting fees to issue requests for proposals or purchase a permanent BMP from a mitigation bank. The construction bond is released once the permanent BMP is installed, an as-built survey is completed, and there is a regulatory release. Then the other bond is active for the life of the project.

The WG discussed the impacts of the proposal. This proposal would shift the developer’s offset requirement to local government (at their choice). With the voluntary acceptance by the local government, it is requested that the State provide assurance – potentially through the Bay Restoration Fund (BRF). A Support Team member suggested that the State is the backstop, and that the BRF might be the primary backstop after the local utility fee. A local government is a more financially sure entity for a 30-year bond than a developer, but governments are not interested in taking every developer’s bond. The State would not bond.

MDE noted that fewer consumers in the marketplace will ensure the supply of resources (credits and bonding). EPA noted that it will soon be providing written guidance on the requirement to offset a permanent load and if it may be achieved through practices that are not permanent.

**ACTION:** Stakeholders will present the proposal on the use of fee-in-lieu to their constituents and bring feedback to the next meeting on the whole proposal, fee-in-lieu cost formulation criteria, and the proposed application of the fee-in-lieu.

### *Credit Stacking*

The WG subgroup agreed that the WG required more information on credit stacking before drafting suggested policies. Mr. Lashley was invited to speak on this topic for the edification of the WG.

Mr. Lashley stated that credit stacking is a concept based on the four resource values: air, water, soil, and habitat. There are many kinds of credit mechanisms and banking under federal, state, and local regulation: forestry conservation/carbon credits, nutrient credits, stream restoration credits, riparian buffer credits, wetland credits, flood storage credits, and habitat credits. There are two ways to stack credits: vertically and horizontally. Vertical stacking is when a participant receives multiple payments for a single management activity on spatially overlapping areas (that is, on the same acre). For example, a landowner plants a forested riparian buffer to receive both water quality credits and carbon credits. Horizontal stacking uses a site master plan with zones for each type of credit generation. For example, a landowner plants trees and receives nutrient credits for the forested buffer along a stream and carbon credits for the trees in the upland part of the property. Vertical stacking is currently met with skepticism.

Mr. Stewart stated that mitigation may not be used for credits, since it is replacing what would have been on the site without development. The current MDA trading program upholds that policy. MDA added that many BMPs generate nutrient and other types of credits simultaneously, but it is not currently part of the policy to sell those credit types simultaneously. It was envisioned, though there are no other markets in place, that the BMP would be sold on whichever credit market yielded the best price.

MACo is in favor of the benefits from stacking: decreasing the cost of practices, encouraging practices with multiple benefits (typically longer-term BMPs). MDE agreed that there is an opportunity for stacking in the policy as long as it does not conflict with mitigation projects and can be accounted for. A developer stakeholder agreed that a required mitigation would not equal a credit, but there should be incentive to add-on and receive credit for that work. MACo agreed that credit should not be awarded where mitigation is replacing habitat. A local government stakeholder proposed vertical stacking for measurable pollution reduction but not for mitigation that serves as a functional replacement requirement. This was generally agreed to by the WG – credit should be awarded for installations which are not obligated.

### *Credit Certification, Verification, and Transparency*

Mr. Rhoderick (MDA) spoke to the WG to clarify understanding of when credits are verified, how they are verified, and what happens if they are not verified. The alternatives currently under consideration by the WG were agreed to by all the members of the subgroup.

Mr. Rhoderick explained the steps of the credit certification process:

1. Independent agents verify the baseline and proposal feasibility of the credit producer. Once verified, the credits are certified – preliminary certification pending implementation. A certification number is issued with a document stating the information on the practice to be provided by the producer and the credits it will generate. This is posted on the market.
2. If purchased, the document is now possessed by the buyer and attached to the permit application to prove the offset is in place. This is submitted for approval by MDE.
3. After MDE approval, MDA ensures installation with an as-built certification process per the requirements of the producer's proposal (acreage and functional).
4. Next, the buyer must have proof of a certified verifier to annually inspect the practice and provide a written report to all parties: buyer, seller, MDE, MDA – which is public record. MDA also performs random spot inspections of the agricultural practices (MDE would likely do the same for urban practices).

If MDA determines that the practice is not functioning due to a maintenance issue, there is a provision of 30-60 days of repair followed by another inspection. If the practice was not installed or is completely

gone, the decertification process includes written notice to all parties, and the contract between the buyer and seller activates. The minimal language in the contract states that in the event of failure, consequences include monetary damages and the seller is obligated to make whole on the offsets (the seller must purchase those offsets on the market at his own cost). This requirement to find the offsets as well as the buyer's requirement to purchase 10% more credits than needed in the permit creates a reserve capacity in case of any default by the seller.

A WG member asked about the MDE approval and if it was necessary before the BMP was installed and certified. MDA responded that MDE retains the right to enforce additional permit limitations or requirements. MDE added that certification of the independent agents should be discussed and included as part of the policy in order to ensure that the agents are held responsible. In response to the direct question if MDE would not find specific BMP-generated credits acceptable for specific permit purposes, MDE answered no, it does not matter how the credits are generated as long as the required load is offset. An ENGO asked what the 10% credit retirement covered – it has been discussed as the margin of safety for BMP efficiency, capacity for failed practices, etc.

The credit producer/seller is ultimately the responsible party, since they are contracted to provide credits to the aggregator, who is in turn contracted to supply credits to the government or developer. If the developer or government does not secure credits, they are at fault; but if the credits are contracted but end up decertified, the credit producer is at fault. The State would require the permittee to supply the offsets, and the permittee's contract with the producer/seller ensures the functioning supply of the offsets. If the State finds the permittee noncompliant, the contract with the producer/seller is enforced; both parties are liable. MDE added that the bonding part of the new proposal adds additional surety that the contract will be enforced. It was remarked that once the developer's obligation is past with the completion of the project, it may be very difficult to track them down and then review their contract with the credit supplier.

It was noted that an installed permanent practice by the developer would require negotiation with the county or local municipality in order to ensure maintenance and monitoring. Remarks were made reminding the WG that maintenance is not a responsibility desired by all counties, but the opportunity for allowing a county to take over the maintenance should remain available. It was also noted that if a permanent BMP is installed on private property and the BMP is not functioning, the easement on the property's deed will result in a lien. Deed restrictions are common in agricultural cost-share programs. This example was followed with the potential for a developer to improve septic systems – if the septic systems are not maintained then the fault lies with the homeowner, not the developer. Landowner agreements are common with restoration grants, as well. MDE urged the definition of 'definably permanent' for the betterment of these contracts and agreements.

An ENGO stakeholder requested that the WG review a comment document on credit verification he will send out before the next meeting. He suggested the WG use the time between meetings to further investigate the issue, since not all parties are interested in the details and the WG had come to a general consensus already on credit certification, verification, and transparency.

The current MDA draft trading regulations were briefly discussed. An independent agent who falsifies a report would lose their certification and, if they were a state employee, their job. It is possible for the certification and monitoring process to be contracted out to land conservancies or trusts; there may be some interested organizations. If the WG approved the draft regulations for use in the AfG policy, the same certification of agents would apply to urban BMP verification procedures, as well. World Resources Institute is the project manager for expanding the MDA trading website into a broader tool, incorporating the urban BMP market. The WG will review an MDA summary document (to be distributed before the next meeting) before reaching consensus on using those rules for the AfG policy. The WG would like the opportunity to ask clarifications and make recommendations to the draft rules after reviewing them.

The WG stakeholders agreed to the more broad concepts which were agreed to by the subgroup:

- Independent (qualified, knowledgeable, and truly independent) audit controls will be established with additional checks and balances to avoid conflicts of interest.
- All trades will be in a publicly accessible, on-line database established by the State (MDE and MDA) and used to calculate progress.
- MDE is ultimately responsible for verification, enforcement, and transparency of the permitting process and market trading program. MDA is responsible for the verification of agricultural credits and MDE is responsible for certification and verification of urban credits.

**ACTION:** A comment document on credit certification, verification, and transparency will be distributed to the WG.

**ACTION:** WG members should review MDA's summary document (on [AfG website](#), Mtg 2, Essential Reading) on the draft trading regulations that was distributed at one of the first few meetings. The WG will revisit the regulations at the next meeting.

### *Restrictions on Trading Geographies*

The three subgroup alternatives were reviewed for the trading geographies:

- Interstate.
- Statewide.
- Limit trading to within the Maryland basin, unless the development occurs on a nutrient impaired local segment, then offsets must come within this smaller watershed (segment).
- Limit trading to statewide, unless the development occurs on a nutrient impaired local segment, then county has option to offset at basin (or modified basin) level.

Mr. Rhoderick presented the changing projection on agricultural credit availability. Although a presentation on credit availability was given to the WG at the beginning of the meeting series, this update addressed regulatory changes and new data which provide a different projection. It was noted that the EPA model run includes BMPs that are not tradable because they are previously regulated necessities (via nutrient management laws) and therefore the model generates an overestimate (about 9 million pounds) of available credits. Additionally, the new Maryland Nutrient Management Regulations have required several high-load-reduction BMPs: off-stream watering without fencing, stream access control with fencing, dairy manure incorporation, poultry litter incorporation, and grass buffers when utilizing a particular fertilizer application method. Cost-share funded BMPs are not available for sale as credits either. 64% of agriculturalist lands currently meet the TMDL baseline. These current and increased nutrient regulations will increase the percentage of baseline compliance, but it also removes the required BMPs from the credit market. Mr. Rhoderick further explained that the EPA memo requiring a 2:1 ratio for any trades from nonpoint sources then halves the new projections. It was noted that stormwater is a point source and would not require the 2:1 credit trade ratio due to the fact that jurisdictions have permits. A self-selected sample (about 2%) of agriculturalists implementing more BMPs than necessary – a sampling of the potential market - showed a modest estimate (under one million pounds, or under 500,000 pounds if using the EPA ratio) of credits available. This estimate would be further reduced by permanent practices taking land out of availability. This may lead to geographies within the state where credits are not available or are quickly bought up, leaving none for other buyers to purchase and forcing a fee-in-lieu. Mr. Rhoderick suggested a trading geography as wide as possible using delivered loads but defined by the segment TMDLs, including interstate trading within specific watersheds; although those states (Virginia, West Virginia, Pennsylvania, Delaware) would need to meet the current Maryland baseline before being able to trade any credits.

MDE expressed the opinion that, of the two estimates, it believes that the credit availability lies somewhere between 9 and 1 million pounds. MDA stated that it does not believe that the 2 million pounds required before 2025 to offset current planned growth will be met by agricultural credits.

An agricultural stakeholder also noted that many of the annual practices in the WIP are not yet in the model.

EPA was asked about other states which are not as rigorous as Maryland. EPA responded that the Pennsylvania baseline did not meet the TMDL allocation in the model. EPA is working with Pennsylvania to revise their baseline. This is likely to be a three-year process. A developer stakeholder stated that this causes a concern for developers – Maryland is so far ahead that the border counties end up losing from the economic imbalance caused by an aggressive state program. A public interest stakeholder responded that the interstate trading report which analyzed the economic impact did not prove a very significant cost-savings from interstate trade, especially when adding in the administrative cost. The developer stakeholder continued, stating that it is more a principle – Virginia must only meet stormwater regulations which are at a forest load baseline and that resolves the offset requirement – any inequity among the Bay states will be a problem for the real estate industry and the market of the border areas. The developers do not wish to be at a regulatory and economic disadvantage to other states' developers. This creates a political problem for MDE enforcement: MDE cannot regulate and claim compulsion to do so from the EPA mandate if other states under the same mandate are not enforcing the same regulations. EPA replied that Pennsylvania still must reach their TMDL allocation and all states must comply on the same timeline (by 2025 and the 2017 midpoint). There will be annual progress reviews of each state. MDE replied that development tends to happen in core communities, and much less near the border.

The WG proposed that although interstate trading is not currently viable, this could be left to the State's discretion so that when other states meet Maryland requirements their markets would open to Maryland. MDA also noted that a specific trade ratio could be required when using out-of-state credits so that the offset would meet Maryland baseline, even if the credits' source state did not.

The subgroup alternative which 'limits trading to the basin unless discharging to a nutrient-impaired local segment, then the offset must come from within the segment' also remained under consideration. This is based on the CWA requirement of eliminating new loads to an impaired water body.

A local government representative added that the subgroup alternative proposal language of "county has option to offset at basin (or modified basin)" allows local jurisdictions the right to limit trades to within the jurisdiction if statewide trades are allowed first.

A comment was also made that a division of the market between nitrogen and phosphorous would not need to limit trading within a basin, only the more limiting of the two nutrients – the one with the impairment. It was therefore proposed that nitrogen and phosphorus do not need to be traded or offset on the same geographical scale: local impairments would drive local trades and nitrogen and phosphorous would be traded separately. This clause was also added for sediment. A developer stakeholder requested information on sediment loads from ongoing development.

The WG discussed whether trades should be open to the state or the local basin when there is no impairment. The ENGO stakeholders in favor of restricting trades to the local basin stated that an unintended outcome of statewide trading may include new impairments. However, one ENGO stakeholder allowed that trades could be opened up to the state if there were no credits available in the basin. He also stated that trading within a basin is already a compromise because segments are the smallest geographical division. Development stakeholders expressed favor for statewide trading unless a local impairment existed and noted the concern Mr. Rhoderick introduced of credit scarcity. It was also noted that the efficiency of the market – more pounds reduced for least cost – would likely offset the potential for impairing local segments through a statewide market. A local government representative disagreed with first restricting trades to the local basin, stating that there may not be robust local markets in every basin, and/or the limited number of trades available might greatly increase the price per credit.

A local government stakeholder suggested a five-year review to assess the impact on Bay segments, and an ENGO stakeholder suggested the opposite – assess the credit availability within each basin in five



years. MDE suggested that language be added to mitigate for the potential of leading segments on a trajectory of impairment: if at any point a local water body or tributary was negatively affected by an overabundance of trading in one area, the proof of this would cause trading to shut down in that area. A development stakeholder expanded on this, suggesting that a periodic review to assess the market would also include a review to ensure there were no unintended consequences or deleterious effects on water quality.

Ms. Culzoni of the Support Team reminded the WG that Virginia allows statewide trading if there are no credits available within the basin. A check through the online database would suffice to determine the absence/presence of credits within a basin; this would be verified by MDE. It was suggested by a development stakeholder that this MDE verification occur before contracts are established with credit suppliers. A local government stakeholder suggested an additional step to the certification process whereby the developer can obtain an official document from MDE stating that credits within the basin could not be obtained. One impact of this requirement would be the developer's obligation to purchase all credits within a basin for development in the same basin regardless of price.

A public interest stakeholder suggested a simulation for trading within the different geographical units. MDE replied that it will examine the basins, pick out the basins least likely to have a robust trading market, and propose some basin bundles that may be acceptable to the WG.

MDA reminded the WG of the delivery ratio applied to credits. Some credit suppliers may have a delivery ratio of zero because the load or offset is delivered to a reservoir. She asked the WG to consider the value of edge-of-segment impact versus delivered to the Bay. If a developer can trade within their segment, it opens the market up more than a market centered on the delivery ratio, which locks out some credit producers.

It was noted by MDE and MDA that all five basins currently have some degree of impairment and half of all segments are impaired.

It was also noted that the difference between starting trading at the state or basin level is distilled in the question, 'is the buyer obligated to buy credits (if available) at the basin level?'

**ACTION:** Information on sediment loads associated with ongoing development will be given to the WG.

**ACTION:** MDE will examine the five basins, pick out the ones least likely to have a robust trading market, and propose some basin bundles that may be acceptable to the WG.

#### *Cross-Sector Trading for TMDL Compliance*

The WG reviewed the three alternatives under consideration, which were chosen by the subgroup.

The discussion began with an agricultural stakeholder proposing another alternative, no cross-sector trading until 2017. MDA is concerned that the agricultural sector will not meet its allocation if trading takes BMPs out-of-sector. There is also concern that there are some agricultural BMPs in the WIP which may not satisfy the TMDL, since the Bay Model has not yet given those BMPs a load reduction rate. With each run of the Model, the agricultural sector has not progressed. The agricultural sector is uncertain if there will be excess credits to trade. MDE responded that cross-sector trading for compliance creates a more robust, larger market.

Local government stakeholders expressed concern that waiting to trade cross-sector may stall the market – using only onsite offsets and fees-in-lieu until those trades are begun, since both compliance and AfG will comprise the trades on the market. It was not acceptable to local government that agricultural credits would be reserved and reduce the competitive price, forcing the public to pay the most expensive price of compliance. Through a reduction in supply, the demand stimulus is likewise reduced. A development stakeholder added that this will also reduce the number of agricultural BMPs produced before 2017 because the price paid will be lower between farmers (and thus there is less incentive to produce), but

after 2017 the price will increase based on the high cross-sector demand. MDE sees the benefits of using short-term agricultural BMPs to meet the state's TMDL until permanent BMPs are affordable.

MDE stated that if agriculture is concerned that there will be additional TMDL requirements than what the BMPs already committed to on agricultural lands will comply with, agriculture can purchase credits. There will also be assured protection for those agriculturalists which have sold off the supply beyond their previous baseline for a committed time period. An agricultural stakeholder welcomed a guarantee of protection for trading farmers before the 2017 model run.

A local government stakeholder added that it is not correct to assume that local jurisdiction WIPs would require trading because they were drafted without the presence of a market. Therefore, most WIPs do not include forms of compliance which may be substituted with trading.

One WG member questioned whether this issue was within the scope of the WG's objectives. He recalled that this issue had been decided as not within this WG's scope at a previous meeting. Another WG member responded that it was decided to approach this topic because of the interrelatedness of all trading and its mechanisms, and to ensure that all trading policy is uniform.

### **Effective Date/Transitioning**

The WG received the clarification that according to the WIP, regulation must be in place by January 1, 2014, the effective date may be chosen as any time thereafter. The developer stakeholders are interested in establishing a transition period which would protect all development with current investments. The subgroup had proposed that preliminary plan submittal demonstrate engineering work or a significant investment beyond parcel purchase on the project. Such a project would be grandfathered into the AfG policy as long as it continued pace and met certain trigger dates. Although MDE cautioned that the grandfathering process used for the stormwater regulations is not fully comparable, developer stakeholders explained that the cost of offsets may cause a whole project to be cancelled or financing to be insufficient. With AfG policy resulting in the incentive to maximize onsite BMPs and minimize project footprints, developers may need to reconfigure projects.

An ENGO stakeholder asked how new loads will be accounted for until the policy effective date. Technically, she added, the state should not be approving development and it should not be grandfathering projects without a plan to offset those loads. MDE requested the WG's recommendation and noted the need to implement the AfG policy as soon as possible. Another ENGO stakeholder recommended project submissions include the AfG arithmetic/calculator results with their submittal to create data of the load generated between the gap of TMDL allocation and the AfG. However, this data might be considered confidential or be only a rough estimate. A public interest stakeholder suggested that the calculator be run on the projects by the State instead.

It was initially suggested that a full year between regulation implementation (December 31, 2013) and the effective date (December 31, 2014) would be sufficient to create and meet the timeline of a grandfathering approval process. This would also create a year for credit generation.

The date under discussion by the WG (December 31, 2014) is the submission deadline, whereby all documents must be submitted for review and meet a certain criteria. The exact documents needed for submittal will also be specified. Depending on the jurisdiction and the size of the project, it would take varying amounts of time to meet the submittal deadline and criteria. Ms. Maloney will ask her constituents for the approximate time required to meet the deadline.

**ACTION:** Ms. Maloney will ask her constituents for the approximate time required to meet the deadline.

### **Redevelopment**

The WG reviewed the current definitions under consideration for redevelopment. MDE is in favor of a sliding scale – which is an alternative under consideration by the WG: “Include in redevelopment parcels having pre-development impervious cover of between 20% and 40%, and provide a sliding scale of

amount of offset needed.” The MACo representative stated that MACo is split between encouraging redevelopment and fearing disincentivizing development in other areas. An ENGO stakeholder suggested treating redevelopment as urban land use, since he found any other accommodations for redevelopment to be unnecessary when wastewater already incentivizes it. MDE noted that when the suggestion was made to exempt redevelopment from the AfG, the zero allocation baseline was still an option. The MDE suggestion for defining redevelopment may change with a different baseline.

It was noted by two WG members that the more work involved with the calculations, the greater disincentive to develop.

This discussion was deferred to constituents until the next meeting, as it was decided by the WG to be contingent upon a baseline decision.

**ACTION:** Stakeholders and constituents will discuss redevelopment as a baseline issue before the next meeting.

#### **Next Steps**

The next meeting will be held on **Thursday, July 11, 2013 at 9:00 a.m. at MDE.**

#### **Public Comment**

None.