

January 8, 2018

VIA E-MAIL

Mr. Gary Setzer  
Senior Advisor  
Maryland Department of the Environment  
1800 Washington Blvd.  
Baltimore, MD 21230

**Re: Food & Water Watch and Patuxent Riverkeeper Comments on Maryland's  
Proposed Regulations Governing the Maryland Water Quality Trading Program**

Dear Mr. Setzer:

On behalf of Food & Water Watch and Patuxent Riverkeeper, and our 70,000 and 800 supporters, respectively, located in the state of Maryland we hereby file these comments on the proposed credit swapping regulations governing the Maryland Water Quality Trading Program (the "Program") proposed by the Maryland Department of the Environment ("MDE") in the December 8, 2017 Maryland register (the "Proposed Regulations"). For the reasons cited below, the Program violates the federal Clean Water Act ("CWA" or "Act"). The CWA does not allow point sources to use pollution credits to exceed permit limitations. To the contrary, pollution trading is inherently antithetical to the goals of the CWA; while the Act calls for the elimination of pollution from our waterways, water pollution trading stops progress in its tracks by sanctioning excess discharges of pollution under a market scheme of credit swapping. As a result, the trading program as outlined in the Program and Proposed Regulations is illegal and subject to legal challenge.

In addition, the Program is an irresponsible abdication of the MDE's responsibility to oversee and regulate pollution discharges to the region's waterways. Allowing polluters to purchase their way out of CWA permit compliance will likely result in worsening water quality in the Chesapeake Bay watershed. Water pollution trading — or water quality trading, as it is often called by proponents — is an overly complex and convoluted system of pollution control that is inherently subject to mismanagement and ineffectiveness. Even more disconcerting is the lack of polluter accountability built into water pollution trading schemes, including as set forth in the Proposed Regulations and the Program. Individual polluter accountability is the hallmark of success of the CWA and its implementing regulations, while water pollution trading is designed and implemented so that polluters can evade responsibility for their discharges to our waterways.

Maryland should reject water pollution trading as a mechanism to address nutrient and sediment pollution from point sources and nonpoint sources. Instead, the CWA should be rigorously enforced against all point source polluters, including Concentrated Animal Feeding Operations ("CAFOs"), and the MDE should exercise its authority to mandate Best Management

Practices (“BMPs”) and other pollution reduction strategies in the nonpoint source sector. Pollution trading is simply another voluntary approach that will allow agricultural operations to continue to avoid doing their share to reduce nutrient and sediment discharges to the state’s watersheds, including the threatened Chesapeake Bay, as they have done for decades. To implement yet another voluntary compliance approach with both the point and nonpoint source agricultural sector means that the Chesapeake Bay and the rest of the waters of Maryland are not likely to achieve the water quality goals set by the Environmental Protection Agency (“EPA”), MDE, and the region, including meeting the goals set for Maryland in the Chesapeake Bay total maximum daily loads (“TMDLs”).

The EPA recently issued Interim Evaluations of the progress each state has made towards meeting goals for the Chesapeake Bay watershed, and these show that water pollution trading is *not* a mechanism that should be used to address nutrient and sediment pollution. Pennsylvania, which has implemented water pollution trading for approximately ten years, is off track to meet its interim goals for reducing nitrogen, phosphorous and sediment.<sup>1</sup> While the EPA does not specify the cause of this failure, it is not likely coincidental that the Bay state with the most extensive water pollution trading program in place is also the Bay’s biggest, ongoing nutrient polluter; clearly, pollution trading has not delivered promised improvements in water quality.

## **I. THE PROPOSED TRADING PROGRAM IS ILLEGAL UNDER THE CLEAN WATER ACT**

The CWA simply does not allow for water pollution trading as a mechanism for point sources to avoid meeting permit effluent limitations<sup>2</sup> at the point of discharge. The Act’s permitting provisions are very clear that each point source of pollution must meet individual permit requirements; there are no allowances in the Act to purchase credits, in the hope that other sources are reducing their own loads, in lieu of compliance. If Congress had intended to authorize such trading, it would have clearly done so as it has in other statutory schemes. For example, while the Clean Air Act specifically allows for some degree of air emissions trading, the CWA contains no similar language and efforts to amend the CWA to allow for trading have never passed. The very fact that legislative proposals to establish authorization for water pollution trading have been introduced<sup>3</sup> underscores the fact that trading is wholly absent from the existing statute and the NPDES permitting scheme.

To the contrary, the CWA established detailed programs to clean up impaired waters by requiring states to identify impaired waters and issue TMDLs, point source waste load

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<sup>1</sup> EPA Interim Evaluation of Pennsylvania’s 2016-2017 milestones, June 30, 2017, available at [https://www.epa.gov/sites/production/files/2017-06/documents/pa\\_interim\\_2016\\_2017\\_milestone\\_eval\\_20170630.pdf](https://www.epa.gov/sites/production/files/2017-06/documents/pa_interim_2016_2017_milestone_eval_20170630.pdf).

<sup>2</sup> The use of the word “fulfill” in the Proposed Regulations is inaccurate – credits purchased by point sources are not used to *fulfill* permit requirements, but to justify *exceeding* the limit. Proposed Regulations .09(A) (hereafter “PR”).

<sup>3</sup> *See, e.g.*, Chesapeake Bay Program Reauthorization and Improvement Act of 2012, H.R. 4153, 112th Cong. § 2(e) (2012).

allocations (“WLAs”), and nonpoint source load allocations (“LAs”) through a public process. Maryland and other states in the region have gone through significant processes to develop the Chesapeake Bay TMDLs to reduce pollution in the Chesapeake Bay. EPA’s regulations make clear that the flexibility for “tradeoffs” between point and nonpoint sources in Maryland only exists in the TMDL process itself; WLAs may only be made less stringent if a TMDL process concurrently assigns more stringent LAs to nonpoint sources.<sup>4</sup> Once WLAs are assigned and incorporated into NPDES permits, dischargers must comply with their own permit limits.

Moreover, pollution trading is fundamentally at odds with the CWA because it circumvents the CWA’s technology-forcing principles. The primary goal of the CWA is to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters” by eventually eliminating all discharges of pollutants to waters of the United States.<sup>5</sup> The five-year limits on NPDES permit terms and requirements for EPA to periodically review and revise industry-wide effluent limitations further ensure that permits will become more stringent over time, and that point sources will be required to ratchet down their pollution and maintain the best available technology to reduce discharges. By allowing permit-holders who buy credits to exceed their permit limits, as well as by allowing permit holders who sell credits to maintain “overhead” that allows them to generate credits instead of triggering more stringent permit limits, trading creates a disincentive to the technological innovation underlying the statute’s goal of continually reducing point source pollution.

## **II. CAFOs SHOULD NOT BE PERMITTED TO PARTICIPATE IN THE PROGRAM**

CAFOs should not be permitted to generate credits under the Program. The Maryland General Discharge Permit for Animal Feeding Operations (the “Maryland Permit”) does not permit any nutrient discharge from production areas. With respect to land application areas, Nutrient Management Plans, mandatory for every CAFO, are already required to minimize nutrient loss or runoff.<sup>6</sup> If manure is applied to land, it must be done in a manner that minimizes “nitrogen and phosphorous losses to waters.”<sup>7</sup> The Maryland Permit, Part IV (1)(a) states: “The [nutrient management] plans shall ensure that appropriate manure management measures are used to store, stockpile, and handle animal manure and waste nutrients associated with animal production to minimize the potential for nutrient loss or runoff.”<sup>8</sup> The BMPs that minimize

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<sup>4</sup> 40 C.F.R. § 130.2(i) (defining “Total maximum daily load” and stating “If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.”).

<sup>5</sup> 33 U.S.C. § 1251.

<sup>6</sup> See COMAR 15.20.07.03(11)(a).

<sup>7</sup> COMAR 15.20.08.05(G).

<sup>8</sup> Maryland General Discharge Permit, Permit No. 14AFA effective August 1, 2016 through November 30, 2019, available at

[http://mde.maryland.gov/programs/LAND/RecyclingandOperationsprogram/Documents/AFO\\_GD\\_Permit\\_14AFA\\_MDG01A.pdf](http://mde.maryland.gov/programs/LAND/RecyclingandOperationsprogram/Documents/AFO_GD_Permit_14AFA_MDG01A.pdf).

nutrient discharge should already be a mandatory part of the Nutrient Management Plans governing land application; therefore, these activities should not be able to generate any credits. If Maryland state agencies are enforcing the law and requiring Nutrient Management Plans that minimize nutrient loss, and CAFOs are complying within the confines of their permits, CAFOs should have no credit-generating capability. They should be prohibited from participating in the Program.

### **III. THE PROPOSED TRADING PROGRAM WILL FAIL TO PROTECT OR IMPROVE WATER QUALITY**

The Program suffers from various additional flaws that will render it ineffective in addressing the Chesapeake Bay's nutrient and sediment impairments; indeed, the Program as proposed will likely lead to increased net discharges of pollutants into the watershed. The Proposed Regulations and the Program in its entirety are likely to worsen water quality, transparency, and accountability.

#### **A. There is little detail regarding verification and no required monitoring of credit generating activities.**

The Proposed Regulations include few details regarding the verification process to ensure that the credit generator has actually implemented the activity that supposedly creates credits, and that it continues to function in the required manner; instead, it leaves the verification for agriculturally-generated credits in the hands of unaccountable third parties and, astonishingly, allows for verification to take place as infrequently as once every three years. Maryland adopted a comprehensive BMP verification plan,<sup>9</sup> and at least, the rigor of that plan should be applied in the Proposed Regulations to credits generated for use in the Program.

For example, the Proposed Regulations are extremely vague in describing how rigorous ongoing verification activities need to be. Credits must be verified "no less frequently than every three years," but the EPA's technical memorandum on verification states that verification should occur on an annual basis.<sup>10</sup> The lack of detail regarding the verification process makes it practically impossible for the public to assess whether the Program will result in adequate, ongoing oversight of practices that require regular, sometimes short term, maintenance.

Regardless, no amount of verification that practices are installed or paperwork requirements can make up for the lack of pollution monitoring requirements to document whether pollution reductions are actually taking place. The Proposed Regulations contain no monitoring demands for determining whether the BMP activity generating the credit is actually

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<sup>9</sup> Maryland's Best Management Practice Verification Protocols, updated September 2016, available at [http://www.mde.state.md.us/programs/Water/TMDL/TMDLImplementation/Documents/BMP%20Verification/MD\\_Verification%20Protocols\\_Master\\_Doc.pdf](http://www.mde.state.md.us/programs/Water/TMDL/TMDLImplementation/Documents/BMP%20Verification/MD_Verification%20Protocols_Master_Doc.pdf).

<sup>10</sup> PR .11(A); US EPA, Certification and Verification of Offsets and Trading Credits in the Chesapeake Bay Watershed, Technical Memorandum, 7 (July 21, 2015).

reducing discharges of pollutants into local waterways. This violates the CWA, which requires that NPDES permits contain conditions to “assure compliance” with NPDES permit effluent limitations, water quality standards, and other requirements of the Act.<sup>11</sup> The federal CWA regulations further specify that “each NPDES permit shall include” monitoring requirements “[t]o assure compliance with permit limitations,” including “[t]he mass (or other measurement specified in the permit) for each pollutant limited in the permit; [t]he volume of effluent discharged from each outfall; or [o]ther measurements as appropriate.”<sup>12</sup>

All NPDES permits must therefore require site-specific water quality monitoring designed to assure compliance with permit limits. The permitting requirements must specify the “type, intervals, and frequency [of sampling] sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring.”<sup>13</sup> Additionally, permits must specify “[r]equirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods.”<sup>14</sup> Permittees must report monitoring results “on a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.”<sup>15</sup> There are no general exceptions from this monitoring requirement, and as trading is not mentioned anywhere in the Act as an alternative to meeting permit limits at the point of discharge, there is no exception for credits generated by third parties and applied to “comply” with permit limits. When point sources use credits generated by other sources that are not properly monitoring their own discharges to “comply” with permit limitations, they are illegally evading these clear CWA monitoring and compliance mandates.

The Proposed Regulations state that “[t]rading may not cause nor contribute to local water quality impairments and prevent the attainment of local water quality standards.”<sup>16</sup> But there is no monitoring, so there is no method for determining whether this section of the Proposed Regulations is being violated.

## **B. The use of third-party “verifiers” makes the pollution trading program highly unreliable.**

The Proposed Regulations rely on unaccountable third-party verifiers to document the implementation of credit generating practices.<sup>17</sup> This amounts to an abdication of MDE’s responsibility to conduct enforcement and compliance oversight, and removes much of the program from meaningful public scrutiny. Allowing independent third-party verifiers to take on

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<sup>11</sup> 33 U.S.C. § 1342.

<sup>12</sup> 40 C.F.R. § 122.44(i). Section 308 of the CWA provides additional authority for water quality monitoring in NPDES permits, stating that “whenever [it is] required to carry out the objective” of the CWA, a permitting agency “(A) shall require the owner or operator of any point source to . . . (iii) install, use, and maintain such monitoring equipment or methods . . . as may reasonably be require[d].” 33 U.S.C. § 1318(a)(1)(A)(iii).

<sup>13</sup> 40 C.F.R. §§ 122.48(b), 122.44(i)(1).

<sup>14</sup> *Id.* § 122.48.

<sup>15</sup> *Id.* § 122.44(i)(2).

<sup>16</sup> PR .08(F)(1).

<sup>17</sup> PR .11(B)(2).

this regulatory role opens up the trading program to the potential for significant inconsistency and mismanagement. It also creates an incentive for credit verifiers to promote trading and document its success, potentially undermining the accuracy of verification practices. In Pennsylvania, third-party verifiers are also aggregators who sell the credits and, therefore, benefit financially from Pennsylvania's trading scheme. Nothing in the Proposed Regulations prohibits such self-interested third-party verifiers in Maryland, further eroding the Program's consistency and integrity and undermining public trust.

**C. Point sources should never be able to generate water pollution credits.**

The Program allows point sources to generate, as well as purchase, pollution credits. Allowing point sources to generate and sell credits undermines the CWA's technology-forcing principles and its goals of strengthening permits and continually reducing pollution over time, eventually achieving the Act's ultimate goal of eliminating pollution from our waterways. Point sources are required to use the best available technology to reduce their discharges, and their permits should reflect that requirement by imposing the most stringent effluent limits that the industry's technology can achieve, or the most stringent limits required to maintain water quality standards. If a point source is able to discharge less than the permitted amount or concentration of a pollutant, this indicates that the permitting authority must strengthen the permit limits accordingly, rather than allowing the discharger to continue complying with lax, outdated standards and profiting from the difference.

**D. Credits should never be able to be used in a different compliance period than the one in which they were generated.**

The Program allows credits to be certified for more than one year, though they are applied annually.<sup>18</sup> This seems to allow a sort of "banking" of credits, with no limit on the number of years for which the credits can be used. It appears a point source could purchase and use credits to continue its nutrient discharges even if the claimed reductions that generated the credits took place years prior.<sup>19</sup> This practice will lead to pollution spikes and hot spots that the Program purports to prohibit.<sup>20</sup> Actions taken to generate credits under the Program must provide water quality benefits that are equal to or greater than the pollutant discharges they are meant to offset in the same year.

This sort of banking is also irreconcilable with the very concept of NPDES permit effluent limits for specific compliance periods. If a permittee has a monthly or annual limit, and the pollution reductions are generated outside of that compliance period, the NPDES permit does not authorize those earlier reductions to count towards meeting a future limit. To the contrary, this would be an exceedance of an effluent limit and a permit violation. MDE lacks authority to

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<sup>18</sup> PR .08(E)(2).

<sup>19</sup> PR .09(C).

<sup>20</sup> "The use of a credit may not cause nor contribute to local water quality impairments or prevent the attainment of local water quality standards." PR .08(F)(1).

allow credit banking and essentially strip the temporal requirements from existing permit effluent limits.

**E. The Proposed Regulations lack meaningful baseline requirements for credit generators.**

The baselines set forth in the Proposed Regulations will not create the conditions for water quality to be improved in Maryland. First, the Proposed Regulations give MDE discretion to allow noncompliant sources to generate credits.<sup>21</sup> However, compliance with permit terms and/or applicable environmental regulations should be a baseline requirement for credit generators. A noncompliant source should never be permitted to generate credits.

Second, the baselines generally consist of the minimum requirements for sources to comply with already existing permit terms and regulations.<sup>22</sup> In order to improve Maryland's water quality through the Program the baseline requirements should be strengthened to require more from point and nonpoint sources to generate credits. At the very least they should require full permit compliance and effective and specified BMPs to be in place.

Third, the Proposed Regulations give the Maryland Department of Agriculture ("MDA") authority to determine the baseline for agricultural nonpoint sources.<sup>23</sup> MDA's regulations state that the agricultural operation must meet the "baseline level of nutrient or sediment reduction which is the more stringent of either the applicable Chesapeake Bay or local TMDL as calculated on the entire farm in aggregate using the [Maryland Nutrient Tracking Tool] analysis."<sup>24</sup> The proposed Program should make it clear that agricultural operations that are not in full compliance with Nutrient Management Plans may not take part in this pollution swapping scheme.

Fourth, the baseline for a wastewater point source in the Proposed Regulations is the annual wasteload allocation established in its NPDES permit.<sup>25</sup> For a stormwater point source, it is the restoration requirement as set forth in its NPDES permit.<sup>26</sup> These baseline requirements ignore permit limits based on shorter timeframes, and only require compliance with a single permit term, thus ignoring the need to require full permit compliance as a baseline for trading. Moreover, as set forth earlier in this section, in order to generate credits a source should be doing *more* than just complying with permit terms and/or already existing regulations.

Finally, the baseline set by the Proposed Regulations for non-regulated sources is "the pollutant load generated under the conditions that existed prior to the installation of the BMP."<sup>27</sup> This allows non-regulated sources that have adopted essentially no BMPs to sell credits, using

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<sup>21</sup> PR .08(G).

<sup>22</sup> For example, the Proposed Regulations require that all baselines be consistent with the 2010 Chesapeake Bay TMDL and any applicable local TMDLs. *See* PR .05(A).

<sup>23</sup> PR .05(B).

<sup>24</sup> COMAR 15.20.12.04.

<sup>25</sup> PR .05(C).

<sup>26</sup> PR .05(D).

<sup>27</sup> PR .05(E).

their current practices, no matter how polluting, as the baseline. This approach will not improve water quality or establish a fair, accountable cleanup plan for the watershed. Instead, it rewards those sources that are currently using the least beneficial practices, as these sources will have the most opportunity to claim reduced loadings through low-cost practices that should already be required.

All nonpoint sources generating credits should be required to meet a consistent baseline, which should require adoption of BMPs and a demonstration of their efficacy through water quality monitoring. The proposed status quo baseline is bad public policy that will not improve water quality.

**F. The Proposed Regulations lack any baseline requirements for credit purchasers.**

There are *no* eligibility requirements for credit purchasers other than having trading allowed in the terms of the permit itself.<sup>28</sup> Common sense baseline requirements must at a minimum include complete NPDES permit compliance with all other permit limits and terms. The lack of eligibility criteria for participating in the trading program further undermines any assertions that the trading program will have positive outcomes for water quality.

**G. Trading across the entire proposed trading area will fail to prevent hotspots of pollution and is contrary to EPA’s guidance.**

The Proposed Regulations allow trading between point and nonpoint sources within the Potomac River Basin, the Patuxent River Basin and within the Eastern Shore and Western Shore River Basins, including the Maryland portion of the Susquehanna Basin.<sup>29</sup> These regions are too large, and there is no hydrological justification for their boundaries. Allowing trading to occur within these large regions directly contradicts the Proposed Regulations’ stated intent to improve water quality,<sup>30</sup> as it will harm local water quality. It is also out of step with EPA’s guidance, which states that to avoid hotspots, trades should only occur within “the same water body or stream segment.”<sup>31</sup> Any trades that do not involve credits generated directly upstream of the credit purchaser threaten to create pollution hotspots that will impair local water quality and disproportionately impact environmental justice communities.<sup>32</sup> This presents an unacceptable risk to local water quality and citizens who already bear the burden of Maryland’s industrial and agricultural pollution.

While the Proposed Regulations require credits used within any impaired waters (defined by being listed pursuant to 33 U.S.C. §1313(d) for nitrogen, phosphorus or sediment) to be

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<sup>28</sup> PR .09(E) and (F).

<sup>29</sup> PR .04(B)(2).

<sup>30</sup> PR .01(A).

<sup>31</sup> EPA, Water Quality Trading Policy at 4.

<sup>32</sup> *See, e.g.*, Food & Water Watch, Paying to Pollute: The Environmental Injustice of Pollution Trading (Nov. 2017), [https://www.foodandwaterwatch.org/sites/default/files/fs\\_1711\\_comp-eipaytopollute-web.pdf](https://www.foodandwaterwatch.org/sites/default/files/fs_1711_comp-eipaytopollute-web.pdf).

“generated within such impaired waters or upstream of the credit user’s discharge,” this is not enough. Allowing trading across the entire proposed trading area will just create more impaired waters.<sup>33</sup>

#### **H. The Program should not allow double-dipping with public conservation funding.**

The Proposed Regulations effectively allow for public subsidization of private credit generating projects, by allowing credit generators to use conservation funding or other grants to help pay for projects, and then sell the credits for profit.<sup>34</sup> The Proposed Regulations allow non-agricultural credit generators to obtain prorated credits, “based on the ratio of non-public funding used to generate the credit to the total cost incurred to generate the credit.”<sup>35</sup> The Program allows agricultural nonpoint sources to profit from practices that they have already implemented, and allows both nonpoint and point sources to profit off practices at least partially implemented with public financing. Allowing nonpoint sources to sell credits for existing practices will actually increase pollution, because the credits will allow a purchaser to avoid meeting its own permit limits.

#### **I. Trading ratios will not address the uncertainties and deficiencies in the Program.**

The use of trading ratios for uncertainty alone cannot adequately mitigate the many deficiencies and problems in the Program, but at the very least Maryland must establish far more protective ratios than currently proposed. The Proposed Regulations propose a 1:1 trading ratio for credits generated by nonpoint sources and acquired by stormwater point sources or other non-regulated sources, and a 2:1 trading ratio for credits generated by nonpoint sources and acquired by wastewater point sources, unless the parties can demonstrate that the lower ratio is justified. This is contrary to EPA guidance, which calls for states to use an uncertainty ratio “of at least 2:1” for all trades involving nonpoint sources.<sup>36</sup> According to the Government Accountability Office (“GAO”), Connecticut and Virginia’s trading programs do not allow for trading with nonpoint sources because of the difficulty in measuring the effectiveness of BMPs.<sup>37</sup> In addition, a recent GAO Report states that based on EPA input, Pennsylvania changed its uncertainty ratio involving nonpoint sources to 3:1.<sup>38</sup> Maryland’s comparably lax ratios do not compensate for the uncertainty and poor verification of credit generating practices and will likely lead to increased discharges to waterways.

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<sup>33</sup> PR .08(F)(2).

<sup>34</sup> PR .04(D)(5).

<sup>35</sup> PR .04(D)(5)(b). For agricultural generators, if the credit-generating practice was implemented using federal, state or county funding, but its lifespan pursuant to the funding is over yet the practice is being maintained, the maintenance of the already implemented project can generate a credit. COMAR 15.20.12.05(B)(3).

<sup>36</sup> US EPA, technical memorandum at 4.

<sup>37</sup> Government Accountability Office Report to the Honorable Sheldon Whitehouse, US Senate, Water Pollution: Some States Have Trading Programs to Help Address Nutrient Pollution, but Use Has Been Limited, October 2017, at 30.

<sup>38</sup> *Id.*

**J. The “reserve pool” in the Proposed Regulations should be eliminated.**

The proposed regulations create a reserve ratio “applied to each credit when it is certified to create a reserve pool of credits that may be used by the Department” in various ways.<sup>39</sup> MDE is permitted to use the reserve credits to replace credits that have been certified when the underlying BMP has not performed appropriately, i.e., more pollution is being generated than was initially calculated. This would allow point sources that violate their discharge limits and obtain credits from MDE *after the fact* to be deemed to be in compliance. It incentivizes polluters to not comply with their permits, because any shortfall will be covered by the “reserve” credits. This whole section creating a reserve should be eliminated from the Program and any “extra” credits should instead be retired.

**K. The enforcement provisions of the Program should be strengthened and made mandatory.**

Under the Proposed Regulations, if a BMP is not reducing discharge in the manner required by a certified credit that has been generated, MDE may order repairs or remedies, and may require other measures.<sup>40</sup> MDE may also suspend or revoke certification under certain conditions.<sup>41</sup> While there may be certain discretionary enforcement measures MDE should be permitted to impose, there should be certain mandatory penalties for noncompliant credit generators and purchasers. If there is fraud, there should be mandated referral to the appropriate authorities. Specific enforcement measures for specific violations should be outlined in the regulations, including that non-compliant entities should not be permitted to generate or purchase credits.

**L. The public participation requirements of the Program are legally deficient.**

Transparency and public participation in the trading program should be greatly expanded. The Proposed Regulations currently only allow for comment and hearing for NPDES permits that propose to allow trading.<sup>42</sup> This is already legally required under CWA. Public participation should be required for every step of the trading program, including verification, certification of credits, and all proposed trades.

In addition, given the lack of monitoring to clearly establish pollutant reductions from credit-generating agricultural operations, the public is effectively estopped from ever being able to hold point source credit purchasers accountable for their discharges. The Program trades truly monitored and verified point source discharges for modeled, unmonitored and unverified nonpoint source credits, essentially gutting the citizen suit provisions of the CWA and, therefore, violating the public participation mandate of the Act.

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<sup>39</sup> PR .08(C)(3).

<sup>40</sup> PR .13(A).

<sup>41</sup> PR .13(B).

<sup>42</sup> PR .12(A).

#### IV. CONCLUSION

Maryland's biggest water pollution problem is caused by nutrient and sediment discharges into Maryland's waters, mainly from irresponsible and unaccountable agricultural operations. Water pollution trading will not solve this problem, and will very likely make this and other water pollution problems worse. The Proposed Regulations and the Program in its entirety will introduce significant uncertainty about what pollution reductions are actually occurring and most importantly, are contrary to the CWA's requirements for NPDES permits. We urge MDE to reject the Proposed Regulations and the Program and focus on imposing enforceable and transparent pollution reduction requirements on all sources of nitrogen, phosphorous and sediment in the watershed.

Sincerely,

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