CHESAPEAKE BAY COMMISSION

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June 29, 2017

Mr. Gary Setzer
Office of the Secretary
Maryland Department of the Environment
1800 Washington Blvd., Suite 745
Baltimore, MD 21230

Dear Mr. Setzer:

At the June 15th meeting of the Maryland Water Quality Trading Advisory Committee, on which I serve, Assistant Secretary Buhl encouraged the members and those present to prove you any comments on the draft MDE regulations concerning the "Maryland Water Quality Nutrient and Sediment Trading and Offset Program" distributed in early June. Our general and specific comments are attached.

We fully support the concept of trading, and believe it is another tool to help advance Bay restoration. The Commission's May 2012 report, "Nutrient Credit Trading for the Chesapeake Bay An Economic Study" helps define the impetus for this approach.

We also believe it would be desirable to reconvene the Advisory Committee prior to the formal submission of these regulations to the Secretary of State, so that all the comments received and the Department's response to those comments could be reviewed. We know there is strong interest in this subject from the Committee members, local government, NGOs, and members of the General Assembly.

Thank you and feel free to contact me if you have any questions, at mhoffman@chesbay.us, or 410-263-3420.

Sincerely,

Mark L. Hoffman
Maryland Director

Cc: The Honorable Tawanna Gains, Chair, Maryland Delegation, CBC
The Honorable Guy Guzzone, Vice-Chair, Maryland Delegation, CBC
Ann Swanson, Executive Director, CBC
Lynn Buhl, Assistant Secretary, MDE

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Proposed Chesapeake Bay Commission Comments on
Maryland Water Quality Nutrient and Sediment Trading and Offset Program Draft Regulations

Comparison to Federal Standards

The draft regulations state that there is "no corresponding federal standard to this proposed action." This is not the case. Although there are not federal regulations, per se, that mirror the intent of the proposal - to established standards for a State trading program - there is a myriad of federal law, rule and policy that define the federal expectations for a State trading program.

One core objective of the proposal is to establish a program that satisfies the programmatic and technical requirements of the EPA, to help address the State's obligations for total maximum daily load (TMDL) compliance and ensure consistency with National Pollutant Discharge Elimination System (NAPDES) permit standards. We believe the draft regulations could be strengthened through detail in this section to address these concerns.

Applicable standards that should be cited include: 1) Clean Water Act (33 USC, §1251 et seq.) and implementing regulations; 2) EPA Water Quality Trading Policy; 3) EPA Water Quality Trading Took-Kit; 4) Chesapeake Bay TMDL (Section 10 and Appendix S); and 5) EPA Technical Memorandum related to trading. Moreover, this section should detail, for each significant provision of the regulations, the extent to which the MDE proposal comports with federal standards, and if deviations from federal guidance are proposed, they should be documented and justified.

Economic Impacts

Both Economic Impact sections should consider, in some detail, the potential financial impacts of these proposals. The presumption is, of course, a net positive economic benefit, but it is important to describe and benchmark anticipated betterments.

Regulation Text

General Comments/Concepts

1. We believe the clarity of chapter could be better achieved through the incorporation of individual regulations dealing with significant themes that cross all potential trading opportunities – specifically: a) enforcement, b) certification and verification, c) local water quality protection, d) uncertainty, e) credit calculation, and f) baseline calculation. Each of these topics is substantive, and requires considerable details for clarity and transparency. As currently drafted, bits and pieces of these topics are mentioned in specific regulations, but it would be much clearer if each were considered in detail in separate regulations.

2. Whom can be excluded from program participation? Detailed in 26.08.11.04E(1) and elsewhere in the draft regulations is the concept that permittees "in significant noncompliance with their permit" "may" be excluded from participation in the program. This issue was discussed at length during the MWQTA meeting on June 15. No consensus emerged, but it seems clear that many felt it was a burdensome requirement (and potentially very bad for trading) if *any* permit violation could be used as a basis for program exclusion (a potential outcome of the draft language). However, the use of the word

"may" provides total latitude to MDE to determine when someone would be ineligible for participation. Given that a core objective of the regulations is to provide certainty to both credit buyers and sellers, this provision and similar ones within the chapter need to be considered and reworked, to achieve the goals of consistency, transparency, encouraging program participation and the exclusion of "bad apples" from the program. Additionally, the impacts (if any) of someone becoming ineligible after a trade had been consummated needs to be specifically addressed.

3. Reserve ratio. This concept is discussed in 26.08.11.05E(7) and 26.08.11.07A(5). The reserve ratio provisions seems to create a pool of credits that MDE could effectively use at their discretion. It doesn't see fair to credit buyers to potentially subsidize someone else, perhaps their competitors.

4. Geographic scale of trading. 26.08.11.05F defines three trading regions and 26.08.11.05B considers the potential impacts of trading on local water quality, and the requirement that trading does not contribute to local quality impairments, prevent the attainment of local water quality standards or violation water quality standards. By definition, trading will impact local water quality at a fine scale, unless both parties are co-located. The key is to define to what extent this impact is acceptable to achieve a broader outcome at a lower cost. The draft regulations only give priority to subwatersheds with a local TMDL. In those cases the credit generator must be upstream of the credit purchaser. However, the regulations do not address the "delivery ratio," the extent to which the impact from the credit generation will be effective reduced based on the distance from the credit purchaser. And this same concept needs to be applied to all trades, whether or not there is a local TMDL.

5. Public Participation. As detailed in the EPA guidance, the trading protocol needs to be clear and transparent. For example, the provisions for public participation need to be expanded to include the ability to review and comment on credit-generating proposals during the certification process.

6. Uncertainty ratio is defined but not used. EPA guidance provides details on the applicability of this concept to trading programs, a 1:2 ratio for point/non-point trades, and criteria for adjusting this standard. This should be included.

7. The concept of the "bubble" permit (26.08.11.07A(4)) is far too open ended as written, and should be limited in scope.

8. Capacity Credits. Subparagraph 26.08.11.08A(1)(b)(iv) allows MS4s to purchase capacity credits "if trading market with other sources, including agriculture, does not reasonable meet the demand in a reliable and cost effective manner." The concept of capacity credits should be abandoned. The goal here is to achieve additive reductions in nutrient and sediments entering our waterways.

9. Trading Manual. During the meeting on June 15th, reference was made several times to details "that would be included in the manual," however, it was clear that no draft copy of the manual would be provided prior to the desired submission of the regulations. We believe in impossible to fully evaluate the proposed trading program without both the regulations and the manual. Lacking the manual, we will desire to see more, not less, details in the regulations to ensure key programmatic outcomes will be achieved.

Specific Comments

26.08.11.01. The sentence "Nutrient and sediment trading offers a promising alternative…" is somewhat speculative and seems out-of-place in regulatory text. The Purpose section should simply clearly define the purpose of the chapter. Also, saying the regulations allow load reductions "elsewhere in the Chesapeake Bay watershed" would imply watershed-wide trading is allowed, when it is not as proposed.

26.08.11.02. This text could be merged with 26.08.11.01 and convene the same meaning, the first sentence is the same.

26.08.11.03B(8). The definition of "Best Management Practice" should include reference that it must be approved by the Chesapeake Bay Program.

26.08.11.03B(5). "Uncertainty ration" is defined, but not used in the text. All of the defined terms should be checked to make sure they are used, if not, no definition is needed.

26.08.11.04A states that "any person" can participate in the program, but then in 26.08.11.04D specific categories of participants are identified "eligible participants … include". Although Section D does not exclude "any person" given the use of the non-exclusionary word "include," great clarity would be conveyed if the list in Section D was part of the definition in Section A.

26.08.11.04B details a requirement for "regulated persons," but this class of individuals is not defined, hence it is unclear to whom it applies.

26.08.11.05C states that "each source must satisfy the baseline established in accordance with this chapter or…". It is tedious to find the potential intersections with this requirement in the individual regulations, and hence (as mentioned in 1), an overall regulation dealing with baseline calculations would improve clarify.

26.08.11.05E(5) says that "permanent credits are available in perpetuity and, once verified upon project completion, do not require recertification, but may be verified annually, except:". It is not clear what the "except" applies to, "available in perpetuity", "do not require recertification" or "may be annual verified". If it is the latter, then the need for the "exception" seems unwarranted, as the draft regulation says the project "may" be verified annually, which means it could never be verified. Hence, if the intent is to never verify the items in 26.08.11.05E(5)(a) and (b) then they are already consistent with the "may be verified" language and do not require an exemption from it.

26.08.11.07B(4) (Significant industrial dischargers). This subsection is very vague. The provision for a "case-by-case" determination effectively creates no transparent standard.

26.08.11.08A references the "Federal Act," but does not define what federal act is being referenced.

26.08.11.08A(1) says "permittees must acquire credits for total nitrogen … to meeting Chesapeake Bay nutrient and sediment reduction requirements". Shouldn't this say "may" acquire credits? Also, aren't the MS4s acquiring credits to meet the terms and conditions of their MS4 permits, as opposed to the broad goal of reducing nutrients and sediments entering the Bay? The latter is the larger goal, but of proximate concern for the MS4s are the provisions of their permits.