

Offset Subcommittee

Issue Paper C – Timing of Off-site Measures

Background

There is a concern amongst DCR and other stakeholders that offsetting activities for stormwater nutrient reductions must be in place before an offset can be sold in order to maintain compliance with state and federal permit requirements and avoid a temporal loss or a violation of permitted wasteload allocations. EPA has expressed concerns about this issue. Specifically, Appendix S of the Bay TMDL indicates an expectation that state programs will ensure “*temporal consistency between the period when a credit or offset is generated and when it is used. As provided for in EPA’s Water Quality Trading Toolkit, “credits should not be used before the time frame in which they are generated.” That includes any credits expected to be generated under a contract between a new discharger and a generating source, or credits generated under an in-lieu fee program in which the jurisdiction uses discharger paid fees to achieve loadings reductions beyond baseline.*”

Issue

This creates a challenge for local pro-rata and in-lieu fee programs, since they routinely collect fees in advance of improvements and to require construction up front would impact budgets and capital improvement planning. Localities generally need this flexibility due to financial constraints and the inability to capitalize all of these projects up front.

Evaluation

In order to resolve this issue, it is proposed that some flexibility be given to generate some portion of the credit sales in advance of the implementation, in the same fashion as wetland and stream compensatory mitigation programs. “Pre-sold” credits in other programs are typically limited to 15% of total estimated credit yield. These programs further provide for assurances (deed restrictions, easements, etc.) and other protective language to assure that the reductions will be implemented. A clause allowing advance credit sales would allow private nutrient bankers some of the same flexibility presently afforded to the public sector.

Additionally, the committee had general consensus that nutrient reductions which have already been implemented and are “on the ground” are generally preferable to advance credit sales. As such, a clause was added that gives preference to those credits over advance credit sales.

Potential Regulatory Language Modifications

*Local pro-rata or in-lieu fee programs and developers of nonpoint nutrient offsets may be allowed, upon approval by the Board, to generate credit sales representing a portion of the total nutrient load reduction (**advance release of 15% of the total load**) in advance of nutrient load reductions if the Board has reviewed their nutrient reduction implementation plan and determined that*

sufficient assurances exist to be protective of water quality and to assure appropriate nutrient reductions will occur. Initial funding commitments must be made within 2 years of collecting credit fees and the seller of the credits must implement the corresponding nutrient reductions or offsets within 5 years or assure that equivalent reductions will be in place temporarily until the offsets or off-site controls have been implemented.

Off-site controls or reductions, whether public or private, which have been implemented or certified shall be given preference over credit advances. Advance credit sales will not be allowed in cases where other off-site controls or reductions are already implemented or certified and are available for sale.

Discussion

- Some parties felt that equivalent reductions or ‘temporary’ credits should be in place if the nutrient reductions have not been achieved within 2 years (rather than the five year limitation provided above).
- Wetland and Stream compensatory mitigation presale release is limited to 15% of the credit total. Should we specifically include the 15% limitation in the above or leave the general language “...a portion of the total nutrient load reduction...” and just defer to guidance to be developed by DCR?
- There was a difference of opinion in the committee as to how stringently EPA’s concerns about “temporal consistency” must be applied.