



VAMSA COMMENTS ON NPS NUTRIENT CREDIT CERTIFICATION REGULATION

March 2015

On December 29, DEQ's nonpoint source nutrient trading credit certification regulations were published for public comment. The regulations are based on legislation from the 2012 session which sought to provide regulatory stability and ensure that the nonpoint credit program did not interfere with the existing nutrient credit exchange for point sources in the Chesapeake Bay watershed. As a result, the new statute provides for an orderly expansion of nutrient trading in a manner that is fully protective of and consistent with the existing point source trading program. The resulting new trading regulations will establish a process for the certification of nonpoint source nutrient credits and create a registry to track these credits. The proposed regulation includes application procedures, baseline requirements, credit calculation procedures, release and registration of credits, compliance and reporting requirements for nutrient credit-generating entities, enforcement requirements, application fees, and financial assurance requirements.

On March 16, VAMSA submitted comments on the proposed regulation. Key points of those comments are highlighted below:

Definition of “Exchange.” VAMSA pointed out that credit exchanges need not necessarily involve monetary compensation, and proposed an alternate, broader definition of the term.

Definition of “Management Area.” In order to generate nonpoint source credits from a property, the entire “management area” – that is, all contiguous properties owned by the credit generator – would have to be in compliance with baseline nutrient reduction requirements. VAMSA agrees with the proposed definition of “management area,” but commented that DEQ should add “utility easements” to the list of excluded areas (along with public roads and rights-of-way) so as to avoid overly broad “management areas” as to utility properties.

Consistency in Purpose and Applicability Section. VAMSA suggested language that would clarify that MS4 projects undertaken for MS4 permit compliance or for TMDL action plan compliance are outside the scope of the proposed rule.

Local Limits on Credit Use. VAMSA proposed language that would clarify that trading of nonpoint source nutrient credits cannot be used to override local water quality-based limitations.

Liability Limitation. In the proposed regulation, DEQ appropriately disclaims any liability for the performance of nutrient credit-generating entities. VAMSA recommended an edit that would establish that the state's political subdivisions are also not to be made responsible for the credit-generating practices or use of such practices by third parties.

Mandatory Credit Retirement Provisions. The proposed rule provides that any nitrogen credits must be retired if the associated phosphorus credits are acquired for compliance with the Virginia Stormwater Management Program ("VSMP") regulation. This restriction is understandable for VSMP permits for construction activity, because those permittees are required only to document reduce phosphorus discharges as a simplified way of producing total nutrient reductions. However, these restrictions make little sense if applied to permits like MS4s that have separate nitrogen and phosphorous reduction requirements and may be trading with POTWs in the future. Accordingly, VAMSA proposes that the restriction not apply to MS4s.

New Practices & Historically DEQ-Regulated Facilities. VAMSA supports DEQ's decision to certify credits from new practices on a "case-by-case basis" as a means of enabling and crediting innovation. Similarly, we supported a distinction in the statute and the proposed regulation for credits generated by facilities historically regulated by DEQ (e.g., water and wastewater infrastructure), which DEQ can approve on a case-by-case basis without all of the requirements and conditions applicable to NPS credits.

Evidence of Financial Assurance. For a locality, authority, sanitation district, or MS4 owner, the existence of taxing or ratemaking authority should provide more than adequate evidence of financial assurance for any credits that may be generated. As proposed, the regulation goes too far in requiring that these entities "certify" the use of tax and rate revenue in a manner that resembles a pledge, which we think could impact bond issues.

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