MRSA

MILTON REGIONAL SEWER AUTHORITY

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March 15, 2010

Sent via Electronic mail to RegComments@state.pa.us

Honorable John Hanger, Chairperson
Pennsylvania Environmental Quality Board
P.O. Box 8477
Harrisburg, PA 17105-8477

Re: Milton Regional Sewer Authority
Comments on Proposed Changes to 25 Pa. Code Ch. 96
Water Quality Standards Implementation
Chesapeake Bay Trading Program

Dear Chairperson Hanger:

These comments are submitted by the Milton Regional Sewer Authority (MRSA) in response to the proposal to amend Chapter 96 of the State's NPDES rules as set forth in 40 Pa. Bulletin 876-83, February 13, 2010 to establish rules for the Chesapeake Bay trading program. The MRSA has historically had an interest in selling credits but has encountered a myriad of inconsistent interpretations and assertions from the Department as to how the program will be implemented. Based upon the following reasons, MRSA does not believe the rules should be promulgated as proposed. Included with these comments is a one-page summary that MRSA requests be provided to each member of the Board in the agenda packet prior to the meeting at which the final regulations will be considered. The MRSA appreciates the Board's consideration of these comments.

The Proposed Credit Program Should Set Forth Objective Trading Criteria

The "Background and Purpose" section of the preamble to the proposed regulations concludes that the "proposed rulemaking will provide clear and certain standards for nutrient trading." Elsewhere the preamble discusses the requirements that the regulations will be put in place "to ensure that credits and offsets are calculated correctly." While we believe that clear and certain standards should be provided and that many projects (particularly point source to point source trades) can involve clear standards where the calculations would not vary from person to person, the proposal fails to establish objective standards on some important underlying issues. A major concern with the proposed regulations, similar to the existing trading policy, is

that the regulated community is not apprised of the specific criteria that the Department will use. This involves, among other things:

- the specific reserve factor, if any, that would apply to point source trades;
- how trades will be calculated based upon the deliverable loads of the seller; and
- how trades will be calculated based upon the deliverable loads of the purchaser.

Although the Department has put out its trading policy in 2006, answers to specific questions regarding implementation have been in a constant state of flux – often depending upon whom at DEP you talk to and what day the discussion occurs. Without the specifics nailed down in the rulemaking – the decision making process can reasonably be expected to be arbitrary.

Without such criteria identified in the rules, the proposed rules essentially state that a facility can trade if the Department says the facility can trade. For example, the definition of credit is based upon a unit of pollutant reduction that the Department has certified, verified and registered. The regulations, however, do not identify the criteria for such decisions. Thus every decision by the Department is subject to disagreement based upon the potential arbitrary decision-making process due to significant issues left unaddressed by the proposed rules. The trading rules should identify the underlying criteria.

Need to Establish a Meaningful Appeal Process

As discussed above, without specific criteria being identified, the process is prone to arbitrary decisions being made. As such, it is imperative that the regulations provide a meaningful process for appeal. As appeals before the EHB are often time-consuming, if the appellant were to obtain a favorable decision, it would likely be after the time period the rule otherwise allows for a trade (*i.e.*, water year plus sixty days).

An action for supersedeas, which the Environmental Hearing Board describes as an extraordinary remedy, is not sufficient. The regulation should, at a minimum, allow for a permittee to use credits in subsequent water year(s) should it obtain a favorable decision on appeal. Such approach would avoid having the Department and the appellants expending significant resources as part of an appeal where the regulations can easily address the concerns.

There must be a mechanism in place which ensures the proposed subject credits in question would be made available (upon a successful resolution of the appeal). Failure to provide such a reasonable approach would potentially impose financial, legal and compliant damages to POTWs and other injured parties, causing such parties to seek any and all legal remedies available. The regulations should assure that the buyers and sellers are not being penalized by an inappropriate decision by the Department.

Trading Should be Based Upon Deliverable Loads Using Delivery Ratios of Both the Buyer and Seller

The proposal recognizes the fact that a pound of nitrogen in the upper reaches of the Susquehanna has less impact than a pound of nitrogen entering the water near the border with Maryland. With the attenuation of nutrients occurring, a discharge of 100 lbs of nitrogen at one location will have a different deliverable load to the Chesapeake Bay than 100 lbs of nitrogen discharged at a distant location.

Inasmuch as the cap load for Pennsylvania is based upon deliverable loads to the Chesapeake Bay, the overriding issue in any trade should be based upon the deliverable load reaching the Chesapeake Bay. As such, when a point source to point source sale occurs the pounds of the seller should be converted into a deliverable load based upon the delivery ratio and then reconverted into the end-of-pipe limits of the buyer based upon the buyer's delivery ratio. As such, if a POTW were to sell 100 pounds of nitrogen to a downstream buyer with a higher delivery ratio, then the end-of-pipe pounds the buyer would end up with would be less than 100 pounds. On the other hand, if a POTW were to sell 100 pounds of nitrogen to an upstream buyer with a lower delivery ratio, then the buyer would end up with more than 100 end-of-pipe pounds. In both examples, the potential impact on the bay or deliverable loads to the bay would be the same. (For the purposes of the above examples they do not include any reserve, to the extent applicable.)

Savings from Trading Program

The preamble iterates the Department's consistent representations to State legislators and the regulated community that the nutrient trading program provides sewage treatment plants with options that have the potential to reduce compliance costs substantially. However, such savings would be illusory, at best, if the companion rulemaking also proposed on February 13, 2010 to Chapter 92a were to be finalized.

One of these changes, as set forth in proposed §92a.47(b)(2), would require tertiary treatment where a facility discharges to a water body that is not meeting water quality standards ("WQS"). It appears that the proposed regulation, if finalized, would arbitrarily require all facilities subject to the Chesapeake Bay Program (which is identified as an impaired water body) to install tertiary treatment. Such approach, would minimize, if not eliminate, the practicality of participating in a trading program.

The Department should not be requiring sewage treatment plants subject to the Chesapeake Bay Program to be meeting tertiary treatment standards. The appropriate permit limits imposed by the Chesapeake Bay Program should be all that is required.

The Concept of Offsets Needs to be Clarified

Proposed §96.8 would define an "offset" as a nontradable unit of compliance that corresponds with a unit of reduction of a pollutant that when certified, verified and registered by the Department, may be used to comply with NPDES permit effluent limitations. The regulations should be clarified to reflect that at the end of the compliance year, any unused loadings (including any unused offsets) are credits that can be traded. The definition of "offset" and/or "credit" should be clarified to reflect such result.

Furthermore, the definition of "offsets" is vague. It should be clarified that if a municipality undertakes an action that results in a permanent reduction (*e.g.*, connection of retired on-lot systems to the POTW) that such loadings may be utilized by the POTW as an offset pending amendment of the NPDES permit cap loadings to reflect such permanent reductions. The definition of "offset" as a "nontradable unit" may be inconsistent with such intent.

In addition, the proposal is replete with references to offsets, similar to credits, being subject to certification, verification and registration. *See e.g.*, §§ 96.8(a) (proposed definition of "offset"), 96.8(b)(2), 96.8(e)(1) and 96.8(g)(3). Offsets should not be subject to certification, verification and registration the same way as a

trade. While we recognize that DEP will be approving offsets (and amending NPDES permits to increase the cap loads for permanent offsets), the formal processes of certification, verification and registration will not be taking place. The regulations should be clarified consistent with such approach.

Definition of "Credit Reserve"

Proposed §96.8(a) defines "credit reserve" as credits set aside by the Department "to address pollutant reduction failures and uncertainty, and to provide liquidity in the market."

The regulation should be clarified that pollution reduction failures and uncertainty generally associated with non-point source projects will not be used as a basis for imposing a credit reserve on point sources generating credits. Inasmuch as point source generation of credits will be based upon information set forth in certified DMRs, there should be no credit reserve associated with pollutant reduction failures and uncertainty. It would be inappropriate to penalize point sources due to the shortfalls anticipated with nonpoint source projects.

Furthermore, the language "and to provide liquidity in the market" should be deleted from the regulation. It is unclear what this means. If a facility is entering into contracts and selling credits for an agreed-upon rate, these credits should not arbitrarily be reduced because of some undefined concern regarding the "liquidity of the market." If the Department has something in mind, then it should propose such approach. Otherwise, such language should be deleted from the regulation.

Trading Ratios

Proposed §96.8(a) contains a definition of "trading ratios" to address "uncertain, water quality, reduction failures or other considerations" including a reserve ratio. Proposed §96.8(e)(3)(v) also addresses the concept that credits can be reduced based upon the department using calculations to address uncertainty, trading ratios, risk-spreading mechanisms and credit reserves. While such concerns may be pertinent to non-point projects generating credits, it does not apply to point source trades. A POTW generating a credit will not have uncertainties. There is no risk associated with these projects. Either they generate the credits or they don't – which can easily be verified from a quick review of the DMRs. Reserves should not be imposed on point sources because of the uncertainties associated with non-point sources.

In addition, it is unclear what is meant by "water quality" or what would be included in "other considerations" as set forth in the definition of "trading ratios." These open-ended concepts are inappropriate and should not be used as a basis to reduce the credits traded.

If the Department intends to impose any sort of trading ratio, reserve, or other reduction on the sale of credits from a point source seller to a point source buyer, then the regulations should set forth the specific amounts. It should not be a moving target and subject to the whim of the decision-maker. Otherwise, the proposal, contrary to the representations being made, will neither provide "clear and certain standards" nor establish procedures to "ensure that credits and offsets are calculated correctly."

For example, nowhere is the regulated community told in the regulations that a reserve factor for point source to point source trades should appropriately be 0%, 1%, 1.5% or some other number. These standards should be spelled out in the regulation rather than resulting in the Regional inconsistencies that often occur when discretion is involved. Moreover, without such regulatory standards, appeals would likely result.

In addition, the term "offsets" should be removed from the definition of "trading ratios." Offsets should not be subject to any ratio. For example, there is no delivery ratio, edge of segment ratio or reserve ratio that should be applicable to a POTW receiving an offset for retired on-lot systems, receipt of septage waste or other offsets.

Threshold Requirements

The regulations should clarify that the threshold requirements set forth in proposed §96.8(d)(3) apply only to non-point sources. While it is clear that §96.8(d)(3)(i), which applies only to an agricultural operation, would be limited to non-point sources, there is no such qualification in §96.8(d)(3)(ii). This subsection provides that 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. Such criteria should not apply to point sources.

If the Department were to intend for it to apply to point sources, then the Department should provide examples of situations where it might be appropriate.

Credits and Technology-Based Requirements

Proposed §96.8(b)(6) provides that credits and offsets may not be used to comply with technology-based effluent limits, except as expressly authorized by federal regulations administered by EPA. Similarly, proposed §96.8(d)(2)(ii) provides that for point sources, the baseline is 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 which is more stringent. These regulations should be modified to reflect that it only applies to "technology-based effluent limits established under the Clean Water Act, if applicable."

The proposed rulemaking to Chapter 92a proposes to establish tertiary treatment standards which, as discussed, potentially would be applicable to all the Chesapeake Bay municipal dischargers. The tertiary treatment standards are not traditional water quality- based standards -- they are not based upon water quality standards. Nor are the tertiary standards traditional technology based standards – they are not based upon a study of the various underlying factors considered in the development of technology-based standards under Section 304 of the CWA. Instead, they appear to be arbitrary numbers intended to require upgrades in municipal treatment plants.

If the tertiary treatment standards were to be finalized and deemed to be a technology-based standard, then under the proposed trading regulations, the ability to trade to meet the Chesapeake Bay requirements would be significantly hampered. Regardless if the tertiary limits are finalized, the trading rule must clarify that such provision would not impact the generation of credits.

Otherwise, the Department must undertake a cost analysis to identify the implications of such restriction. In the past, the Department reduced its cost calculations for compliance with Chesapeake Bay requirements upon the assertion that a number of plants would not need to upgrade but, instead, would be able to have significant cost savings associated with trading. If such savings would now be hampered, then the Department must correct such misconceptions.

Use of DMR Information

Proposed §96.8(c)(5), a subsection that addresses the methodology for certifying credits and offsets, provides that the Department may rely on the information submitted in the DMRs when calculating and certifying credits and offsets for point sources. The DMRs would also be used as a simple means to verify that the credits were generated by a point source. Once the DMRs are submitted and the permittee requests verification, upon review of the DMRs the Department should be able to immediately register the credits on the web site.

Section 96.8(e)(4), pertaining to a verification plan, is silent on the use of DMRs. This section should be amended to reflect that, for point sources, the use of DMRs may be used for verification.

Methodology

Proposed §96.8(c) addresses the methodology associated with trading. Subsection §96.8(c)(1) addresses the methods when calculating and certifying credits and offsets. Subsection §96.8(c)(2) explains how credits and offsets may be calculated. Subsection §96.8(c)(3) sets forth approaches to calculate removal efficiencies of BMPs. Subsection §96.8(c)(5) addresses calculating and certifying credits and offsets. Subsection §96.8(c)(4), however, indicates that the Department may rely on the methods, data, sources and conclusions in the listed EPA documents, but does not identify what decisions those documents would potentially be used for. This regulation should be clarified to reflect whether the documents would be used to calculate removal efficiencies, calculate credits, for certifying credits, and/or for some other specified purpose.

Disqualification from the Trading Program Should Not be Based Upon Compliance Status or Intent

Proposed §96.8(d)(4) does not allow any person to generate or use credits or offsets if the person is currently not in compliance with, or who lacks the ability or intention to comply with Department regulations, permits, schedules of compliance, orders, any law or regulation that addresses pollution of waters of the Commonwealth, or contracts for the exchange of credits. This provision is overbroad and should be eliminated.

Just because a facility is not in compliance with any of the listed items should not be a basis for blacklisting the facility from participating in the trading program. If a facility, for example, were to have a single pH violation, does that mean that the facility, instead of being able to buy credits as originally planned, would now need to spend millions of dollars in upgrading its facility? Why should the single pH violation preclude participation in the program?

Furthermore, the proposed regulation would apply to violations of any Department requirement, regardless of the environmental media or whether it is even from the same facility. So if another facility owned by the

same entity were to have a violation of an air requirement, that somehow would preclude participation in the nutrient trading program. Such restriction makes no sense.

In addition, noncompliance with an order should not preclude participation in the trading program particularly since Department orders may be unilaterally issued. The unilateral imposition of a requirement in an order should not result in preclusion from the trading program.

In addition, the language of the regulation would create a catch-22. While the Department has indicated that a facility would have sixty days after the end of the water year to purchase credits, if applicable, this new regulation would preclude such approach. It addresses persons "currently not in compliance." Once the end of the water year is reached, a facility that has not met its permit limits would "currently be in noncompliance" and as such §96.8(d)(4) would preclude that person from coming into compliance during the extra sixty-day period.

Noncompliance with the various listed items is already subject to potential sanctions under applicable law. It should have no affect on the ability to trade.

Such approach would also make trading contracts essentially meaningless because any contract would be based upon the fortuity that both the buyer and the seller have not somehow overstepped some other requirement. This provision would be such a disincentive to participate in the trading program that it would make the trading program essentially useless. No one would buy or sell credits if its ability to participate in the trading program was so elusive.

List of Items Required for Certification

Proposed §96.8(e)(2) contains a list of information that a certification must contain. The preamble indicates that there are already 45 proposals that have been approved. By use of the term approval, it appears that the Department has already certified these 45 projects. As the Department did not have the regulatory list of items that it now proposes in subsection §96.8(e)(2) applicable to such projects, the Department should make it clear that these projects do not need to go back and be recertified under the new standards. The new regulations should only apply prospectively to new projects.

Nonpoint Source Caps

Proposed §96.8(e)(3)(vi) provides that the annual sum of all credits certified from nonpoint sources may not exceed the applicable trade load calculated by the Department which is identified as 5.7 million pounds of nitrogen per year and 396,800 pounds of phosphorus per year. The Department should provide public information on the genesis of these numbers. It is unclear how these numbers were calculated and, as such, limits the ability of the public to understand and comment on such values.

Certification by the Department

Proposed §96.8(e)(5) provides that the Department will certify credits and offsets when it determines that the applicable requirements have been satisfied. The question that arises is what happens if the seller of credits has done everything that is required and due to no fault of the seller, the Department does not timely act upon

the verification and certification? For example, the Department may be understaffed and may not have sufficient personnel to timely respond. Such failure of the Department to act should not result in the seller losing its credits.

The regulations should include a provision allowing the seller, in such situations, to use the credits in a subsequent water year. Protections can be built into such approach to assure that it will not result in more deliverable loads to the Chesapeake Bay than is otherwise provided for.

Contracts

Proposed §96.8(f)(2)(ii) provides that the Department may establish basic contract elements and require approval of trade contracts before registration. If "basic contract elements" are to be required, then such elements should be set forth in the regulations. The regulations cannot appropriately provide the Department the right to establish any contract elements, regardless of the reasonableness or appropriateness of such provisions.

In addition, proposed §96.8(g)(5) [i.e., the first of two subsections that are numbered (g)(5)] provides that permittees are responsible for enforcing the terms of their credit and offset contracts, when needed to assure compliance with their permits. While a contract action for specific performance would be appropriate where the seller has, in fact, generated the credits, a contract cause of action from the NPDES compliance perspective would be useless if the credits have not been generated. While the buyer may be able to collect damages, the contract action would not enable the buyer to come into compliance. Accordingly, this section should be clarified to reflect such concerns.

Water Quality and TMDL

Proposed §96.8(h)(2) provides that the use of credits and offsets 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 Maryland and Virginia for the Chesapeake Bay. This section is extremely vague and should be eliminated. It is unclear what is meant by the "compliance point." Furthermore, it is unclear how a net increase will be determined. As New York State discharges will be going through Pennsylvania, would Pennsylvania facilities potentially lose their right to trade if New York State is above its cap load?

If this section means that trading will be based upon consideration of deliverable loads, then, as indicated in the comment above regarding deliverable loads, the regulations should reflect how the adjustments will be made.

Verification and Registration of Point Source to Point Source Trades

The proposed regulations should clarify that a point source seeking to have credits verified and registered need not wait until the end of the water year to proceed. It should reflect that once DMRs are submitted for a month, it can have credits approved. Furthermore, once verified and registered, those are credits that the buyer could immediately use.

MRSA appreciates the opportunity to comment on the proposed rules and, as a municipality that has an interest in being a seller of credits, looks forward to resolving these issues with the Department.

Sincerely,

George Myers
Superintendent MRSA

Enclosure: One Page Summary of Primary Comments

Electronic cc: Gary Cohen, Esq.
P. Lin Davis, Esq.
Charles Wunz, P.E. (HRG)
Peggy Miller (HRG)
Genie Bausinger
John Hines (DEP)

One Page Summary of Primary Comments on Proposed Ch. 96 –Trading Program
Milton Regional Sewer Authority (MRSA), George Myers, Superintendent

The Regulations Should Set Forth Objective Criteria: Although DEP put out its trading policy in 2006, answers to specific questions regarding implementation have been in a constant state of flux – often depending upon whom at DEP you talk to and what day the discussion occurs. The proposal neither provides clear and certain standards for nutrient trading nor ensures that credits and offsets will be calculated correctly. Questions which remain unanswered include, among other things: the specific reserve factor, if any, that would apply to point source trades and how trades will be calculated based upon the deliverable loads to the seller and the purchaser. MRSA strongly encourages the establishment of objective criteria for point source to point source ("PS-PS") trades rather than leaving every decision by DEP subject to disagreement based upon the potential arbitrary decision-making process.

A Meaningful Appeal Process is Necessary: Due to the subjective nature of the trading criteria, it is imperative that the regulations provide a meaningful process for appeal. As appeals before the EHB are often time-consuming, if the appellant were to obtain a favorable decision, it would likely be after the time period the rule otherwise allows for a trade (*i.e.,* water year plus sixty days). There must be a mechanism in place which ensures the proposed subject credits in question would be made available (upon a successful resolution of the appeal). Failure to provide such a reasonable approach would potentially impose financial, legal and compliant damages to POTWs and other injured parties, causing them to seek any and all legal remedies available. The regulations should assure that the buyers and sellers are not being penalized by an inappropriate decision by DEP.

Trading Should be Based Upon Deliverable Loads Using Delivery Ratios of Both the Buyer and Seller: The proposal recognizes the fact that a pound of nitrogen in the upper reaches of the Susquehanna has less impact than a pound of nitrogen entering the water near the border with Maryland. With the attenuation of nutrients occurring, a discharge of 100 lbs of nitrogen at one location will have a different deliverable load to the Chesapeake Bay than 100 lbs of nitrogen discharged at a distant location. Inasmuch as the cap load for Pennsylvania is based upon deliverable loads to the Chesapeake Bay, the overriding issue in any trade should be based upon the deliverable load reaching the Chesapeake Bay. When a PS-PS sale occurs the pounds of the seller should be converted into a deliverable load based upon the delivery ratio and then reconverted into the end-of-pipe limits of the buyer based upon the buyer's delivery ratio.

Definition of "Credit Reserve": "Credit reserve" would be defined as credits set aside "to address pollutant reduction failures and uncertainty, and to provide liquidity in the market." The regulation should be clarified that pollution reduction failures and uncertainty generally associated with non-point source ("NPS") projects will not be used as a basis for imposing a credit reserve on PS-PS trades. Inasmuch as point source generation of credits will be based upon information set forth in certified DMRs, there should be no credit reserve associated with pollutant reduction failures and uncertainty. It would be inappropriate to penalize PS-PS trades due to the shortfalls anticipated with NPS projects. Furthermore, the language "and to provide liquidity in the market" should be deleted from the regulation. It is unclear what this means.

Disqualification from the Trading Program Should Not be Based Upon Compliance Status: Noncompliance with the various items listed in §96.8(d)(4) is already subject to potential sanctions under applicable law. It should have no affect on the ability to trade. Contracts to trade should not be contingent upon the fortuitous compliance record of each facility under all environmental programs. If any noncompliance (*e.g.,* a single pH violation) could disqualify a facility, no one would buy or sell credits if its ability to participate in the trading program was so elusive.

2821

From: George Myers [gmyers@miltonregional.org]
Sent: Monday, March 15, 2010 3:23 PM
To: EP, RegComments
Cc: Hines, John; Gary Cohen Esq.; Chuck Wunz (Work); P. Lin Davis; Peggy Miller; Genie Bausinger
Subject: Ch 96 comments - final
Attachments: MRSA Chapter 96 Comments - Final.doc

Honorable John Hanger, Chairman, PA Environmental Quality Board:

Attached are our comments on the proposed 25 PA Code, Chapters 96 regulations which appeared in the Pennsylvania Bulletin on February 13, 2010. This transmittal includes a one page summary of our comments. We would appreciate a confirmation of the receipt of this eMail submittal.

Thank you for your consideration of our comments on this important matter.

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