



July 17, 2017

Lynn Buhl, Assistant Secretary of the Environment  
Office of the Secretary  
Department of the Environment  
Montgomery Park Business Center, 1800 Washington Blvd.  
Baltimore, MD 21230

Dear Assistant Secretary Buhl,

We appreciate this opportunity to provide comments on the Department's proposed Water Quality Nutrient and Sediment Trading and Offset Regulations provided to the Advisory Committee in June 15, 2017. The need for a clear and practical basis for trading and offsets is essential to ensuring that all options are available in making progress on our shared goals for restoring the Chesapeake Bay. We commend the Departments of Environment and Agriculture for all the hard work that has gone into drafting these regulations and promoting stakeholder input and engagement.

The Alliance has been engaged in a number of pilot projects aimed at developing approaches and creating tools that support landowner access to markets. In evaluating options in each of the Bay states we can see how well-designed and simple policies and regulations can facilitate or discourage market-based approaches. Any trading and offset program, must be designed so that all transactions result in real nutrient and sediment reductions, environmental uplift that is real and not just on paper or Maryland will not leverage private investment in restoration.

I apologize for providing these comments beyond the July 7 requested date but due to vacations and workload was unable to prepare until this time. I hope they may still be useful to your drafting team.

General Comments are provided below.

**1. The Use of Performance Credits Should be Eliminated or Strictly Controlled and the Use of Capacity Credits Limited.**

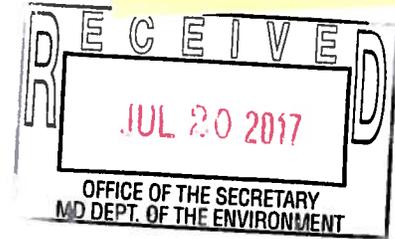
While we appreciate the need for regulatory flexibility, we strongly object to the use of so-called performance credits under the Proposal, which would allow municipalities to sell or trade credits based on the difference between a "cap" and the actual or projected optimized annual average effluent concentrations. Allowing the use of performance credits has the potential to undermine the Offset Program by diluting the market with paper credits that do not ultimately result in improvements to the Chesapeake Bay.

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Municipalities that have received Bay Restoration Funds (BRF) to upgrade their facilities to enhanced nutrient removal (ENR) are contractually obligated in exchange for BRF funding to operate their enhanced nutrient removal facilities in a manner that optimizes the nutrient capability of the facility. Authorizing “performance credits” would, by definition, either assume (1) a lack of enforcement by the state to enforce the terms of the BRF agreement and/or (2) an admission that such facilities have failed to optimize nutrient removal as required under their BRF agreement. In either case, the practice as defined in the Proposal raises legitimate legal questions and concerns.

Maryland citizens, as a matter of policy, have already invested in BRF facility upgrades. Therefore, to allow municipalities to gain an additional benefit under the Offset Program, without any further action, constitutes a form of “double-dipping” that would erode the integrity and purpose of the BRF program in restoring the Bay. Most importantly, the use of performance credits, as defined, would result in no additional reduction of pollution loading to the Bay.

Further, we believe that “Performance credits” if adopted would create a huge burden on MDE to administer, certify and track.

## **2. The “Bubble Permit” Concept Should be restricted by sector or establish a Priority for Credits Generated from Non-municipal Sources.**

“Bubble” permits or “watershed permits” have been used elsewhere to allow watershed load allocations to be met by trading within sectors. Where the bubble permit approach (sometimes referred to as a watershed-based permit) has been used, *e.g.*, Connecticut- Long Island Sound trading program and the North Carolina Tar-Pamlico program, Virginia’s wastewater credit exchange, it is applicable to combining wastewater treatment plant obligations. In each of these cases, the point sources have traded amongst themselves and have not been used to service stormwater or non-point source obligations. The legal precedent for using local bubble permits to include both wastewater treatment plants and stormwater requirements is questionable and could seriously discourage reduce demand for restoration-type credits (that result in new nutrient load reductions).

If the bubble permit concept is retained in this Proposal, the Department should at a minimum establish a clear policy based on a hierarchy that provides preference for all non-point source credits over credits from point sources (*e.g.*, municipal sources), exhausting all non-point source credits available in the marketplace before point-source credits would be eligible for exchange. Toward this end, if municipalities need nutrient credits to achieve individual wasteload reductions, we believe municipalities should be required to purchase available credits from sources unrelated to MS4 stormwater or municipal wastewater.

## **3. The Proposal Should Incorporate Aligning for Growth.**

The Department should incorporate a policy for Aligning for Growth within the Trading and Offset Program. For over a decade, the Department has deliberated – with significant stakeholder input – the need to account for and establish offsets to address growth that could undermine the Chesapeake Bay cleanup effort. The Proposal is the appropriate tool to address the basic environmental benefits associated with Aligning for Growth.

For new construction in urban areas, Virginia, for example, has adopted a post-construction target load for total phosphorus of 0.41 pounds per acre per year, using a flow-weighted mean concentration of pollutant in urban runoff. We believe that adopting a similar standard and approach to new growth within Maryland should be considered.

At a minimum, the Department should expressly authorize use of this rulemaking to address growth and allow the use of trading/offset credits described under this Program. Incorporating Aligning for

Growth into this Proposal could encourage local governments to proceed with policies to address new economic development without jeopardizing the hard work to restore the Bay.

#### **4. The Department Should Quickly Finalize the Trading Guidance.**

We acknowledge all the hard work over the last two years that has gone into developing the Department's draft guidance on the trading and offset program. Given the continued questions and concerns regarding how the trading and offset program will be implemented, we would encourage the Department to quickly finalize the guidance concurrently with or once the Proposal is finalized.

#### **Detailed Comments**

##### p. 2, Lines 6-9 – Definition of “Best Management Practices”

The Program should clarify that BMPs to be used under this Program must be consistent with the loading and effectiveness specifications under the Chesapeake Bay Model.

*Suggested language:*

(8) *Best management practice (BMP).*

(a) *“Best management practice” means a practice, or combination of practices, that is determined to be an effective and practicable method of preventing or reducing the amount of pollution generated by point or nonpoint sources.*

(b) *BMPs include agricultural and urban structural and nonstructural pollution control, operation, and maintenance procedures and practices that prevent or reduce pollutants.*

(c) *BMPs must be consistent with the Chesapeake Bay Model, including specifications for loading, effectiveness, and life span, unless otherwise authorized by MDE.*

##### p. 2, lines 15-18 – Definition of “Capacity Credits”

We recommend the definition of capacity credits be eliminated altogether or, if included, should be defined as follows:

##### p. 3, lines 2-5 – Definition of “Credit”

We recommend the Department establish in guidance the life span for the various BMPs that generate credits. For example, while some BMPs, such as no-till farming, will result in credits that have a life span of one year, other BMPs, such as rain gardens, may have duration of 5-10 years; in contrast, stream restoration and buffers protected by an easement would ordinarily have a perpetual life span.

##### p. 4, lines 17-19 – Definition of “Minor permit modification”

We recommend this definition be deleted as a defined term in the regulations as it is not used elsewhere in the regulations.

##### p. 5, lines 1-10 – Definition of “Performance Credit”

For the reasons stated above, we believe the use of so-called performance credits should be eliminated from this program.

##### p.5, lines 19-23 – General Policies

This section should differentiate between existing and new dischargers and include a provision for MDE to make a determination based on the location and nature of the project proposed to utilize credits.

##### p. 6., lines 1-2 – Definition of “Reserve Ratio”

*Suggested language:*

We recommend that the reserve ratio be expressly defined as follows:

(41) *“Reserve ratio” means five percent of the total number of credits in a trade to create a portion that is set aside into a pool or cache of credits.*

p. 6, lines 8-9 – Definition of “Stormwater point source”

Suggested language:

(44) “Stormwater point source” means a regulated stormwater discharger, including but not limited to, a Phase I MS4 or a Phase II MS4 entity.”

p. 6, lines 26-29 – Definition of “Uncertainty ratio”

Uncertainty represents an intent to hedge against a deviation from established BMP effectiveness rates based on inherent risks with implementation or performance. Some BMP’s have a higher risk of failure than others and many are difficult to verify in terms of performance. We recommend that the MDE consider creating categories of uncertainty ratio that would favor credits produced by land restoration or other low risk BMPs while reserving higher uncertainty ratios for annualized BMPs where performance is highly variable or difficult to verify. For example, a riparian forest buffer or wetland restoration has less risk of performance.

Suggested language:

(50) “Uncertainty ratio” means a ratio that is applied to compensate for possible discrepancies in estimated pollution reductions resulting from inaccuracy in credit estimation methodology or variability in project performance, or to provide a margin of safety in the achievement of water quality goals.

(a) The Department may adjust the uncertainty ratio where documentation or monitoring provides reasonable assurance of the projected reductions or to account for variations in performance and ease of verification for allowable practices.

p. 8, lines 5-6 – Eligible participants

Suggested language:

(10) Persons that aggregate certified credits for future sale.

p. 9, lines 1-7 – Certified credits

The Department should clarify in the Proposal that it has or will create a registry for the recording certified credits. It should also establish and provide clear guidelines on the certification process, including the use of deadlines for credit approval. There is some concern with the Department of Agriculture providing certification of agricultural BMPs used for trading because the trading guidance has the stated purpose protecting productive farmland as a goal. There may be a direct conflict between the mission and the objective of implementing restoration BMP’s.

Suggested language:

E. Credits may be generated using practices that reduce total nitrogen, total phosphorus, or total suspended solids and are accepted by the Chesapeake Bay Program.

(1) Before a credit is available for purchase it must be certified by the:

(a) Department through the issuance of a permit;

(b) Department through its Water Quality Nutrient and Sediment Trading and Offset Program; or

(c) Department of Agriculture through its Nutrient and Sediment Credit Certification Program.

(2) Credits shall be quantified using methodologies consistent with appropriate assumptions and provisions of the Chesapeake Bay TMDL and the Chesapeake Bay Watershed Model and recorded in a Registry maintained by the Department in accordance with Departmental guidance.

(a) Credits shall be classified as term or perpetual credits by the Department.

(b) The registry will indicate whether the credits have been released and eligible for exchange.

p. 10, lines 9-16, Trading Regions

The Department should consider dividing the Eastern Shore and the Western Shore Trading regions.

Suggested language:

(1) *The Department has establish the following trading regions necessary to attain the water quality standards for the tidal waters of the Chesapeake Bay, while also considering the potential effect on local water quality standards:*

- (a) *Potomac River Basin;*
- (b) *Patuxent River Basin; and*
- (c) *Eastern Shore River Basins*
- (d) *Western Shore River Basins, including the Susquehanna watershed.*

p.11, line 15

Change "trade" to "purchase".

p. 12, line 5-10 – Bubble permits

Additionality must be a central principle for a trading program. If municipal facilities are permitted to exchange paper credits without actually reducing additional loading, the trading program will be undermined. If the Department should proceed with adopting a watershed based permit, it should limit trading to point sources and clarify a tiered-preference where credits for non-municipal sources, if readily available, get priority over credits generated from point sources, such as MS4 stormwater or wastewater treatment plants.

p.12, line 10 – reserve ratio

The 5 percent reserve ration reference here should be moved to section .10 and should be applicable to all sectors not just point sources.

p.14, lines 9-19 – MS4 Stormwater Point Source Trading

In order to clarify MS4 permits as this regulation is implemented, we encourage MDE to consider language for .08 A (1) that would provide for the replacement of all MS4 permits with new reissued permits that puts all on a consistent playing field as it relates to incorporation of credit and offset provisions. (1) a and b should be amended to prevent those in non-compliance from selling credits but should allow the purchase of credits from other sectors to achieve compliance.

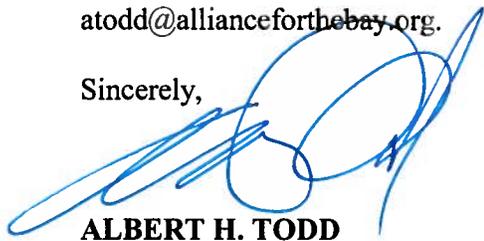
p.16, Section C. – Credit Determination and Verification

This section currently lacks any description of credit verification requirements or responsibilities. This must be added.

In conclusion, thank you for your opportunity to comment. We are grateful for efforts to include stakeholders in the process to develop these regulations and trading guidance. We hope your leadership and continued effort results in the establishment of a successful trading and offset program in Maryland.

Please do not hesitate to contact me if you have any questions. I can be reached at 443.949.0575 or [atodd@allianceforthebay.org](mailto:atodd@allianceforthebay.org).

Sincerely,



**ALBERT H. TODD**

Executive Director

Member, Water Quality Trading Advisory Committee