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Environmental Quality Board
PO Box 8477
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[Sent via electronic mail to RegComments@state.pa.us]

The Pennsylvania Municipal Authorities Association (PMAA) represents over 740 municipal authorities across the Commonwealth providing drinking water and sewage treatment management to more than six million Pennsylvania citizens.

The comments attached are submitted in regard to the proposed revisions to 25 PA Code, Chapter 96 relating to Water Quality Standards Implementation, addressing trading of nutrient and sediment reduction credits, that were published in the February 13, 2010 PA Bulletin.

Thank you for the opportunity to provide comments.

Sincerely,

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Governmental Relations Associate

PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION

DETAILED COMMENTS ON PROPOSED RULEMAKING

25 PA CODE CHAPTER 96.8

General Comments

A. Offsets vs. Credits - Proposed new section 96.8 addresses the use of “ offsets” and tradable “credits” from pollution reduction activities in the Chesapeake Bay watershed. Because “ offsets” are fundamentally different than “credits”, treating these two concepts identically in this regulation will be very problematic for both the Department and entities subject to this regulation.

It should also be noted that the term “offset” is specifically defined in current NPDES permit boilerplate language as follows:

Offset = Verb - The act of reducing the aggregate production of nutrients from an action or activity by use of a complimentary action, activity or technology on that site or directly related to the activity.
Noun - The load in pounds of nitrogen or phosphorus created by an action, activity or technology that is available to apply against the proposed load to be generated. offsets are not the same as credits as they cannot be directly bought, sold or transferred between owners, projects, or properties.

Offsets are used to directly adjust a point source's annual cap load. Offsets are not impacted by delivery ratios or edge of segment ratios or reserve ratios, and they are not certified, verified or registered with DEP in the same manner as credits. There are currently two recognized offsets that are associated with:

- 1) connecting homes with septic tanks to municipal sewer systems
- 2) shifting effluent loads between treatment facilities owned by a single entity

In our detailed comments below, we have pointed out several instances of how “ offsets” should not be addressed in the same manner as “credits”. **Note:** in regulatory language cited, we have highlighted the term OFFSETS in all caps for ease of reference.

B. Program uncertainty created by the regulations – Throughout the subsections, there seems to be ambiguity in the Department’s having the ability to readjust BMP reduction efficiencies, thresholds, delivery ratios, etc. To maintain confidence and stability in the trading program, it must be stated clearly in the regulation that once credits are verified, registered and sold, the number of pounds of credits is guaranteed for the current or future years for which they are purchased and cannot be reduced based on further review of how they were originally determined. This is a significant consideration for both buyers and sellers of credits.

Specific Comments

1. Definitions 96.8(a) – Several proposed definitions are problematic and should be reconsidered:

Baseline—

(i) *The compliance activities and performance standards which must be implemented to meet current environmental laws and regulations related to the pollutant for which credits or OFFSETS are generated.*

(ii) *The term includes allocations established under this chapter, in a TMDL or similar allocation, for those pollutants.*

Comment – In Part (i), the term “offset” should be removed. Part (ii) prevents point sources and others from generating Bay-related credits if their local TMDL limits result in greater reductions than needed to comply with their Bay annual cap loads. This restriction should be removed.

Delivery ratio—*A ratio that compensates for the natural attenuation of pollutants as they travel in water before they reach a defined compliance point.*

Comment - the term "defined compliance point" is unclear. Why not spell out what that means or add a definition of that term ?

Edge of segment ratio—*A ratio that identifies the amount of land-applied pollutants expected to reach the surface waters at the boundary of a Chesapeake Bay Watershed Model segment through surface runoff and groundwater flows from nonpoint sources within a watershed segment.*

Comment - Does this ratio really reflect pollutant contributions associated with groundwater flows? Compared with the relatively short amount of time it takes for surface runoff of pollutants into streams, doesn't it take considerably longer for groundwater contributions to occur in those same streams?

Offset—*The nontradable unit of compliance that corresponds with a unit of reduction of a pollutant as recognized by the Department which, when certified, verified and registered by the Department, may be used to comply with NPDES permit effluent limitations.*

Comment - This definition needs to be revised to be consistent with NPDES permit language (and that permit language also needs to be stated in less ambiguous terms).

Threshold - *Activities and performance standards beyond baseline compliance which are required by the Department before credits or OFFSETS will be certified.*

AND

Tradable load—*The amount of pollutant reductions determined to be the projected future pollutant load which is the difference between the total reductions theoretically possible from maximum implementation of reduction activities, and the reductions associated with a level of reduction activities identified by the Department as reasonably attainable.*

Comment - OFFSETS should not be mentioned in the definition of threshold. The definition of tradable load should somehow incorporate the term threshold. The term "reasonably attainable" is very ambiguous and open-ended.

Trading ratios—*Ratios applied by the Department to adjust pollutant reductions when certifying credits or OFFSETS for a pollutant reduction activity, to address uncertainty, water quality, reduction failures or other considerations. These ratios may include a delivery ratio, an edge of segment ratio and a reserve ratio.*

Comment - OFFSETS are not subject to any of these trading ratios.

(b) Chesapeake Bay water quality.

(1) Credits and OFFSETS may be used to meet legal requirements for restoration, protection and maintenance of the water quality of the Chesapeake Bay.

(2) Credits and OFFSETS must be generated only from pollutant reduction activity that has been certified, verified and registered by the Department under this section.

Comment - OFFSETS are not certified, verified or registered

(3) Credits and OFFSETS may be used by permittees to meet effluent limits for nitrogen, phosphorus and sediment expressed as annual loads in pounds contained in NPDES permits that are based on compliance with water quality standards established under the Federal Water Pollution Control Act (33 U.S.C.A. §§ 1251—1387), specifically for restoration, protection and maintenance of the water quality of the Chesapeake Bay.

(4) The use of credits and OFFSETS must involve comparable pollutants. For example, nitrogen credits or OFFSETS may only be used to meet nitrogen effluent limits.

(5) The use of credits and OFFSETS must comply with legal requirements under applicable laws and regulations, including the requirements of this section.

(6) Credits and OFFSETS may not be used to comply with technology-based effluent limits, except as expressly authorized by Federal regulations administered by the EPA.

Comment - (3) through (6) are OK, provided the Department concurs with other comments on use of the term "offset" in this regulation and reflects such in the final rulemaking.

(c) Methodology.

(1) The Department may use any of the methods contained in this subsection when calculating and certifying credits and OFFSETS.

(2) Credits and OFFSETS may be calculated by use of pollutant removal efficiencies for BMPs, and edge of segment and delivery ratios addressing fate and transport of pollutants, approved by the EPA Region III Chesapeake Bay Program Office for use with the Chesapeake Bay Watershed Model Version 4.3 or any subsequent versions.

Comment - the term "offset" should not be used in this subsection for reasons mentioned in other comments.

We would caution against making references in (c)(2) to a specific version of the Bay model and in (c)(3) to a lengthy list of other models and technical references. Almost all of these references are already out of date and irrelevant.

(d) Eligibility requirements for the Chesapeake Bay.

(1) General. To generate credits and OFFSETS, the generator shall demonstrate a reduction in pollutant loads beyond those that are allowed under applicable baseline requirements, and any threshold established by the Department.

Comment - the term "offset" should not be used in this subsection for reasons mentioned in other comments.

(2) Baseline requirements to generate credits or OFFSETS

(i) For nonpoint sources, baseline shall be the current requirements in regulations applicable to the sources at the location where the credits or OFFSETS are generated, and the pollutant load associated with that location. For agricultural operations, this includes compliance with the erosion and sedimentation requirements for agricultural operations in Chapter 102 (relating to erosion and sediment control), the requirements for agricultural operations under § 91.36 (relating to pollution control and prevention at agricultural operations) and the requirements for agricultural operations under Chapter 83 Subchapter D (relating to nutrient management), as applicable.

Comment - the term "offset" should not be used in this subsection for reasons mentioned in other comments.

(ii) For point sources, the baseline shall be the pollutant effluent load associated with effluent limitations contained in an NPDES permit based on the applicable technology-based requirements, or the load in a TMDL or similar allocation, whichever is more stringent.

Comment - As with the definition of "baseline" this language prevents point sources and others from generating Bay-related credits if their local TMDL limits result in greater

reductions than needed to comply with their Bay annual cap loads. This restriction should be removed. For point sources, the baseline should simply be the annual cap load required for the Bay. Any reductions beyond that should be eligible for credit generation, while still meeting local TMDL reduction needs.

(3) Threshold requirements to generate credits or OFFSETS.

(i) An agricultural operation must meet one of the following threshold requirements at the location where the credits or OFFSETS are generated. For the purpose of this subparagraph the term “surface water” means a perennial or intermittent stream with a defined bed or bank, a lake or a pond.

(ii) The Department may establish other threshold requirements necessary to ensure the effectiveness of the use of credits and OFFSETS to meet legal requirements for restoration, protection and maintenance of the water quality of the Chesapeake Bay.

Comment – the term “offset” should not be used in this subsection for reasons mentioned in other comments.

(4) Compliance status. *Persons currently not in compliance status with, or who lack the ability or intention to comply with, ANY of the following are not eligible to generate credits or OFFSETS, or to USE credits or OFFSETS to meet permit effluent limits:*

Comment – Delete the reference to using credits or offsets in this subsection. Any point source that considers using credits or offsets could already be in a non-compliance status.

(6) Failure to meet eligibility requirements. *If the Department determines that a person no longer meets the eligibility requirements under this section, it may take appropriate action such as prohibiting the person from participating in any trading under this section and denial of requests for certification and registration of any credits and OFFSETS.*

Comment – the term “offset” should not be used in this subsection for reasons mentioned in other comments.

(e) Certification requirements for the Chesapeake Bay.

(1) General. *All credits and OFFSETS must be certified by the Department before they may be applied to meet permit effluent limitations. Certification will serve as the Department's final determination of the appropriate amount of credits approved by the Department. Certification must be followed by verification and registration of the credits and OFFSETS prior to their use to meet permit effluent limits.*

(2) Request for certification. *Persons who wish to have credits or OFFSETS certified by the Department shall submit a request in the format required by the Department.*

(i) *The request must contain information sufficient to demonstrate the following:*

Comment - the term "offset" should not be used in this subsection for reasons mentioned in other comments.

(3) Calculation requirements. *The following credit and OFFSET calculation requirements apply:*

(vi) *The annual sum of all credits certified from nonpoint sources may not exceed the applicable tradable load calculated by the Department. The tradable load for the Chesapeake Bay Watershed is 5.7 million pounds of nitrogen per year and 396,800 pounds of phosphorus per year, unless otherwise revised by the Department.*

Comment - Is it really appropriate or necessary to include actual numbers for the tradable load? We suggest deleting those numbers and allowing the Department to periodically re-evaluate tradable load without subsequent regulation changes.

(4) Verification plan. *A request for certification must contain a verification plan.*

(i) *The verification plan must include the methods for credit and OFFSET verification, such as the documentation of the implemented pollutant reduction activity, sufficient to allow the Department to verify that the qualifying reduction efforts approved were properly implemented during the applicable compliance period.*

Comment – the term “offset” should not be used in this subsection for reasons mentioned in other comments.

(5) Certification by the Department. *The Department will certify credits and OFFSETS when it has determined that the requirements of paragraphs (1) – (4) have been met.*

Comment – the term “offset” should not be used in this subsection for reasons mentioned in other comments.

(ii) *Credits and OFFSETS must only be used to meet permit effluent limits for the compliance period for which they are certified, verified and registered by the Department under this section.*

Comment – the term “offset” should not be used in this subsection for reasons mentioned in other comments.

(f) Registration requirements for the Chesapeake Bay.

(1) *General. All credits and OFFSETS used to comply with effluent limitations in NPDES permits must be registered by the Department before they may be applied to a permit to meet the effluent limitations.*

Comment – the term “offset” should not be used in this subsection for reasons mentioned in other comments.

(2) Registration requirements. The following registration requirements apply:

(i) Credits and OFFSETS must be certified under the provisions of subsection (e).

Comment – the term “offset” should not be used in this subsection for reasons mentioned in other comments.

(ii) Credits must be addressed in a valid contract which ensures that the requirements of this section will be met. The Department may require submittal of trade contracts, establish basic contract elements and require approval of trade contracts before registration.

Comment - Based on the definition of "registration", why require that a contract be in place to buy/sell credits prior to those credits being registered? Doesn't that create a real predicament for credit generators who may not yet have a customer but have actually created credits?

(iii) The credits and OFFSETS must be verified prior to registration. The following applies to verification:

Comment – the term “offset” should not be used in this subsection for reasons mentioned in other comments.

(3) Failure to implement: The Department will not register credits or OFFSETS if the person who generates the credits has not implemented, or who demonstrates a lack of ability or intention to implement, operations and maintenance requirements contained in the certification or the verification plan, or otherwise to implement the requirements of this section. The Department will not register credits or OFFSETS submitted by an aggregator that is currently not complying, or demonstrates a lack of ability or intention to comply, with this section.

Comment – the term “offset” should not be used in this subsection for reasons mentioned in other comments.

g) Use of credits and OFFSETS to meet NPDES permit requirements related to the Chesapeake Bay.

(1) Permittees will only be authorized to use credits and OFFSETS through the provisions of their NPDES permit. The permit conditions will require appropriate terms such as recordkeeping, monitoring and tracking, and reporting in DMRs.

(2) Only credits and OFFSETS generated from activities located within the Chesapeake Bay watershed may be used to meet NPDES permit requirements related to the Chesapeake Bay. Credits generated in either the Susquehanna or the Potomac basins may only be used in the same basin unless otherwise approved by the Department.

(3) Permittees shall ensure that the credits and OFFSETS that they apply to their permits for compliance purposes are certified, verified and registered by the Department under this section for the compliance period in which they are used.

Comment – the term “offset” should not be used in this subsection for reasons mentioned in other comments.

(4) The Department may authorize a period not to exceed 60 days following the completion of the annual compliance period in an NPDES permit, for a permittee to come into compliance through the application of credits and OFFSETS to the permit provided that the credits and OFFSETS were registered during that compliance period.

Comment – the term “offset” should not be used in this subsection for reasons mentioned in other comments.

(5) Permittees are responsible for enforcing the terms of their credit and OFFSET contracts, when needed to ensure compliance with their permit. The Department may waive this requirement where the pollutant reduction activity fails due to uncontrollable or unforeseeable circumstances such as extreme weather conditions, and timely notice is provided to the Department, if the following apply:

Comment – Permittees must be “held harmless” from the failure of credit-generating activities to produce the required amount of credits needed. If this language is retained in the final regulation, there will be very little interest on the part of permittees to pursue credit trading (buying or selling).

Offsets, as defined in the NPDES permits, do not involve use of contracts.

(i) The failure is not due to negligence or willfulness on the part of the permittee.

(ii) The Department determines that replacement credits will be available.

(iii) The Department determines that the requirements for restoration, protection and maintenance of the water quality of the Chesapeake Bay will be met due to the requirements of this section, which may include the type of methodologies used when calculating the certified credits, the existence of an approved legal mechanism that is enforceable by the Department, and the use of a credit reserve.

(5) The use of credits and OFFSETS must be identified in DMR forms, which will be submitted at the end of each compliance year or as otherwise provided by the Department in the permit. Registered credits and OFFSETS shall only be used to meet permit effluent limits for the compliance period for which they are certified, verified and registered by the Department under this section.

Comment - Offsets are not certified, verified or registered and that term should be deleted from the 2nd sentence.

(h) Water quality and TMDLs.

(1) Use of credits and OFFSETS under this section will be allowed only where surface water quality will be protected and maintained as required by applicable regulations including this chapter and Chapter 93, Department permits and schedules of compliance and orders.

(2) Use of credits and OFFSETS under this section must ensure that there is no net increase in discharge of pollutants to the compliance point used for purposes of determining compliance with the water quality standards established by the states of Maryland and Virginia for restoration, protection and maintenance of water quality of the Chesapeake Bay.

(3) Where a TMDL has been established for the watershed where the permitted activity is located, the use of credits and OFFSETS under this section will be consistent with the assumptions and requirements upon which the TMDL is based.

(4) Use of credits and OFFSETS under this section will comply with the antidegradation requirements contained in Department regulations.

Comment – the Department should reconsider whether or not to include the term “offset” in this subsection for reasons mentioned in other comments.

(i) Public participation. *The Department will publish a notice in the Pennsylvania Bulletin of the receipt of administratively complete requests for certifications of credits and OFFSETS, and the Department's final determinations regarding those requests. This notice is not required to follow the requirements of § 92.61 (relating to public notice of permit application and public hearing).*

Comments -

- Aside from the fact that 92.61 will become 92a.83, the public notices called for under 92.61 are significantly different than what the Department has been using for credit generating proposals and are not appropriate for this purpose. The last sentence should be deleted.
- Offsets are permit-specific and not subject to the same kinds of public notices as credit generating proposals. The term "offset" should not be used in this subsection for reasons mentioned in other comments.