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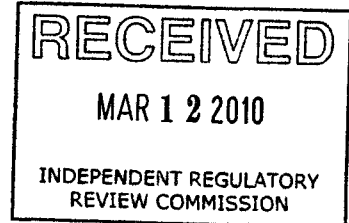
March 10, 2010

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Environmental Quality Board
c/o Chairperson
Commonwealth of Pennsylvania
P.O. Box 8477
Harrisburg, PA 17105-8477



Re: Water Quality Standards Implementation

Dear Chairperson, Environmental Quality Board:

Enclosed for filing, please find the comments of the Board of Commissioners, County of Lycoming, in the matter referenced above.

Since 2008, Lycoming County government has invested more than \$500,000 to design a County-based strategy that partners wastewater treatment plants, farmers, municipalities, and other stakeholders within the County in a nutrient credit trading program to keep compliance costs in check. A web page devoted to the Lycoming County Chesapeake Bay Tributary Strategy (CBTS) can be accessed by visiting www.lyco.org and clicking on the CBTS logo on the navigation bar at the right side of the home page.

The County has a significant vested interest in the success of the statewide nutrient trading program. While we have completed a great deal of work and feel confident in the CBTS program being implemented, we are also fully aware that the road ahead is very challenging and requires persistence and dedication by all. We appreciate the opportunity to submit these comments for your consideration.

Sincerely,

Rebecca A. Burke
Chairperson

**Before the
Environmental Quality Board (EQB)**

In Re: 25 PA. CODE CH. 96 Water Quality
Standards Implementation

**Comments of
Lycoming County Commissioners**

Lycoming County, Pennsylvania is located in North Central Pennsylvania and has a geographic area of 1,246 square miles (larger than Rhode Island) and is home to more than 120,000 residents living in 52 municipalities.

In January 2005, the Pennsylvania Chesapeake Bay Tributary Strategy (CBTS), which mandates reductions in nutrient discharges by specified dates, resulted in some important implications. The seven publicly owned Wastewater Treatment Plants (WWTPs) in Lycoming County will face millions of dollars in upgrade costs to comply (and fines/penalties if they do not). The impact of these environmental compliance costs is compounded by aged WWTP infrastructure, including municipal sewage collection systems that require improvements to reduce wet weather overflows and to improve the hydraulic capacity of the WWTP. Ultimately, local ratepayers will shoulder this infrastructure cost burden.

Since 2008, Lycoming County government (despite not owning a WWTP or collection system) has invested more than \$500,000 to design a county-based strategy that partners county WWTPs, farmers, and landowners in a County-based nutrient credit trading program to keep compliance costs in check. The county's goals and objectives include:

- Preserve or improve the quality of our local waterways.

- Meet goals of the Chesapeake Bay recovery.
- Integrate Non-Point Sources and support the local agricultural community with revenue for conservation practices.
- Provide maximum flexibility for WWTPs in meeting regulatory requirements.
- Assure that future economic growth and development needs can be met.
- Create a self-sustaining nutrient trading program.

With technical and financial assistance through the County Conservation District, Department of Environmental Protection (DEP), Department of Community and Economic Development (DCED), and the National Fish and Wildlife Foundation (NFWF), the county has had approximately 8,500 credits certified by the DEP and another 5,500 credits have been applied for in 2010.

Finally, the Pennsylvania Infrastructure Investment Authority (PENNVEST) and DEP are working with stakeholder groups and the Chicago Climate Exchange to establish PENNVEST as a nutrient credit clearinghouse in Pennsylvania to provide surety, facilitate the market, and satisfy public entity bidding/purchasing requirements.

I. Introduction

The Environmental Quality Board (EQB) proposes to amend 25 Pa. Code Chapter 96 (relating to water quality standards implementation) which would codify the Department of Environmental Protection's (DEP) existing guidance entitled "Final Trading of Nutrient and Sediment Reduction Credits—Policy and Guidelines" (No. 392-0900-001, December, 2006) as it relates to the Chesapeake Bay ("Nutrient Credit Trading Policy"). That policy provides a cost-effective means for facilities subject to meet new limits for nitrogen, phosphorus and sediment to meet those limits by working with other facilities, nonpoint sources, or both. It helps the

Commonwealth achieve its Chesapeake Bay nutrient reduction goals from the agriculture sector, provides a source of revenue to farmers and other property owners, and advances the restoration and protection of the water quality of the Chesapeake Bay.

The Lycoming County Commissioners – Rebecca A. Burke, Chairperson; Ernest P. Larson, Vice Chairman; and Jeff C. Wheeland, Secretary –welcome this opportunity to offer the following comments to the EQB.

II. Comments

1. Definitions (§ 96.8 (a)).

The proposal adds a number of definitions to Chapter 96 to clarify various new terms. The County seeks clarification on the following definitions:

***Aggregator**—A person that arranges for the sale of credits generated by another person, or arranges for the credits to be certified, verified and registered.*

The County recommends the following change to the definition: “A person that arranges for the sale of credits generated by another person or persons, and/or arranges for the credits to be certified, verified and registered.”

***Credit**—The tradable 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.*

The County believes that this definition should reflect how "delivery ratios," when applied to point source cap loads, determines how many credits are needed.

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

The County seeks clarification on the meaning of the term "defined compliance point" as it is unclear.

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.

The County is unclear as to how this ratio reflects pollutant contributions associated with groundwater flows. Compared with the relatively short amount of time it takes for surface runoff of pollutants into streams, it should 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.

The County's WWTPs are very concerned with this definition and believe it needs to be revised, as "offsets" are different from "credits."

- Offsets (associated with connecting homes with septic tanks to municipal sewer systems) are used to directly offset a point source's allowable annual cap load.
- Offsets are not impacted by delivery ratios or edge of segment ratios or reserve ratios.
- Offsets are not certified, verified or registered with DEP, but they are recognized within the NPDES permit process.

Moreover, it should also be noted that the term “offset” is also defined in the NPDES permit boilerplate language, and that language specifically states, in part, that: “Offsets are not the same as credits as they cannot be directly bought, sold or transferred between owners, projects, or properties.”

Finally, the term “offset” is used throughout this proposed rulemaking and needs to be clarified and addressed in those instances as well. The County recommends the EQB carefully consider the comments submitted by the Pennsylvania Municipal Authorities Association with respect to the usage of the term “offsets.”

2. General provisions (§ 96.8 (b), (h) and (j)).

The proposal contains several subsections with overarching provisions. Subsection (b) sets forth the core concepts and basic requirements of the trading programs. Subsection (h) contains provisions regarding the interaction of this section and important provisions elsewhere in this title regarding protection of water quality. Subsection (j) makes it clear that this proposed rulemaking is not intended to foreclose the use of credits or offsets in other contexts outside of their use to comply with the nutrient and sediment cap loads for the Chesapeake Bay.

The County seeks clarification on how this proposed rulemaking affects point source to point source trades? Because the loadings from WWTPs are certified on the Discharge Monitoring Report (DMR), we believe that point source to point source credits should be certified as pound for pound without the 10 percent reserve ratio; and if a reserve ratio is deemed necessary, we believe it should be lower than 10 percent. This would greatly enhance the collaborative approach taken by the County and encourage our WWTPs to actively trade within our own county and watershed; thus meeting the goals of the trading program and CBTS.

3. Methodology for calculating credits and offsets (§ 96.8 (c)).

Much of the methodology for establishing the water quality standards for the Chesapeake Bay, and determining effectiveness of various activities to meet those standards, is based on scientific work done by the Environmental Protection Agency (EPA). This includes the use of several complex models and the scientific research related to them. Subsection (c) identifies those models and that research, and establishes them as a basis for the DEP's decisions regarding, among other things, the amount of reductions (and therefore credits) to assign to a given pollutant reduction activity.

Specifically, the DEP is soliciting comments on whether delivery ratios should be applied to permit limits when trading is chosen as the compliance option. The County offers the following:

1. There needs to be equability in how delivery ratios are applied. For Lycoming County, the non-point source load reduction credits are calculated as delivered to the Bay. The cap loads for the WWTPs should be similarly calculated. Lycoming County WWTPs should not have to purchase more credits to achieve the same cap load as someone else just because they are located further from the Bay.

2. § 96.8 (c) basically allows for the readjustment of BMP reduction efficiencies, delivery ratios, and edge-of-segment ratios as the Bay model is continually refined. For instance, the load reduction efficiencies from riparian buffers or no-till agriculture could be reduced in future years by DEP. The predictability of nutrient credit costs is then brought into question for a WWTP trying to compare hard infrastructure costs to nutrient credit costs in their long-range planning. A reduction in BMP efficiencies resulting from changes in the science as outlined in paragraph (c) would necessitate that additional units (e.g. acres) of BMPs be implemented to achieve the same number of credits. The cost per nutrient credit will then likely increase if the

BMP implementation unit costs remains constant. This is problematic in a multiple-year planning timeframe for the WWTPs. Section (g) (3) states that credits must be certified for each year they are used to achieve compliance. Section (e) (5) (iii) states that DEP may certify credit proposals for multiple years, but verification and registration must be done for each compliance year. However, section (f) (2) (iii) (C) states that DEP may conduct other verification activities to ensure that pollutant reduction obligations are being met. It is through this latter section that DEP could alter the multiple year certified credits because EPA lowered the BMP reduction efficiency, and a reduced efficiency would mean that the expected pollutant reduction would no longer be met. Explicit language should be included in the rule to prohibit changes in the credit calculation methods for multiple compliance year credit proposals that have been certified by the DEP.

The County strongly believes that once credits are under contract to a buyer, the DEP should not be able recalculate those credits using a different method of calculation. There needs to be certainty and predictability for both the sellers who are making investments in BMPs and buyers who are relying on those credits being available. Certainty and predictability is the cornerstone which will incentivize regional efforts as part of a long term strategy.

4. Eligibility requirements (§ 96.8 (d)).

This subsection describes the various requirements for a source to be able to generate credits for use under the proposed regulation. There are two components. First, the generator shall meet “baseline” requirements, which essentially are the legal requirements that apply to that operation.

The second requirement is “threshold.” This requirement is defined as either a 100-foot manure set back, a 35-foot vegetative buffer or a 20% adjustment made to the overall reduction.

It provides an added level of nutrient and sediment reductions that would not necessarily be accomplished without the financial incentives of trading. Threshold therefore adds to the nutrient reduction benefits for the Bay, especially from the agricultural sector.

Therefore, only after demonstrating (1) compliance with the applicable legal requirements (baseline); and (2) achieving an additional set of pollutant reductions (threshold), can a person begin to generate credits or offsets (by further reductions) under this proposal.

The County has submitted proposals and received approval for the generation of credits that achieved these requirements. However, § 96.8 (d) (3) (ii) and (d) (5) both allow DEP to basically change the rules regarding threshold requirements (former section) and credit eligibility requirements (latter section) as it sees fit in meeting EPA's legal mandates for restoration of the Chesapeake Bay. The County believes that these two sections should be struck from the rulemaking because there needs to be certainty, predictability, and equitability in the trading program over time.

In addition, § 96.8 (d) (4) regarding compliance status seems overly broad and is a concern to our WWTPs. Specifically, (4) (ii) may be interpreted to mean that if a WWTP is under a consent order to address wet weather issues they would not be able to sell credits to neighboring systems who may need them to meet permit effluent limits. This seems counter-productive in meeting the goals of the CBTS.

5. Certification, verification and registration (§ 96.8 (e) and (f)).

These subsections describe the procedural requirements that the DEP has in place to ensure that credits and offsets are calculated correctly and accomplish pollutant reductions.

The first step is "certification," which is typically done in advance of any pollutant reduction activities. In reviewing these requests, the DEP evaluates detailed requests for

approval of credit and offset-generation activities, for the purpose of assigning a specific number of credits to the activity.

The number of credits assigned would have applied all appropriate adjustments such as the reserve and delivery ratios with particular attention being paid to the requirements of subsection (c) (methodology). The result is a letter from the DEP indicating the amount and types of certified credits or offsets, which in the case of credits the generator can then use to market them.

A second important procedural requirement and a key component of the certification decision is a review of the “verification” plan submitted by the proponent of the credits or offsets, followed by actual verification. Verification can take a number of forms, but it must demonstrate that the pollutant reduction activities were implemented as described in the proposal that was certified.

The final procedural step in these subsections is “registration.” This is the DEP’s accounting mechanism to track verified credits and offsets before they are used to comply with the NPDES permit effluent limits for the Bay.

Under § 96.8 (e) (1), the County is concerned that it excludes DMR generated credits. Credits generated by point sources are already managed by the DMR. As mentioned earlier, the point source to point source issue needs to be addressed here as well.

§ 96.8 (e) (2) (ii) (E) states that information on any source of funding used to pay for any portion of the pollutant reduction activity, including the dollar amount and any conditions and restrictions regarding the use of those funds towards the generation or sale of credits or offsets. The County believes this paragraph should specify that only information on any source of “public or governmental” funding should be provided.

§ 96.8 (e) (2) (ii) (F) requires a description of how risks of failure of the pollutant reduction activity shall be managed, such as the use of financial guarantee mechanisms, contractual arrangements, permits, insurance products and reduction of the concentration of projects in a particular sub-watershed. The County seeks clarification on the terms “financial guarantee mechanisms,” “contractual arrangements,” and “insurance products” since they are undefined.

§ 96.8 (e) (2) (ii) (I) requires the names of the persons submitting the request and other participants involved in the pollutant reduction activity. The County seeks clarification on “other participants” since it is not defined and could potentially involve dozens of individuals when dealing with large agricultural operations or WWTPs that are producing credits. The County suggests it be deleted, since the person submitting the request is the responsible party.

§ 96.8 (e) (3) (v) states that DEP can establish new or modified procedures for calculating nutrient credits, including changes in trading ratios, that can result in a reduction of nutrient credits from a BMP proposal. As stated above with respect to § 96.8 (c), explicit language should be included in the rulemaking to prohibit changes in the credit calculation methods for multiple compliance period credit proposals that have been approved. It is suggested that DEP include a time horizon on the credit certification letter and guarantee the “credit yield” for the BMPs will be honored through the end of that time horizon. This would allow DEP discretion in the duration of credit yield certainty, while still offering some predictability to the credit generator and purchaser.

§ 96.8 (e) (3) (vii) allows DEP the latitude to approve or deny credits accrued from a BMP implementation project that was fully or partially subsidized by Federal funds. This section should be struck, since DEP should simply be following the rules established by the

funding agency, not enforcing additional rules on the funding source. This could essentially be seen as one governmental entity working counter to the intentions of another and could create a disincentive for participation in voluntary government programs. Such latitude for denial of credits, even though the funding agency allows for the credits, limits the predictability for credit generation and thereby inhibits initiating nutrient trading activities and projects that would implement BMPs, reduce pollutant loads, and generate nutrient credits through the use of federal or state funds. Again, the County's WWTPs are concerned with how this may affect point source to point source trades.

§ 96.8 (e) (5) (ii) and (iii) address the time period in which credits can be traded and used to meet compliance needs. Credits can only be used for compliance purposes within the compliance year in which they are certified, unless DEP allows multiple year certifications per paragraph (iii). This creates a timeline bottleneck in which many credits must be certified in the fall and early winter, so that the entity implementing the BMP(s) – a farmer, for instance – can have an idea how many credits will be available for sale if he goes through the expense of implementing the BMP(s) in the spring. It can be done, but it is a very tight time frame.

The other issue relative to § 96.8 (e) (5) (iii) was stated earlier with respect to § 96.8 (c), stating that explicit language should be included in the rulemaking to prohibit changes in the credit calculation methods for multiple compliance period credit proposals once those credit proposals are approved.

§ 96.8 (f) (2) (iii) (C) states that DEP can conduct monitoring of water quality to determine if the BMP load reductions are occurring. Monitoring activities by DEP should be restricted to inspecting the BMP site to determine if the BMP has been implemented and maintained as approved in the credit proposal. The BMP load reductions utilized in the credit

calculation and certification process should not be brought into question by post-water quality monitoring to determine if the assumed BMP load reduction efficiencies are realized. If the actual reductions realized were less than the reductions predicted by the model used to calculate credits, it would be through no fault of the credit generator. Such monitoring could be helpful in revising the model for the future, but should not be used to penalize a credit generator who is acting in good faith with DEP's rules, regulations and calculations.

6. Use of credits and offsets (§ 96.8 (g)).

This subsection addresses the obligations of persons who use credits and offsets to meet permit requirements. This underscores that the use of credits and offsets only applies to the nutrient and sediment effluent limits in National Pollutant Discharge Elimination System (NPDES) permits for the purposes of restoration and protection of the water quality of the Chesapeake Bay.

Credit and offset failure is addressed in § 96.8 (g) (5). There are several factors that come into play with this issue. First, it is important that credits and offsets generate real reduction in pollutant loads delivered to the Bay. In addition, the one sector most likely to purchase credits, the sewage treatment plant operators, has expressed concern over purchasing credits and then later being subject to enforcement action by the DEP if the credits are not accepted due to credit failure.

The County believes that § 96.8 (g) (5) attempts to address both of the above concerns through the existence of an approved legal mechanism that is enforceable by the DEP and the use of a credit reserve. While permittees are responsible for enforcing the terms of their credit and offset contracts, the DEP may waive this requirement when the pollutant reduction activity fails due to uncontrollable or unforeseen circumstances. However, the County believes that

clarification is necessary with respect to the use of the credit reserve and whether the permittee will be “held harmless” from the failure of credit generating activities or availability of replacement credits.

In addition, would the permittee still be responsible if PENNVEST, as proposed, becomes the nutrient credit clearinghouse? As you know, liability in the event of a failure has been one of the major issues and stumbling blocks for WWTP participation in the trading program.

We would also point out that there is a typographical error in the numbering under § 96.8 (g) that has resulted in two number fives (5) instead of a number (6).

7. Water quality and Total Maximum Daily Loads (TMDLs) (§ 96.8 (h)).

This subsection makes it clear that local water quality issues and other existing regulatory requirements takes precedence over any decisions made under this proposal.

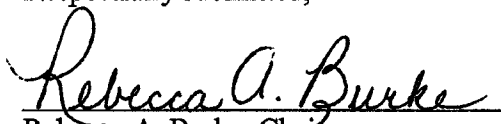
§ 96.8 (h) (1) states that nutrient credits cannot or may not be certified on an impaired water body that doesn't meet its water use. This creates uncertainty for generating nutrient credits on impaired waters where a TMDL has not as yet been approved. If non-point BMPs are required to meet the TMDL for an impaired stream, are those BMPs ineligible for nutrient credits? There is further uncertainty for impaired streams that don't yet have a TMDL. There needs to be additional clarification in the rule for these situations.

Finally, this raises the concerns mentioned above with respect to § 96.8 (d) (3) and (4) on compliance. Point source to point source trading needs to be specifically addressed or clarified with respect to § 96.8 (h) (1) and (2).

III. Conclusion

The Lycoming County Commissioners appreciate the opportunity to present comments on this Proposed Rulemaking for Water Quality Standards Implementation and respectfully requests that the EQB consider its comments on these issues. We also appreciate and acknowledge the DEP for their outreach efforts and collaboration with advisory committees and PENNVEST.

Respectfully submitted,

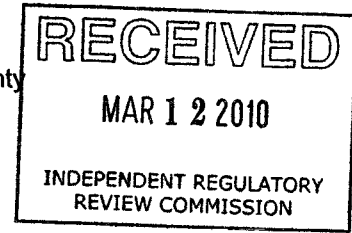
A handwritten signature in cursive script that reads "Rebecca A. Burke". The signature is written in black ink and is positioned above a horizontal line.

Rebecca A. Burke, Chairperson
Board of Commissioners

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From: Megan Lehman [MLehman@lyco.org]
Sent: Thursday, March 11, 2010 11:22 AM
To: EP, RegComments
Cc: Smith, Ann E
Subject: 25 Pa. Code Chapter 96 Comments from Lycoming County
Attachments: Nutrient trading regs Lycoming County comments.pdf

Importance: High




Good morning,

Attached is a comment letter from the County of Lycoming regarding the proposed rulemaking for 25 Pa. Code Chapter 96, concerning nutrient trading. A hard copy with original signature is being sent via mail. Thank you very much for the opportunity to comment. The rulemaking is an important step in establishing the trading program in which we plan to actively participate.

Thank you,

Megan D. Lehman
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