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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

April 14, 2010

Honorable John Hanger, Chairman
Environmental Quality Board
Rachel Carson State Office Building
400 Market Street, 16th Floor
Harrisburg, PA 17101

Re: Regulation #7-451 (IRRC #2821)
Environmental Quality Board
Water Quality Standards Implementation

Dear Chairman Hanger:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable Mary Jo White, Majority Chairman, Senate Environmental Resources and Energy Committee
Honorable Raphael J. Musto, Minority Chairman, Senate Environmental Resources and Energy Committee
Honorable Camille George, Majority Chairman, House Environmental Resources and Energy Committee
Honorable Scott E. Hutchinson, Minority Chairman, House Environmental Resources and Energy Committee
Robert A. Mulle, Esq., Office of Attorney General
Andrew Clark, Esq., Office of General Counsel

Comments of the Independent Regulatory Review Commission



Environmental Quality Board Regulation #7-451 (IRRC #2821)

Water Quality Standards Implementation

April 14, 2010

We submit for your consideration the following comments on the proposed rulemaking published in the February 13, 2010 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Environmental Quality Board (Board) to respond to all comments received from us or any other source.

Section 96.8. Use of offsets and tradable credits from pollution reduction activities in the Chesapeake Bay watershed. – Fiscal impact; Effect on natural resources; Feasibility; Reasonableness; Implementation procedure; Clarity.

General

The proposed regulation is one new section with ten subsections and codifies a document entitled “Final Trading of Nutrient and Sediment Reduction Credits - Policy and Guidelines” (No. 392-0900-001), which was issued by the Department of Environmental Protection (DEP) in December 2006. Commentators identified several concerns throughout the proposed regulation. Many of the concerns are similar in that it appears the transition from a policy and guidance document to a regulation may be incomplete.

The Preamble states: “The proposed rulemaking will provide clear and certain standards for nutrient credit trading in this Commonwealth....” Commentators disagree. They claim the regulation, like the existing policy document, does not contain clear and concise criteria. They contend that it creates ambiguity by allowing DEP to readjust best management practice efficiencies, thresholds, ratios, and other factors. Participation in this program is voluntary. It is also beneficial because it reduces pollution at lower costs. However, the rules governing the trading market must be consistent and predictable to encourage investment and participation. Therefore, the Board and DEP need to work with stakeholders to develop greater specificity in the criteria, procedures and standards in the final-form regulation.

Credits and offsets

Commentators have expressed concern with the Board's similar treatment of the term "credit" and "offset" throughout the proposed regulation. They assert that there are fundamental differences between the two, and the two terms should not be treated identically. For example, commentators noted that "offsets" are already incorporated into National Pollutant Discharge Elimination System (NPDES) permits and are not subject to certification, registration or verification as outlined in this proposed regulation. The Board needs to explain the differences and similarities between the two. In addition, the procedures for certification and verification or approval processes for credits and offsets need to be clearly delineated in the final-form regulation.

Timetables and notification

Provisions in the proposed regulation refer to eligibility determinations, credit certifications, verifications or other types of decisions to be made by DEP. What are the timetables for such actions? How will affected parties be notified? Will the DEP provide written notice? To increase predictability for buyers and sellers, the Board should address these questions in the final-form regulation.

Subsection (a) Definitions.

Baseline --

Commentators, including the Pennsylvania Farm Bureau, Pennsylvania Municipal Authorities Association (PMAA), and Nutrient Trading Subcommittee of DEP's Agricultural Advisory Board, expressed concerns with this definition. There appears to be confusion as to how the total maximum daily load (TMDL) will impact a "baseline." In addition, it is unclear what is included in the term "similar allocation" which is used in Paragraph (ii) of this definition and in Subsection (d)(2)(ii). We recommend that DEP work with stakeholders to address these concerns. The Board should utilize greater detail in setting forth its intent in the final-form regulation.

Credit reserve

The need for the phrase "and to provide liquidity in the market" in this definition is unclear. Why would the Commonwealth want to manage "liquidity" in a market and how has DEP determined that the credit reserve will be properly sized to achieve that liquidity? The Board needs to provide an explanation or delete it from the final-form regulation.

Delivery ratio

This definition contains the phrase "defined compliance point." However, it is not clear what this is referring to. For clarity, this phrase should be defined in the final-form regulation.

DMR – Discharge monitoring report

According to existing definitions in Section 92.1, a DMR is the same as an NPDES reporting form. Why are two different terms used for the same form?

Edge of segment ratio

Commentators questioned the use of the term “groundwater” in this definition. It is unclear whether this ratio could provide accurate information about a pollutant moving through both surface runoff and groundwater flows. The Board should provide an explanation or improve the definition in the final-form regulation.

Tradable load

This definition ends with the phrase “a level of reduction activities identified by the Department [DEP] as reasonably attainable.” What criteria and process will be used by DEP in determining what is “reasonably attainable”?

Subsection (c) Methodology.

Subsection (c)(6) includes the sentence “The Department may also rely on other published or peer-reviewed scientific sources.” How will the regulated community know what these sources are? Will DEP publish a list in the *Pennsylvania Bulletin*?

Subsection (d) Eligibility requirements for the Chesapeake Bay.

In order to generate credits and offsets, Subsection (d)(1) requires that generators “demonstrate a reduction in pollutant loads beyond...any threshold established by the Department.” How will the generators know what this threshold is? This threshold should be set forth in the final-form regulation.

In its comments, PMAA contends that the language in Subsection (d)(2)(ii), together with the definition of “baseline,” will unnecessarily limit the ability of point sources to generate credits while still meeting local TMDL reduction requirements. The Board should provide an explanation, or if necessary, modify this provision to promote additional pollution reduction.

Subsection (d)(3)(ii) allows DEP to establish other threshold requirements to protect the Chesapeake Bay. Will these other requirements be promulgated as regulations? If not, how will generators know what these requirements are? We note that requirements that are not contained in law or a promulgated regulation are not enforceable by the Board or DEP. Similar concerns apply to Subsections (d)(5) and (e)(3)(v).

What is the appeals process for someone under Subsection (d)(6)? It should be cross-referenced or set forth in the final-form regulation.

Subsection (e) Certification requirements for the Chesapeake Bay.

Subsection (e)(2)(i)(D) states the “implementation of the pollutant reduction activity must be verified to the extent acceptable to the Department...” What is “the extent acceptable” to DEP? There is a reference to Paragraph (4) and the “verification plan” but it is unclear how the “extent acceptable” is identified. Also, Paragraph (2)(i)(D) appears to be unnecessary since verification is covered in Paragraph (4).

Subsection (e)(3)(vi) sets forth the level at which the sum of all credits may not exceed. It then contains the phrase “...unless otherwise revised by the Department.” Will this be done via regulation? If not, how will generators know what the new levels are? We note that requirements not contained in law or promulgated regulations cannot be enforced.

Subsection (f) Registration requirements for the Chesapeake Bay.

In Subsection (f)(2)(ii), what are “basic contract elements”? This term should be defined. Is there a basic model contract or list of basic contract contents for which DEP will be establishing? If so, it should be set forth in the final-form regulation.

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

Paragraph (5) begins with this sentence: “Permittees are responsible for enforcing the terms of their credit and offset contracts, when needed to ensure compliance with their permit.” The expectations of this sentence are unclear. What enforcement tools will be available to permittees? In addition, PMAA expressed serious reservations about this paragraph and indicated that it may significantly reduce involvement in the trading program. The Board should explain its intent, and avoid language that will unnecessarily deter entry into the trading market.

Miscellaneous Clarity

Provisions in the proposed regulation include general references to other laws and regulations. Examples of these provisions include:

- Subsection (a), definition of “baseline,” Paragraph (i);
- Subsections (b)(5) and (6);
- Subsections (d)(4)(i) and (ii); and
- Subsections (h)(1) and (4).

Our concern with such general references is exemplified by Subparagraph (i) in the definition of “baseline” which includes this phrase “... which must be implemented to meet current environmental laws and regulations related to the

pollutant for which credits or offsets are generated.” Subsection (a) also defines “pollutant” as “nutrients and sediment,” and “nutrients” are defined as “nitrogen and phosphorus.” Therefore, there should be specific citations to the laws and regulations related to three specific pollutants. All general references to other applicable laws and regulations should be replaced with specific citations in the final-form regulation.

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Facsimile Cover Sheet



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333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

To: Debra L. Failor
Agency: Environmental Quality Board
Phone: 7-2814
Fax: 705-4980
Date: April 14, 2010
Pages: 7

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Environmental Quality Board's regulation #7-451 (IRRC #2821). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Tommy Odama **Date:** 4/14/10