

December 20, 2011

Ms. Patricia Gleason  
Lead, Trading Program Review  
U.S. Environmental Protection Agency, Region 3  
1650 Arch Street  
Philadelphia, PA 19103-2029

Dear Ms. Gleason:

Thank you for circulating and soliciting feedback on the draft observations of state trading and offset programs. This letter contains comments from the World Resources Institute (WRI). Our comments are based on findings from over a decade of developing Bay programs and forecasting their volume and financial impacts. In particular, our findings suggest that interstate and interbasin transactions will provide the most cost-effective compliance options for regulated entities and thus accelerate progress toward meeting TMDL goals. If such trading is not immediately possible, the state's trading programs should avoid precluding future interstate and interbasin transactions to the extent possible.

We provide both general and state-specific comments.

#### General comments

1. The reviews provide EPA with an opportunity to clarify the types of market-based mechanisms that are included in trading conversations throughout the Bay watershed. To date, conversations have focused on programs intended to provide NPDES permittees with flexibility in meeting effluent limits. The reviews include those programs as well as the Stormwater Retention Credit Trading Program in the District of Columbia. If the forthcoming national stormwater rule suggests jurisdictions adopt onsite retention standards, the DC program could become a regional and national model for similar programs in the future.

Programs providing NPDES permittees with flexibility in meeting effluent limits define a credit or offset as one pound of pollutant delivered to the Bay's tidal waters each year. That definition is consistent regardless of whether the program allows for credits to just offset growth, or both offset growth and meet existing effluent limits. It is also consistent among programs in states with more than one program. In Virginia, for example, both the 2005 nutrient exchange and 2009 stormwater offset legislation use commodities based on one pound of pollutant delivered to the Bay's tidal waters each year.

Trading infrastructure is based on the common definition of a credit or offset among state programs. For example, WRI's current effort to integrate NutrientNet with the USDA Nitrogen Tracking Tool and establish a common trading platform for all Bay jurisdictions assumes that the trading commodity will be one pound of pollutant. The trading study by Research Triangle Institute and the Chesapeake Bay Commission will make the same assumption. Analyses and

recommendations for trading in the stormwater sector, both to accommodate growth and complement retrofits, will likely follow suit.

If DC or other jurisdictions use retention credits to meet Bay-related requirements, trading infrastructure may need to accommodate those transactions. EPA could explain the issue in the introduction to the final reviews or the DC review. Going forward, and if necessary, EPA should consider options for integrating the two types of programs wherever possible.

2. EPA should list all program observations/recommendations in Part B of the review documents. EPA should avoid including important observations/recommendations in the text of the document. For example, the last paragraph on page 9 of the Pennsylvania review notes “EPA believes that the current tradable load in-use by PA needs to be recalculated based on the CB TMDL.”
3. EPA should clarify its expectations from states in addressing the observations/recommendations. Neither the TMDL language requiring the program review nor the draft observation documents themselves explain how jurisdictions should address the observations/recommendations. At the EPA presentation on draft findings in Annapolis on December 4<sup>th</sup>, EPA staff said that states are expected to comment with reasoning on the observations. If so, that should be clearly required through text in the documents and deadlines for comments should be set.

In addition, EPA could clearly state the consequences. What will happen in states with insufficient trading programs? Will the TMDL backstop measures take effect? In those states, will EPA stop authorizing NPDES permits using credits for compliance?

4. EPA makes a good recommendation in suggesting that all states evaluate interstate and intrabasin trades and offsets. Recommendation number 2 for all jurisdictions states:

“Suggest that interstate and intrabasin trades and offsets be evaluated by the jurisdictions for potential inclusion in their trading and offset programs.”

However, the text “inclusion in their trading and offset programs” is unclear. Currently, only Virginia mandates that transactions between a buyer and seller occur in the same sub-basin (there is an exception for some Eastern Shore point source facilities). The other state policies in Maryland, Pennsylvania, and West Virginia are silent on the issue; which is supportive to the extent that the policies do not *forbid* interstate and intrabasin transactions from occurring.

Is EPA saying that states should consider changing their trading policies to allow explicitly for interstate and intrabasin transactions? Or, is EPA saying that states should consider such transactions on a case-by-base basis? EPA might consider using this text instead:

“Suggest that interstate and intrabasin trades and offsets be evaluated by the jurisdictions. If such transactions would benefit the jurisdictions, trading statutes, regulations, or policies should be adapted as necessary to accommodate them.”

5. EPA should focus more on certification and verification processes in the state programs. Currently, the certification and verification processes vary significantly among states. For example, Maryland requires a site visit before certifying credits for sale, while Pennsylvania does not. Also, the annual verification processes in Maryland are explicitly defined. In Pennsylvania, verification processes are more flexible and are negotiated in a plan between the project sponsor and Department of Environmental Protection staff. Certification and verification processes will weigh heavily in states' decisions to authorize or forbid credits generated in other states.

Related to certification and verification issues, EPA should comment on the need for consistent reviews among states of "non-traditional" and new technologies. Currently, states vary in their approach to authorizing credits generated from technologies that are not covered under the Bay programs review panel and subsequently included into the Bay model. A Bay-wide technology Action Team, such as the one suggested by WRI, the Chesapeake Bay Foundation, Virginia Tech, and the Interstate Commission on the Potomac River Basin, would provide a forum for impartial recommendations on baselines and other relevant issues. The Action Team would also support interstate and interbasin trading in the future by eliminating the need for multiple states to review and authorize the same technology; technology proponents would also benefit from expediency in vetting their projects to one, central group rather than several state groups.

6. EPA should suggest that jurisdictions consider allowing nutrient and sediment credits to complement stormwater retrofit requirements. Jurisdictions are expecting challenges in implementing retrofits because of their high cost and the time delay associated with vetting projects, awarding contracts, implementing projects, and realizing pollutant reductions. Also, some jurisdictions could lack the legal authority to require retrofits on private lands, regardless of whether projects on public lands achieve necessary pollutant reductions. In all cases, credits would provide MS4s with additional options for maintaining compliance with permits and other requirements.

### State-specific comments

#### *Pennsylvania*

1. EPA states that Pennsylvania's trading program "lacks adequate baseline requirements that ensures there is no net increase in nutrients..." To improve baseline requirements, EPA suggests Pennsylvania "consider including the additional baseline requirements of 20% reduction and either the 100-foot manure setback or the 35-foot vegetative buffer as well as requiring whole-farm nutrient management plans to their existing baseline requirements."

It is unclear if the suggested changes would ensure "no net increase in nutrients" to the Bay and its tidal waters. EPA should recommend that Pennsylvania clearly document the progress of nonpoint source BMPs in achieving pollutant reductions necessary to meet agriculture load allocations. Doing so would demonstrate whether the current baseline requirements are sufficient or the additional baseline requirements are necessary. There are at least two ways to demonstrate such progress; Pennsylvania could adopt the approach of Maryland in requiring

nonpoint source credit generators to meet a per-acre loading rate calculated from the applicable TMDL load allocations, or the state could demonstrate the progress implemented BMPs make toward meeting its own tradable load and explain how that figure was calculated.

EPA should also confirm that suggested changes are not required through other regulations. For example, prior to requiring nonpoint sources to meet a threshold requirement, the Pennsylvania trading policy has a baseline requirement. The baseline is defined as complying with all applicable regulations for nutrient management, manure management, and erosion control. Those regulations include

- 25 Pa. Code §§ 83.201 through 83.491 regarding nutrient management plans, manure storage facilities, and financial assistance and incentives to develop nutrient management plans;
- 25 Pa. Code § 91.36 establishing pollution control and prevention requirements for animal manure storage facilities, liquid manure application, and pollutant discharge;
- 25 Pa. Code § 92a.29 establishing the permitting process for concentrated animal feeding operations (CAFOs), including having a nutrient management plan; and
- 25 Pa. Code §§ 102.1 through 102.8 regarding erosion and sediment control.

The regulations could already require EPA's recommendations. Notably, 25 Pa. Code §§ 83.201 through 83.491 and 25 Pa. Code § 92a.29 could require manure management plans in some situations. In such cases, EPA should consider whether just the 20% reduction and the 100-foot manure setback or 35-foot vegetative buffer are sufficient for providing additionality.

2. EPA should comment on the suitability of allowing BMPs funded through state or federal cost-share money to generate credits for sale. Maryland and Virginia do not allow the portion of BMPs funded through cost-share to generate credits for sale. This is another issue that will need to be addressed if Pennsylvania credits are to be sold in other jurisdictions.

Thank you again for the opportunity to comment on the draft observations of state trading and offset programs. We appreciate the attention EPA is paying to trading in the Bay watershed. Please contact us with any questions.

Sincerely,



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cc: Jeff Corbin, EPA, Senior Advisor, Chesapeake Bay  
Nick DiPasquale, EPA, Director, Chesapeake Bay Program Office