

December 29, 2005

Via Hand Delivery

Hon. Kathleen A. McGinty
Secretary
Department of Environmental Protection
16th Floor, Rachel Carson State Office Building
400 Market Street
Harrisburg, PA 17105

Re: Comments Concerning Nutrient and Sediment Reduction Credit Trading Interim
Final Policy and Guidelines

Dear Secretary McGinty:

On behalf of our 9,000 members, the Pennsylvania Chamber of Business and Industry is submitting the following comments on the Department's Nutrient and Sediment Reduction Credit Trading Interim Final Policy and Guidelines ("Nutrient Trading Policy") as issued on October 1, 2005. As explained below, while the Chamber is generally supportive of utilizing market-based systems in environmental programs, the Chamber has some very serious concerns regarding the structure and formulation of the Nutrient Trading Policy.

We believe that the Nutrient Trading Policy leaves open and unaddressed far too many issues, and as a result fails to provide a proper foundation for implementing a market-based system at this time. "Interim" implementation of this Policy appears to be premature, and such premature implementation is likely to lead to serious confusion, problems and attendant disillusionment with market approaches. As currently crafted, the program appears to be a thinly veiled effort to transfer funds from highly-regulated point sources (industries and municipalities) to relatively unregulated non-point sources, with little assurance that those who make an investment in nutrient trading efforts will obtain the type of reliable and dependable "return" that will permit municipal and industrial development to proceed. Little to no effort is proposed to properly engage the agricultural and horticultural community in sound nutrient management solutions.

Our specific concerns are outlined in the following paragraphs. At this point, we are able to provide only topical comments, since many of the details necessary to structure a viable nutrient trading program are missing from this proposal.

1. **The “Moratorium” on New Permits**

Among the Chamber’s most serious concerns is the message issued by one of the Department’s regional offices indicating that the Department has imposed a moratorium on permits for new or expanded wastewater treatment discharges in the Susquehanna and Potomac basins. Although the proposal for a moratorium has never been announced or subject to proper regulatory procedures, personnel from one of DEP’s regional offices have recently advised several applicants that such a moratorium has, in fact, been put in place, allegedly under aegis of the Nutrient Trading Policy and the related Chesapeake Bay Tributary Strategy.

For obvious reasons, the Chamber is strongly opposed to any *sub silencio* effort to impose an indeterminate moratorium on permits for development across this vast area. The imposition of such a moratorium, with no public announcement, let alone any opportunity for public comment, is extremely troublesome. We strongly question the legal basis of any such moratorium directive. If such a moratorium has been imposed, we urge that it be rescinded immediately. If the information conveyed by your regional staff is merely a “misunderstanding” of regional staff members, then such misunderstandings must be swiftly corrected – with a clear message to the agency staff, the regulated public, municipal officials and others who have received this misinformation.

All across the central portion of the Commonwealth, communities and businesses are struggling to attract and keep employment, to finance and build affordable housing, and to provide the type of communities where our children can continue to live and thrive. Indiscriminate and arbitrary impositions of permitting moratoria or delays on new and expanded wastewater treatment plants threatens to undermine these efforts, as businesses will rapidly turn elsewhere to make investments in new facilities and enterprises. At the same time, the agricultural and horticultural community face economic struggles, and a poorly implemented program will do more harm than good, at a time that this community faces increased non-point source runoff regulation.

2. **Prerequisites for a Market-Based Approach**

Employment of a viable market-based approach requires at least two things: (1) creation of a commodity to trade in a manner that is measurable, predictable, and tangible; and (2) creation of a marketplace where willing sellers and buyers can get together to conduct trading transactions. Our concern is that the Nutrient Trading Policy is insufficiently defined and detailed to provide either of these prerequisites. Without the support of the agricultural/horticultural community, the program will fail.

(a) Creation of the Trading Commodity

The Policy seeks to define the trading commodity in terms of “credits” measured annual pounds of nitrogen and phosphorus. However, the process for creating such credits, and assuring that they will be “real” and “exist” over some period of time, is not well defined.

(i) *Defining Credits*

Although the interim Policy provides a few examples of how credits might be calculated, the actual methods for defining credits in various situations remain amorphous. For example, the interim Policy refers to terms such as total available nitrogen load, best management practice (“BMP”) implementation reduction, new estimate nitrogen loading reduction, and current nutrient management reduction, with no clear definition of these terms. The Appendix to the Policy contains oblique references to “sources” for determining various factors (such as “Chesapeake Bay BMPs (7-27-04)”), but lacks a bibliography which translates these into references that someone could find and use. The interim Policy refers to nutrient management reductions as determined under the Chesapeake Bay Model, but does not provide links or further references on how this computer Model will be made available broadly to the regulated community as it attempts to plan and approach particular trades. In short, the interim Policy creates an indecipherable “black box” which is nearly impenetrable by the regulated community. Such opacity does not provide the required basis for defining a commodity that can be traded.

As a further comment, some of our members who are familiar with the Chesapeake Bay Model have indicated that while the model may be appropriate in some circumstances, it is not well suited or well calibrated for use in other circumstances, such as in tributaries to mainstem waterways. The policy should be sufficiently flexible to allow alternative tools to be used to define credits that may be better suited to particular circumstances.

(ii) *Minimum Measures for Non-Point Sources*

We note that DEP has proposed that credits for non-point sources be measured as nutrient reductions above those provided by certain “minimum” measures, including for agricultural sources (1) an approved and implemented nutrient management budget for nitrogen and phosphorous, and (2) a minimum 35 foot vegetative buffer along streams (100 foot setback for manure application).

While we believe that all sources should be carrying out best management practices, the fact is that currently there are few, if any, BMPs enforced against the agricultural community. The agricultural/horticultural community operates under up to four regulatory programs, most of which are “help based”, not regulatory program. Specifically, we are unaware of any regulatory mandate for all agricultural users to implement a nutrient management budget or to maintain a 35 foot vegetative buffer. Under the recently enacted ACRE legislation (3 Pa.C.S. §311 *et seq.*), the requirement to develop nutrient management plans is only imposed on the operators of a “concentrated animal operation.” See 3 Pa. C.S. §506(b). Section 507 of that legislation restricts the application of manure by operators of concentrated animal operations and agricultural operations receiving manure from a concentrated animal operation. The §507 restrictions preclude application of manure “within 100 feet of surface water unless a vegetated buffer no less than 35 feet in width” is used to prevent manure runoff. Thus, the statute (i) only requires nutrient management programs for concentrated animal operations; and (ii) only requires a 35 foot vegetative buffer be maintained by those apply manure from a concentrated animal

operation. The Nutrient Management Policy is fundamentally inconsistent with the ACRE requirements. The Policy goes far beyond the ACRE requirement by assuming a 35 foot buffer for all agricultural operations, and a 100 foot setback (*e.g.*, more than the statutory 35 foot buffer) for manure management.

Since agricultural users are under no requirement to establish such buffers and undertake such nutrient management budgets, the interim Policy is establishing a high hurdle for inducting non-point agricultural sources into the credit-generating program. As a result, the interim Policy will essentially force point source “buyers” to pay for the first 35 feet of buffer, and pay for the nutrient management budget, without getting anything in return for that investment. With all due respect, this arrangement becomes a “Robin Hood” approach to BMP implementation, with industries and municipalities forced to pay non-point users to implement the most basic of best management practices – practices which DEP has either been unable or unwilling to implement directly through regulation applied to these sectors. National failures to properly regulate or assist agricultural/horticultural operations will not be helped by creating a private sector forced market for operations which are not properly managed or regulated in the first place.

(iii) *Enforcement of Credit-Creating Arrangements*

As highlighted by discussions at the recent Water Resources Advisory Committee meeting, the issue of how credit-creating arrangements will be enforced is critical to the workings of the market approach. As currently structured, the issue of buyer versus seller liability is not clearly addressed, and it appears that the enforcement emphasis could ultimately be on the buyer who holds a point source permit and needs credits, with little leverage to the seller who takes money to be invested in nutrient reduction measures and then fails to implement or maintain those measures.

The interim Policy indicates that credits will be determined on an annual basis (see pg. 6), based upon whether certain nutrient control practices continue to be exercised by the “seller” of the credits. Thus, it appears that the “buyer” of credits – after making a substantial investment to pay for improved measures (such as creation of riparian buffers, or switching to cover crops) – could watch that investment evaporate when the seller fails to continue implementation of the measures. Although the Policy suggests that DEP will take the lead regarding enforcement of these measures used to create credits that are traded, significant questions have been raised as to whether DEP has the personnel and resources to police a large number of trading transactions. Moreover, whether DEP does or does not take enforcement action, the Policy is unclear as to what happens to the “buyer.” For example, if an industrial buyer signs an agreement with a farmer to provide 1000 pounds of nitrogen reductions per year through buffers and implementation of a nutrient management plan, and the farmer decides to walk away from the arrangement, while DEP may “enforce” the agreement, does the buyer’s discharge suddenly become unlawful because the credits are no longer being generated? Is the industry forced to pay another farmer (or even the same farmer) once more to create such credits? In a recent question and answer session, the responses from DEP leadership seemed to indicate that these concerns are, in fact, very real – that the industry or wastewater treatment

plant that paid for actions to create permanent credits could find those credits to no longer exist after any annual review of how the seller of those credits was performing.

A factor critical to making this system work will be to assure the long-term viability of trades. We suspect that substantial capital may be expended at the front end to invest in measures that will generate credits, and even more capital will be expended on the development and wastewater treatment plants that are using the credits. If individual non-point source operators can cause those credits to evaporate by walking away from the deal, or alternatively seeking to “hold up” the point source for more money to continue to perform, investments in municipal, industrial and other development will become highly risky. Further, without adequate funding for enforcement personnel, the system will simply not work.

(b) Creation of the Marketplace

The second prerequisite to a market-based approach lies in creating a marketplace where willing buyers and sellers can find each other and effectuate trades. A market, to be viable, must involve more than “wandering through the woods” looking for a potential trading partner. However, that appears to be precisely the situation we face today under the interim Policy. Although we understand that there have been informal discussions regarding a nutrient trading internet website (www.nutrientnet.org), the interim policy lacks clear and formal direction for finding or using an available nutrient marketplace. Those involved in developing land or industries in central Pennsylvania who will generate new or increased nitrogen or phosphorous loadings face the daunting prospect of searching out those, be they point or non-point source owners, who might be able and willing to generate credits through implementation of various control measures. While the number of potential parties is vast, the process of finding specific parties among the masses is extraordinarily difficult. Further, agricultural and horticultural operations will resist poorly thought-out or thinly disguised government regulation. Moreover, it appears that little or no training has been provided to DEP staff in advance of releasing this policy; and regional office staff is seemingly wholly incapable of providing any useful guidance to those involved in current development projects.

We strongly suspect that most non-point source operators (such as farmers) will not be very amenable to a number of seriatim approaches by multiple industries or municipalities seeking to “buy” their cooperation in implementing control measures to create credits. Like the “dinner-time” telemarketing calls, the process of untargeted contacts with these non-point sources will quickly become a nuisance, denigrating the effectiveness of the program. In this respect, the proposed approach will do more harm than good, unless, the Farm Bureaus and agricultural/horticultural trade organizations support the program from its inception.

If this system is to have any chance of working, DEP will need to develop a much more robust and active effort to identify potential opportunities for nutrient reduction credit generation, and formalize this process in the final policy. This means working with and through County Conservation Districts and the agricultural/horticultural community and agriculture agencies to identify possible non-point source project opportunities, and helping bring together

potential buyers and sellers to work out “deals.” In short, the current agriculture/horticulture agency infrastructure and trade organizations need to be the intermediaries to help identify and broker these transactions if this process is to become even somewhat efficient.

3. **Additional Concerns**

The Chamber shares many of the same concerns expressed by the Water Resources Advisory Committee at its November 9, 2005 meeting.

Among those concerns, the Committee noted the lack of a clear scientific basis for the 5% retirement ratio and the higher “uncertainty ratios” described in the Policy. Since the nutrient removal Best Management Practice (BMP) models used for calculating nutrient credits tends to be scientifically conservative, the uncertainty ratio concept appears to be ill-defined, and absent a clear rationale and method for calculation. This will become a fount for confusion, disputes and arbitrary impositions.

In summary, a poorly conceived “planning to implementation” policy forced on those with permits will likely do more harm than good. If nutrient rich runoff is really a concern, the Department needs to make efforts to develop an effective program with the agricultural and horticultural community and not use a “side door” regulatory technique with inadequate enforcement resources.

The Chamber appreciates the opportunity to comment on the Nutrient Trading Policy, and hope that we will have the opportunity to work with the Department in the months ahead to frame a more workable and refined basis for effective market-based approaches to the Commonwealth’s nutrient challenge.

Sincerely,

Eugene M. Barr

cc: Cathleen Curran Myers, Deputy Secretary for Water Management
Mr. Andy Zemba