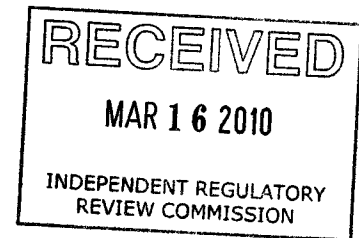


2821

**COMMENTS TO ENVIRONMENTAL QUALITY BOARD'S PROPOSED
RULEMAKING – (25 PA. CODE CH. 96) WATER QUALITY STANDARDS
IMPLEMENTATION - DATED FEBRUARY 13, 2010 (40 Pa.B. 876)**

**SUBMITTED BY: STEVEN A. HANN, ESQUIRE
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**SUBMITTED TO: Environmental Quality Board
RegComments@state.pa.us**



Please accept the following comments in response to the Proposed Rulemaking – Water Quality Standards Implementation – that appeared in the Pennsylvania Bulletin on Saturday, February 13, 2010 (40 Pa.B. 876).

1. There are fundamental concerns with the Department's use of the terms "offsets" and "credits" in the proposed regulation and the following comments address such concerns:

a. "Credits" and "offsets" are two different methods that could be utilized by a permittee to meet its annual nutrient cap load, and each should be addressed in separate sections of any final regulation. The proposed regulation differentiates between the two only with respect to credits being tradable, when, in fact, the two concepts are fundamentally different. The Department's seemingly parallel treatment of the two creates confusion and difficulty for both the regulated community in determining whether trading is appropriate and the Department, who will be regulating such trading.

b. Offsets have traditionally been applied to situations where septic systems are taken out of operation and the properties are connected to public sewer, or when a single entity owns/operates two or more treatment plants and offsets are applied intra-facility between the treatment plants. In the proposed regulation, the Department recognizes that Best Management Practices ("BMPs") can be used to calculate an offset. The Department should provide specific removal efficiencies for typical BMPs in lieu of relying solely on the Chesapeake Bay Watershed Model for offset calculations.

c. Any definition or application of "offset" must be clear that offsets are used by a NPDES permittee to directly offset (or adjust) that discharger's permitted annual nutrient cap load.

d. Offsets not subject to trading ratios as set forth in the definition section of the proposed regulation (e.g., see definition of "trading ratio").

e. The term “offsets” should not be included in the proposed definitions of “threshold” or “verification.”

f. Offsets need not be “certified, verified and registered” (e.g., see proposed section addressing “Chesapeake Bay water quality” (Section 96.8(b)).

2. To the extent that pollutant removal efficiencies for BMPs are applicable to offsets, the proposed regulation refers to the Chesapeake Bay Watershed Model Version 4.3 or any subsequent versions. (See proposed Section 98.6(c).) It is the commenter’s understanding that Version 5.3 of the referenced Model is or will be available. The proposal seems to indicate that only the latest version of the model should be used when calculating offsets. At what point will Version 5.3 be available to calculate and/or allocate nutrient loading reductions to the respective basins in the Watershed and, therefore, also be available for use in offset calculations.

3. The methodology section of the proposed regulation (Section 98.6(c)(3) indicates that the Department “may rely on results ... to approve other pollutant removal efficiencies for BMPs” and that “the Department may rely on the information supplied by permittees in the DMR when calculating and certifying credits and offsets” [Section 98.6(c)(5)]. Do the aforementioned provisions mean that only the Department can calculate offsets under the proposed regulation or may a permittee itself calculate offsets subject to Department review and approval? Based on proposed section 96.8 (c)(5), it would seem that a permittee itself could submit the calculations. In either case, what is the Department’s expected timeline for calculation of credits/offsets or approval of a submitted calculation?

4. The methodology section of the final regulation (or section addressing eligibility requirements for the Chesapeake Bay) should specifically encourage and provide a mechanism for NPDES permittees to evaluate and implement a broad range of BMPs, as well as other applicable actions, such as non-stream discharge alternatives, as a means of facilitating and achieving nutrient loading reductions.

5. The methodology section of the final regulation (or section addressing eligibility requirements for the Chesapeake Bay) should provide NPDES permittees with substantial discretion to document offsets for use within a given project for all mechanisms utilized to control, minimize, restrict or eliminate stream discharges. For example, a municipal permittee should receive credit for a full offset if it is able to divert flows from a permitted stream discharge to a non-stream discharge. This type of offset is consistent with the intended use of offsets, *i.e.*, an application used by an NPDES permittee to directly offset (or adjust) that discharger’s permitted annual nutrient cap load. Such “internal” offsets, which are capable of being documented, can potentially generate significant load reductions. Establishing a mechanism to calculate offsets of this nature will further the objectives of the proposed regulation. Conversely, limiting the offset value of such mechanisms will potentially discourage creative strategies that the trading program is intended to encourage. Therefore, consistent with the aforementioned comments, the final regulation should acknowledge the value of non-stream discharge alternatives and the nutrient loading offsets that they can generate.

6. Part (ii) of the definition of the term “baseline,” if retained, could prevent a wastewater treatment plant from generating Chesapeake Bay related credits, as encouraged by the Department, if a local TMDL requires greater nutrient reductions than those reductions required from the permittee to comply with annual nutrient cap loads in its NPDES permit. (See also proposed Section 98.6(d)(2)(ii).)

7. The definition of the term “delivery ratio” contains the phrase “defined compliance point,” but such phrase is not defined elsewhere in the proposal and appears critical to the determination of a delivery ratio.

8. The definition of the term “edge of segment ratio” contains a groundwater component. The Preamble fails to discuss the applicability of groundwater pollutants to this ratio.

9. Proposed Section 98.6(d)(4) indicates that a permittee not in compliance with its NPDES permit cannot use credits or offsets to meet its permit requirements. This statement is contrary to the intent of the proposed regulation, which would allow a permittee to attain compliance with the term of its NPDES permit by the purchase of credits. (See proposed Section 98.6(g).)

10. Proposed Section 98.6(f)(2)(ii) requires that there be a valid contract prior to the registration of credits. How does the Department intend to address an entity that has “generated” credits, but has not yet identified a potential buyer of such credits? Does that entity need to avoid or postpone registration of these credits?

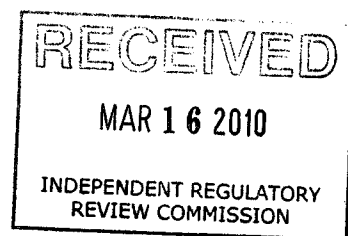
11. Proposed Section 96.8(g)(5) requires a permittee to enforce the terms of a credit contract to ensure compliance with its NPDES permit. Although the Department provides a narrow exception to this strict requirement, any exception needs to be much broader in order for the trading program to be workable. If a permittee has purchased credits through a valid contract, and the credits later become unavailable through no fault of the permittee, the permittee should not be penalized under any circumstances and should not risk enforcement action by the Department.

2821

From: Ruth Muir [rmuir@hrmml.com]
Sent: Monday, March 15, 2010 4:31 PM
To: EP, RegComments
Cc: Steve Hann
Subject: On behalf of Steven A. Hann, Esquire - Comments to Environmental Quality Board's Proposed Rulemaking - Water Quality Standards Implementation -dated February 13, 2010 (40 Pa.B. 876)
Attachments: Trading comments 031510 (00520079).pdf

Please accept these comments on behalf of Steven A. Hann, Esquire in response to the Proposed Rulemaking – Water Quality Standards Implementation – that appeared in the Pennsylvania Bulletin on Saturday, February 13, 2010 (40 Pa.B. 876).

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