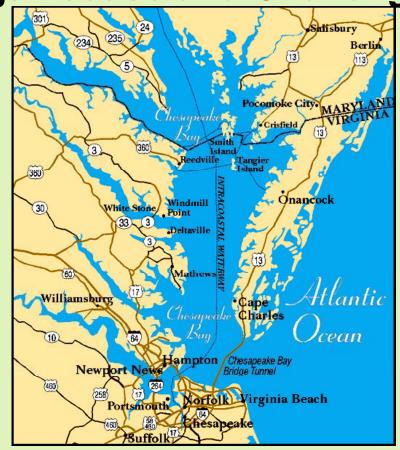
Nutrient Trading Programs in the Chesapeake Bay:

Legal Issues and Challenges



Stephanie Showalter, Director, NSGLC CZ '09, Boston, Mass.

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Water Quality (Nutrient) Trading

- * Market-based instruments that create a market for the buying and selling of "pollution" credits.
 - Primarily nitrogen and phosphorus.
- Water Quality Trading Red Flags:
 - No clear statutory authority
 - Unregulated sources generating majority of credits
 - Technically challenging

CWA Basics

- * CWA goal is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."
- Discharge of pollutant from a point source into waters of the U.S without a permit is prohibited.
- * Points sources are required to met:
 - Technology-based effluent limitations
 - Water quality-based effluent limitations, where necessary to achieve water quality standards.

Role of the States

- Establish water quality standards (WQS) that include designated uses for each waterbody in the state and water quality criteria (WQC).
- Identify waters which are not meeting WQS on an impaired waters list
 - For such waters, states must establish a Total Maximum Daily Load [TMDL] for each pollutant.
 - Set "load" (max. amount of pollutant waterbody can receive) and allocate among existing sources.

CWA & THE CHESAPEAKE BAY

- * Chesapeake 2000 Agreement
 - Partners agreed to clean up Bay by 2010 so it could be removed from "impaired waters" list.
- Water Quality Standards
 - Water Quality Criteria and designated uses set
 - States incorporate new WQC into WQS
- Load Allocations
 - Nitrogen, phosphorus, and sediment reduction goals.
 - Target loads allocated by basin
 - Tributary strategies developed by states

PA's Tributary Strategy

- In December 2006, Pennsylvania approve a policy to allow point sources of pollution to offset pollution discharges by purchasing "credits" from other facilities or farmers.
- Necessary reductions allocated between point and nonpoint sources within each major basin.
 - 27,000 lb phosphorus shortfall would be made up by POTWs through trading program.
- * Concerns:
 - Trading Ratio 1:1
 - Generation of credits via land use conversion.
- * Legal Challenge: Borough of Bedford v. PA DEP
 - Summary judgment denied on Apr. 14, 2009. Case ongoing.

MD's Policy for Nutrient Cap Management and Trading - Phase

- * Finalized April 17, 2008
- Trading between point sources and trading involving removal of septic tanks.
 - Phase II (currently under development) will address point source to nonpoint source trading.
- **★** Unique Aspects:
 - All wastewater treatment plants must upgrade to technology capable of reducing wastewater concentrations to 4 milligrams per liter total N and .3 milligrams per liter total P.
 - 5% retirement ratio applied to each point source generated credit.
 - Credit for retiring septic systems.

VA's General Permit for Nutrient Trading

- * Effective Aug. 7, 2008
- * New and expanding facilities discharging 40,000 gallons or more per day must offset.
- * Trading ratio for point/nonpoint trades of 1:2 (two pounds reduced for every pound discharged).
 - Must achieve reductions beyond those already required or funded under federal or state law.
- * Credits can be obtained through payments made to Virginia Water Quality Improvement Fund, if facility unable to acquire sufficient credits from other facilities in same tributary.
 - \$11.06 for lb. N and \$5.04 lb. P

Does the CWA allow Offsets?

- * 44 C.F.R. 122.4(i) prohibits the issuance of a permit "to a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards."
- * Further prohibits discharges into waters not meeting WQS unless:
 - There are sufficient remaining pollutant load allocations to allow for the discharge; and
 - The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

In re City of Annandale

- Minnesota Supreme Court upheld permit issued to new wastewater treatment.
 - MPCA determined would not "contribute" to violation of WQS because another plant in in area would be upgrading facility and reducing discharge.
 - "The phrase 'cause or contribute to the violation of water quality standards' leaves leeway for MPCA to make a range of policy judgments based on MPCA's scientific and technical knowledge."
 - "Nothing in the language of the regulation or the structure of the CWA prohibits the MPCA from considering offsets in this situation."

Friends of Pinto Creek v. EPA

- * EPA issued permit authorizing discharges of copper into an impaired water.
- * Ninth Circuit vacated permit.
 - "Nothing in the CWA or the regulation [] provides an exception for an offset when the waters remain impaired and the new source is discharging pollution into that impaired water."
 - 122.4(i)(2) exception does not apply unless new source can demonstrate how water quality standard will be meet if discharge is allowed.
- * U.S. Supreme Court denied cert Jan. 12, 2009.

Other Concerns

- Anti-backsliding
 - CWA "bars the renewal, reissuance or modification of a permit which contains an effluent limitation that is less stringent than those contained in the previous permit."
- * Addressing Uncertainty
 - Uncertainty ratios
 - Monitoring
 - Reserve Credit Pools
- * Enforcement and Compliance

Risk Allocation

- Contracts can be used to shift some legal responsibility to nonpoint sources.
 - Terms and conditions;
 - Monitoring and verification procedures;
 - Penalties for noncompliance.
- * Remedies for Breach of Contract
 - Money damages
 - Specific Performance Rare
 - "Special or unique nature"
 - Protect public interest
 - Public nuisance

Questions????

Stephanie Showalter, Director National Sea Grant Law Center University of Mississippi Kinard Hall – Wing E, Room 256 University, MS 38677

(662) 915-7775

sshowalt@olemiss.edu