



COMMENTS ON EPA DRAFT REVIEWS OF STATE NUTRIENT TRADING PROGRAMS

REVIEW RECOMMENDATIONS COMMON TO ALL JURISDICTIONS

Most of the EPA draft reviews are narrative descriptions of the state nutrient trading programs that reflect more of the state's own perspectives, rather than specific in-depth program evaluation and analysis. However, each state review does include nine "Program Recommendations Common to all Jurisdictions" (relating to definitions, interstate trading, local data, stormwater offsets, guidelines for methodologies for addressing baselines for other sectors besides agriculture, use of stormwater BMPs as offsets, updating enforcement policies and procedures, tracking and accounting, need for new resources to implement programs).

While this list contains some important points, the list does not provide guidance regarding the appropriate response to these recommendations or the weight they will carry in final review of Phase II WIPs. This expectation or some procedure to ensure that these concerns can be reevaluated at the time WIPs are submitted is important. In addition, the Common Recommendations do not appear to have equal weight to the state specific Tier 1 and Tier 2 recommendations. The weight, EPA expectations and specific state response to these recommendations should be clarified in the final report.

More detail is needed in order for EPA expectations to be clearly communicated. Section 10 and Appendix S both provide a useful framework for state trading program contents but offer little specific guidance. EPA should commit to improve this guidance in the near future. This is extremely important as trading programs begun under the Tributary Strategies may not be acceptable to meet the expectations of the Bay TMDL.

In addition, several of the reviews identified issues associated with offsetting new loads and with the role of stormwater management in nutrient trading programs. While EPA has rightly listed these issues, there is little guidance offered by the agency on how to acceptably address such matters. The nature of offsets and credit trading for nutrients in stormwater is an area of concern expressed by all states and considered deficient in all state reviews. Will the new federal stormwater management rulemaking or the upcoming review of the national stormwater management policy provide greater clarity on these matters? If not, will EPA offer states better guidance on this important "driver" for nutrient trades?

Number 2 of the draft EPA review suggests that a watershed framework does not exist for interstate trading but does not comment on what EPA thinks needs to be considered. Setting forth the common criteria to be met for interstate trades as well as a process for future consideration of a process for consideration of interstate trade could prove to be useful. At a minimum, EPA should emphasize that if interstate trading moves forward that it is done in a manner that ensures the more

stringent trading provisions of the states involved would apply. Furthermore, any discussion of interstate trading must reconcile the dramatic differences in baselines and credit calculations that currently exist among the Bay states.

Regarding Number 5, the recommendation language should be separated in order to clearly convey that EPA is recommending states address both nontraditional BMPs and the retirement of credits and use of net improvement offsets as programs expand or are developed. In addition, EPA should incorporate language that encourages the Bay states to develop a regional approach to reviewing nontraditional sources so that the region can agree on a consistent approach for determining the creditworthiness of such sources, and related trading ratios and uncertainty allowances. Such procedures have already been put forward for consideration by partners in the Bay program.

Number 9 addresses the need for new resources to fully implement the developing trading and offset programs. This is an important accountability issue. EPA's recommendation should be modified to include language that recognizes that this issue is also extremely important for handling the additional state and third party oversight roles (reviews, inspections, tracking, monitoring) that states will need to implement as programs expand. While it will ultimately be up to the states to consider whether user revenue sources such as transaction or credit certification fees are needed, EPA should consider making a portion of its grants available to assist state trading programs.

While the list of common recommendations raises several important points, there are a number of additional cross-cutting issues that should be added to the list including the following:

- States should provide a clear justification and rationale for the use of any baseline determination that is not performance based.
- States should be asked to explain how they will evaluate proposed trades that occur within the watershed of an already impaired waterway. Although Appendix S clearly points out the need for this consideration, states should have clearly stated policies that they will not allow nutrient trading that will result in violations of water quality standards or that will cause or contribute to local violations of water quality standards;
- States should be asked to justify not using uncertainty ratios for any trades involving nonpoint sources unless the credit generator can demonstrate likely outcomes and use of more durable practices. Using Bay Model BMP efficiencies should not be a satisfactory justification for using 1 to 1 ratios for trades involving nonpoint sources;
- EPA and the states should identify current BMPs that require further evaluation in order to be used in trading programs (such as manure export and septic to stormwater trades);
- Baselines need to be updated within the context of the Bay TMDL and dates for existing practices to generate credits must be consistently established;
- EPA should evaluate and make recommendations regarding verification and transparency issues such as need for annual verification, frequency of inspections, use of third party inspections, tracking, public registries, etc.

EPA should incorporate the state and common recommendations for nutrient trading programs into the Two-Year Milestones as a means of providing accountability and transparency.

EPA should also commit to a re-evaluation of Bay state trading programs in conjunction with the 2017 TMDL review. In addition, the reviews point out the need for EPA's continued oversight and monitoring.

VIRGINIA

Generally speaking, the review confirms the relative strengths of the current VA nutrient trading program and does a good job of describing many of the fine points of the existing state program.

The EPA review points out three Tier 1 deficiencies in the current program (grandfathering provisions in the construction stormwater regulations as they relate to offsets from new loads; offsetting of new growth; and a permit coverage loophole for wastewater facilities) and one Tier 2 recommendation (relating to local interpretations of offsets).

There are other important issues mentioned by EPA in the remainder of the Virginia review that are not currently included in the Tier 2 Recommendations. The following should be added to the Virginia Tier 2 list:

- Virginia should adopt net water quality improvement provisions;
- Virginia should develop a public registry in order to improve transparency;
- Virginia should develop a procedure to monitor statutory provisions that prohibit local water quality impairment. This issue should also be incorporated into the Common Recommendations as well.

MARYLAND

The EPA review indicates that Maryland has a strong trading program, which is generally acknowledged. However, there are issues that should be addressed as trading expands under the TMDL and requirements for stormwater are developed.

Although it is mentioned on p. 10, the Tier 2 Program Recommendations should ask Maryland officials to review their decision not to use uncertainty ratios for nonpoint source trades despite the shortcomings of the BMP efficiencies to accurately calculate reductions, as pointed out most recently by the National Academy of Sciences report.

It should be recommended that Maryland's program be expanded to accommodate non-agricultural credits and to consider including guidance for crediting nutrients relative to stormwater offsets or trades.

EPA should also address the differences in the phosphorus loads from septic systems mentioned in the New York review with the approach Maryland has reportedly taken (i.e., assuming that there are no phosphorus loads from septic systems).

It should be recommended that Maryland reconsider its policy of not giving credit for farmland conversion to less intensive uses such as the conversion of farmland or pasture to forests. At a minimum, Maryland should establish and publish clear criteria for evaluating properties when credits are generated in part from land conversion.

It has also been pointed out that EPA should review Maryland's program to determine if the state has enforceable laws or regulations governing trading and offset programs in the event that a trade does not occur as designed.

PENNSYLVANIA

EPA's review has rightly pointed out concerns with Pennsylvania's baseline and credit calculations. These are among the most significant trading issues facing the Bay region and are an indication of the variability that exists in the way the Bay states are currently handling nutrient trading, as described in the recent PennFuture report.

While it should be acknowledged that Pennsylvania was the Bay "pioneer" in many aspects of nutrient trading, flaws in Pennsylvania's current approach to baseline and credit calculations must be addressed if trading in Pennsylvania's WIP is accepted as meeting reasonable assurance under the Bay TMDL. These issues must also be addressed by if nutrient trading in the Bay region is to be better accepted and before any serious consideration of interstate trading continues. They also point out the importance of EPA's oversight role.

Pennsylvania's current approach to modeling and calculations of nutrient reductions appears to have resulted in significantly overstating credits generated and threatens the ability of trading to actually produce improvements in water quality. Consequently, EPA should direct the Commonwealth to address its mathematical assumptions and credit calculations.

If Pennsylvania's program does not respond to the review recommendations, EPA should find the Commonwealth's program unacceptable and take appropriate actions.

There are other important issues mentioned by EPA in the remainder of the state review that are not currently included in the State Specific Tier 1 or Tier 2 Recommendations.

The following should be added to the Pennsylvania list:

- Pennsylvania should reconsider its current practice of allowing activities paid for by state or federal cost share to generate credits;
- The Commonwealth should review its current policy of not crediting farmland conversion to a less intensive use;
- The Commonwealth should ensure that safeguards related to credits generated through manure transport are clearly articulated because of Pennsylvania's significant reliance on manure transport credits as its primary form of nutrient trading.