



CHESAPEAKE BAY FOUNDATION
Saving a National Treasure

December 19, 2011

Ms. Patricia Gleason
Water Protection Division
U. S. Environmental Protection Agency, Region 3
1650 Arch Street
Philadelphia, PA 19103-2029

Dear Ms. Gleason:

The Chesapeake Bay Foundation (CBF) would like to commend you, and other involved Environmental Protection Agency (EPA) staff, for the review of the state nutrient trading programs. We recognize this was an intensive, complicated task and we sincerely appreciate your efforts. As you know, CBF believes that nutrient trading programs, subject to strict oversight and carefully-crafted rules, are important to the achievement and maintenance of the Chesapeake Bay Total Maximum Daily Load (TMDL).

We have also encouraged EPA to play a greater role in structuring and overseeing the jurisdictions' nutrient trading programs. Absent EPA's leadership, we will be left with an unequal playing field across jurisdictions and lose the opportunities for cost-efficiency in pollution reductions that a nutrient trading market can offer.

With that in mind, we ask you to consider the following comments on the draft audits of the state trading programs.

General Comments:

First, we suggest that EPA clarify, in the report, language that is attributable to the states' perspective on their own trading programs versus EPA's assessment of the program. As it stands now, the report appears to be a mix of those perspectives which leads to confusion. For example, in the Pennsylvania review, EPA concludes "...PADEP NCT needs to change its NPS baseline requirements to conform to the Chesapeake Bay TMDL." (p.3) The last paragraph on p. 8, however, conflicts with this conclusion. This section apparently reflects the perspective of PA DEP not EPA, though that distinction is not clear.

Similarly, in the review of Maryland's program (top of p. 6), there is language regarding the need for National Pollutant Discharge Elimination System (NPDES) permits to be consistent with local water and sewer plans. Does this comment reflect EPA's recommendations or what the state claims should happen?

Overall, we recommend the document be revised to clarify these and other similar discrepancies and, where possible, EPA should convey where it agrees or disagrees with a state's policy position.

Second, we remain concerned about the lack of guidance from EPA regarding how states should be evaluating, tracking, and offsetting pollutant loads associated with new development. This issue was identified as a "Tier 1" conformance need in all the state audits that we reviewed. And, as we have previously discussed, we believe this is an area where EPA guidance and leadership is sorely needed. Specifically, we recommend that EPA consider issuing guidance that addresses the following questions:

- What sources of additional pollution loads should be included in offset policy/rules? (i.e., septic, construction, post-construction stormwater, air)
- Do the states' existing requirements for post-construction stormwater management comport with the requirement of no net increase in pollutant loads for nitrogen, phosphorus, and sediment? If not, how should the states quantify and track the necessary pollution offsets?

We also believe the jurisdictions would benefit from EPA clearly articulating an approach or framework that NPDES permit writers could use to ensure that trading does not cause or contribute to the violation of local water quality standards. This guidance should include an approach for evaluating nutrient exchanges that occur among the 92 tidal TMDL segments as well as addressing exchanges that involve non-tidal waters, especially those with nutrient-related impairments.

The goal should be a standardized process for demonstrating that prospective nutrient exchanges are protective of local water quality. Such an evaluation could be modeled after the types of analyses routinely completed by state permitting staff when individual NPDES permits for wastewater treatment plants are issued or reissued. This guidance will help ensure that the state trading programs are consistent with the Clean Water Act and provide clarity and consistency among the states. Furthermore, we suggest that EPA require the states to amend their trading policies or regulations to mandate this type of evaluation as part of their Tier 1 recommendations.

Lastly, EPA should also make recommendations for minimum standards for the states' certification and verification processes. Currently, processes in some states are clearly explained in trading policies and include safeguards such as on-site inspections, mandatory annual or bi-annual inspections, and spot checks. Others are more flexible, allowing project proponents to develop verification plans. Keeping in mind that the use of water quality credits is in NPDES permits, EPA guidance on what is minimally acceptable for certification and verification is critical to ensuring the programs are legally defensible and provide the necessary level of accountability and transparency.

State Specific Comments:

Virginia – We commend EPA for highlighting the problems associated with the grandfathering provisions in Virginia’s stormwater regulations and the permit loophole that does not require offsets for pollution loads associated with small wastewater treatment plants. We note, however, that some the deficiencies under Tier 1 conformance are listed as questions. EPA should clarify that addressing these issues is a “must” in order for Virginia’s trading program to provide the necessary “reasonable assurance” of complying with the Bay TMDL.

As noted in our general comments, we believe that Virginia should amend their trading program to include a standard evaluation process to ensure local water quality is protected. In addition, we suggest that EPA require Virginia to amend their trading program to ensure that baseline requirements for sellers are consistent with the most current version of the Bay-wide TMDL and the associated Watershed Implementation Plan. Virginia’s current baseline for agricultural operations, while relatively strong, is dated, based on Virginia’s Tributary Strategy. This recommendation should be included as a Tier 1 recommendation.

On p. 4, it is noted that Virginia’s trading program does not currently include MS4 permittees and septic systems. We suggest that EPA encourage Virginia to allow trading by MS4s that are assigned wasteload allocations (WLAs) in their permit and existing/new septic systems. In particular, we believe that efforts to meet MS4 WLAs will especially benefit from trading. The most costly and, arguably, the most challenging aspect of complying with the Bay-wide TMDL will be reducing and maintaining pollutant loadings from urban/suburban stormwater. The majority of this responsibility will fall to local governments, many of which lack the technical and financial capacity to achieve and maintain the necessary pollution reductions. CBF has a keen interest in helping local governments meet their TMDL obligations and facilitating the participation of MS4 permittees in a nutrient trading program is appealing as a cost-effective way to achieve some of their pollution reductions.

Maryland – As noted in our general comments, there are several instances in the text when it is unclear if what is stated is Maryland’s policy or EPA’s recommendations.

In addition, on pages 10 and 11, there is a discrepancy regarding the use of reserved credits. On page 10, it is stated that the reserve is not insurance for failed offsets. On page 11, it is stated the reserve could be used to help the generator stay in compliance. EPA should clarify that the reserve is not to be used as insurance for credit failures.

Lastly, we re-iterate our general comment that EPA should include a Tier 1 recommendation that the state should amend their trading policy to include a standard evaluation process to ensure local water quality is protected.

Pennsylvania – We commend EPA for highlighting that Pennsylvania’s baseline for agricultural producers is deficient. We disagree, however, with the recommended changes that EPA has offered for Pennsylvania’s baseline, absent a demonstration that these additions will equate to an individual farm’s share of Pennsylvania’s load allocation for agriculture under the Bay-wide TMDL. Without this demonstration, CBF will maintain its current belief that this aspect of Pennsylvania’s program, as currently structured, does not comply with EPA’s own guidance on water quality trading.

Similarly, we agree with EPA’s assessment that Pennsylvania’s crediting approaches need to be more closely examined. In particular, we have raised concerns about the amount of credits attributed to “non-traditional” credit generating projects, such as manure to energy. As a result, we have been working through the Chesapeake Bay Program’s Trading and Offsets and Agricultural Workgroups to set up a regional review panel that will provide technical input on the expected pollution reductions associated with these types of projects. We ask that EPA provide the necessary technical and financial support to ensure this review occurs in a timely fashion.

EPA should include, as a Tier 1 recommendation, that Pennsylvania eliminate their policy that allows credits to be generated by state or federally funded practices. This provision violates typical “additionality” principles contained within other environmental markets.

Lastly, we re-iterate our general comment that EPA should include a Tier 1 recommendation that the Commonwealth should amend their trading policy to include a standard evaluation process to ensure local water quality is protected.

Thank you for the opportunity to provide input. Please do not hesitate to contact me with comments or questions (email: bmcgee@cbf.org; phone: 443-482-2157).

Sincerely,



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Chesapeake Bay Foundation

cc: Jeff Corbin, EPA, Senior Advisor, Chesapeake Bay
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