

Permanence of Credits Used for NPDES Permit Issuance and Compliance

EPA Technical Memorandum

Prepared by EPA Region III

8/19/2014

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ABBREVIATIONS AND ACRONYMNS

CAFO.....	Concentrated Animal Feeding Operation
EPA	United States Environmental Protection Agency
MS4	Municipal Separate Storm Sewer System
NPDES.....	National Pollutant Discharge Elimination System
TMDL.....	Total Maximum Daily Load
WLA	Waste Load Allocation

SCOPE

This technical memorandum addresses EPA's expectations for information the Chesapeake Bay jurisdictions¹ should incorporate when addressing credit permanence in NPDES permits.

This technical memorandum is not official agency guidance and does not replace the EPA 2003 Trading Policy². Its purpose is to elaborate on EPA's expectations, set out in Appendix S and Section 10 of the Chesapeake Bay Total Maximum Daily Load (Bay TMDL)³, for the Bay jurisdictions' offset and/or trading programs. As stated in the Bay TMDL, the Bay jurisdictions' offset and/or trading programs are expected to be consistent with and supportive of the water quality goals of the Chesapeake Bay TMDL, including its allocations and assumptions and the common elements of Appendix S. Specifically, this technical memorandum identifies EPA's expectations for credit permanence in the Chesapeake Bay jurisdictions' offset and/or trading programs when using credits for NPDES permit issuance and compliance. This technical memorandum is applicable only in the Chesapeake Bay watershed and may be revised in the future.

INTRODUCTION

The Bay TMDL expects the Bay jurisdictions to offset all new or increased loads and identifies trading as a potential tool that the Bay jurisdictions could use to implement the Bay TMDL. Trading and offset programs should be consistent with the Clean Water Act,⁴ its implementing regulations, EPA's 2003 Water Quality Trading Policy, EPA's 2007 Water Quality Trading Toolkit for NPDES Permit Writers⁵, and the Chesapeake Bay TMDL as described above.

Credit permanence in the context of this technical memorandum is defined as the duration for which a credit purchaser should purchase nitrogen, phosphorus and/or sediment credits from certified projects and/or practices to meet the obligations of its NPDES permit.

There are essentially two separate cases:

- 1) Credit permanence for an existing point source to meet its permit limits: In this case, the source was in existence when the Bay TMDL was issued in December 2010 and received a wasteload allocation (WLA) that has been incorporated into its NPDES permit.
- 2) Credit permanence for new or expanded source offsets: The Bay TMDL defines all new point sources as having a WLA of zero; that WLA would need to be incorporated

¹ The Bay jurisdictions are: Delaware, Maryland, Pennsylvania, New York, Virginia, West Virginia and the District of Columbia.

² United States Environmental Protection Agency, Water Quality Trading Policy (2003), available at <http://www.epa.gov/owow/watershed/trading/finalpolicy2003.pdf>. Last accessed 11/30/2013.

³ Full text of the Bay TMDL is available at <http://www.epa.gov/reg3wapd/tmdl/ChesapeakeBay/tmdlexec.html>.

⁴ Clean Water Act, 33 U.S.C. §§ 1251 et seq.

⁵ United States Environmental Protection Agency, "Water Quality Trading Toolkit for Permit Writers," Updated June 2009. Available online at <http://water.epa.gov/type/watersheds/trading/WQTTToolkit.cfm>

into an NPDES permit, which essentially means a permit could not be issued without securing credits to offset the entire load. Existing sources that are expanding also are expected to offset increased loads because these increased loads were not included in the Bay TMDL. The credits for these offsets should be secured prior to the authorization to discharge.

In both instances, credits should be created and used within the periods that are used to determine compliance with effluent limitations. The NPDES permits for Bay sources establish annual effluent limitations and therefore the credit life should be of similar duration. To ensure that this technical memorandum is addressed, EPA expects to review all permits for significant dischargers⁶, any new or increased dischargers, and any permit involving an offset or trade issued in the Chesapeake Bay Watershed.

NPDES PERMIT HOLDER CREDIT PURCHASES

The credit purchaser should provide the certainty through a demonstrated commitment that it can meet its NPDES compliance obligations as outlined in the Bay TMDL Appendix S common elements, “Certification and Enforceability (a) –(f)” and “Safeguards (g)”. EPA expects that commitment to meet the following three criteria:

1. At a minimum, credits should be secured for the duration of the authorization to discharge. This should be set forth as a permit condition.
2. The credits should be created and used within the periods that are used to determine compliance with effluent limitations.
3. The procurement of credits should be documented in the permit, fact sheet, and administrative record. This includes documented assurances in place to show that credits have been secured from a project and /or practice certified by a person properly authorized and qualified to do so for the duration of the authorization to discharge. This documentation should include, at a minimum, the following:
 - a clear description of the measures that provide the basis for the credits and demonstrate that they are quantifiable, verifiable, and enforceable;
 - documents reflecting that criteria 1 and 2 above have been met; and,
 - a copy of the contract or agreement between the credit buyer-permittee and the seller including appropriate measures for the buyer-permittee to verify the continuing existence and effectiveness of the measures on which the credits are based, and appropriate remedial relief in the event that those measures lose their effectiveness, in whole or in part or documentation of registration to participate in a Nutrient Trading Clearinghouse, Auction or Exchange for applicable credits that are approved by the state, and,
 - available and existing monitoring and modeling data related to the credit generation and credit usage.

⁶ Significant dischargers as defined by the Chesapeake Bay TMDL page 4-7.

LENGTH OF TIME FOR WHICH AN NPDES PERMITTED CREDIT PURCHASER IS EXPECTED TO SECURE CREDITS

NPDES permits should require that credits for new loads be available and secured for the duration of the authorization to discharge. Most permits contain multiple-year terms. Credit-generating projects and practices are generally certified for one year or longer, while credits are generated and used in accordance with state offset and trading programs and/or case-by-case practices for one year. Assurance that credits are available for the full duration of the permit provides a greater likelihood that permit conditions will be met. This assurance should be set forth as a permit condition.

EPA expects the Bay jurisdictions to require that needed credits will be secured by the permittee for the duration of the authorization to discharge. Each Bay jurisdiction has discretion to decide how to assure credit availability in the future but, at a minimum, credits should be secured for the duration of the authorization to discharge. Currently, some Bay jurisdictions have different requirements for the minimum amount of time for which facilities with NPDES permits should secure credits. In Region III, some states require permit holders to secure credits for ten years, while other states require the permit holder to secure credits for five years.

Credits should be created and used within the periods that are used to determine compliance with effluent limitations. The NPDES permits for Bay sources establish annual effluent limitations and therefore the credit life should be of similar duration. This is consistent with Section III G (3) of the 2003 EPA Water Quality Trading Policy where permits specify monthly, seasonal, annual, or other time periods during which compliance will be determined.

OBLIGATION TO SATISFY PERMIT LIMITS

There may be a situation where a seller does not provide credits that were committed in a contract between the seller and the buyer, i.e., a default. The NPDES permittee continues to be responsible for meeting the limits of its permit including all terms and conditions. If the credit purchaser's permit indicated that credits would be used to meet a limit, the limit remains in place regardless of issues with the credit seller. EPA expects NPDES credit purchasers to exhibit due diligence when entering into credit purchase agreements because the facility with an NPDES permit remains liable and is legally responsible for meeting its compliance obligations, even when a seller defaults.

SUMMARY OF EXPECTATIONS

To ensure that this TM is addressed, EPA expects to review all permits for significant dischargers in the Chesapeake Bay and for any new or increased dischargers, as well as any permit involving an offset or trade. As part of its review, EPA will review the permit, the administrative record and associated fact sheet, and supporting documentation and expects that the expectations in this document will be addressed. To the extent feasible, these reviews will be conducted in consultation with the applicable state agency.