



MEMO

To: Jon Laria, Chair, Maryland Sustainable Growth Commission
Sustainable Growth Commissioners

From: Alan Girard, WIP Workgroup Chair, Maryland Sustainable Growth Commission
Yates Clagett, WIP Workgroup Vice-Chair, Maryland Sustainable Growth Commission

Subject: Summary Comments and Recommendation on May 30, 2012 Accounting for Growth
Discussion Draft PowerPoint Presentation

Date: July 23, 2012

The WIP Workgroup is charged by the Maryland Sustainable Growth Commission to serve in an advisory capacity to the interagency Growth Offset Workgroup, referred to in this memo as the Bay Workgroup.

On May 30, 2012, the WIP Workgroup was briefed by members of the Bay Workgroup using a PowerPoint presentation on a draft Accounting for Growth policy, the content of which is being developed and refined to serve as the basis for a proposed regulation expected to be promulgated by December 2012 (consistent with Maryland's commitment to the U.S. Environmental Protection Agency under the Bay TMDL process). Written and oral comments on the presentation by WIP Workgroup members and interested parties were discussed on July 10, 2012 (written comments attached). Subsequent collaboration resulted in the creation of this summary comment memo and recommendation. Contributing organizations included 1000 Friends of Maryland, Chesapeake Bay Commission, Chesapeake Bay Foundation, Chester River Association, Eastern Shore Land Conservancy, Maryland Association of Counties, Maryland Farm Bureau, Maryland Municipal League, Maryland State Builders Association, NAIOP Maryland Chapters – The Association for Commercial Real Estate, South River Federation, Sierra Club – Maryland Chapter, and the Upper Shore Regional Council.

The WIP Workgroup recommends that the Sustainable Growth Commission formally submit these summary comments to the Bay Workgroup.

Summary Comments

1. **Offset Ratios.** The Discussion Draft proposes that urban growth should offset loads at a ratio of 1:1, with certain exemptions included for infill and redevelopment activities. This portion of the policy received much attention in oral and written comments received from stakeholder groups.

A number of stakeholders agreed that development located outside Targeted Growth and Revitalization Areas (including Priority Funding Areas and other areas defined by the strategy) should be required to offset the post-development load at a ratio greater than 1:1. Both the Phase II WIP and the Discussion Draft of the offset policy recognize that “minimizing loads from new development is essential to the success of the strategy to offset growth” (p. 46). To minimize loads, the state’s WIP stated that the “strategy will encourage growth where pollutant loading is low by easing offset requirements in those areas, and will increase offset requirements where loadings are high or sensitive areas need to be protected” (p. 46).

The use of increased ratios was advanced in the WIPs to actively discourage high-polluting forms of growth, and to protect offset generation capacity, a vital public interest in terms of economic development and environmental protection. It also provides a margin of safety against modeling errors and the inefficiencies associated with mitigation. For these reasons, many in the workgroup suggested that the 1:1 calculation put forth in the discussion draft would be insufficient to achieve the state’s valid public policy objectives as represented to EPA in the Phase I and Phase II WIPs.

While the proposed calculator for post development load attempts to fully account for loads from new growth, the WIP requires additional reductions beyond the net increase in load for development that contributes the highest levels of pollution. The WIP states that “the goal of Maryland’s Offset Policy will be to offset new loads in a way that is not just load neutral, but begins to address the need to reduce current loadings and is supportive and consistent with the State’s Smart Growth policies” (p. 47). Stakeholders expressed concern that the 1:1 ratio in the draft policy could run counter to the state’s smart growth policies because it could require fewer offsets from low-density “sprawl” development than smart growth on a per-acre basis. For example, a development of two-acre residential lots on BAT septic would be required to offset approximately 8.5 lbs N per acre converted to urban use, while a project meeting the state’s smart growth criteria of quarter-acre lots on ENR wastewater treatment would be required to offset more than 19 lbs N per acre. Given the major role that land use and land area plays both in the development process and the TMDL accountability framework, these stakeholders suggested that the policy should speak with one voice regardless of whether the offset requirements are viewed in terms of households or acres.

Support for an increase in the offset ratio above 1:1 was not unanimous in the Workgroup. Some stakeholders cautioned that the cost of offsets in Maryland should be an important consideration in the determination of appropriate offset ratios, and recommended that the ratios should not be finalized until cost estimates are available. Nutrient credits in neighboring states are valued at about \$5/lb of N in Pennsylvania to approximately \$650/lb of N in North Carolina and depend on a number of factors, including supply. Additional research on projected costs in Maryland is recommended (see #4 below).

Another stakeholder suggested that achieving a 1:1 offset should be considered as a baseline requirement for development outside of Target Growth and Revitalization Areas but opposed a 1:1

offset ratio without the existence of adequate flexibility for achieving such an offset. It was suggested that for flexibility to exist, a broad range of acceptable offset practices must be established, including a robust and practical trading program and consideration of a fee-in-lieu program (see #5).

2. **Offset Stability.** Practices installed to offset pollution from growth should fully account for the long-term impact of the development activity. Therefore, these practices should have a long-term design life. Administrative mechanisms should be established to ensure that practices are adequately monitored, maintained, and renewed as necessary. It is recognized that such mechanisms could require additional administrative responsibility for those state and local agencies involved in the development approval process. The state should clearly describe how credits would be certified, verified, and tracked, in addition to detailing the enforcement mechanism citizens can expect for failures to comply with certain conditions.
3. **Simplicity.** The process to purchase and verify credit should be as simple and transparent as possible. Effort should be made to ensure the public understands the intention of the policy to promote pollution prevention first (to help reduce the need for offsets and help preserve Maryland's economic and environmental health) while making a mechanism to purchase offsets available as a last resort. Some stakeholders expressed concern that the complex monitoring and enforcement duties of the proposed program could present a financial administrative burden to state and local jurisdictions that should be addressed. Others indicated that updating existing trading policies independent from the finalization of the Accounting for Growth policy will undermine the state's ability to adequately build the public's confidence in nutrient trading as an acceptable form of pollution management.
4. **Cost estimates.** Estimated costs to purchase offset credits and install practices should be determined to adequately evaluate the implications and consequences of the policy. Estimates could be based on an analysis of Maryland's capacity to generate offsets, including an inventory of anticipated supply and demand of offsets and an analysis of the overall impact on the rate, location, and extent of planned growth. It is noted that the Maryland Sustainable Growth Commission formally requested in November 2011 that the Governor should see that Maryland's offset generation capacity is determined. A cost-per-pound of reduction by offset practice (similar to information already calculated by BayStat) should be calculated and shared with the Maryland Sustainable Growth Commission and the general public to further develop the foundation of the trading marketplace envisioned under the policy. This can help build confidence in and ease uncertainty about the new marketplace for offset credits.
5. **Fee-in-lieu.** A fee-in-lieu option would provide developers an alternative to purchasing offset credits by paying into a fund that would be accessed to implement pollution reduction practices as part of the strategy. Some stakeholders suggested a fee-in-lieu option would increase flexibility and help address an anticipated deficiency in the supply of offset credits in the near term so as not to prevent development when a required level of credit is unavailable to be purchased. Others suggested that a fee-in-lieu option would not address the root challenge of potential limitations in offset credit supply, increasing uncertainty about the ability of practices to be installed and appropriately credited for pollution reduction and potentially confounding the open-market approach already adopted by the state for nutrient trading. The effectiveness of some current environmental fee-in-lieu programs was also debated. Neither the draft strategy nor current trading policies allow for fee-in-lieu payments to offset the impacts of growth.

6. **Trading Geography.** The draft strategy allows for impacts from new development *within* Targeted Growth and Revitalization Areas to be offset by purchasing credits anywhere in the state that is permitted by the basic trading policies, but restricts new development *outside* of Targeted Growth and Revitalization Areas to purchasing credits only within the county in which the development occurs. Some stakeholders favored expanding the allowable trading area to include subwatersheds or watersheds of various scales. This approach could maximize trading opportunities and potentially lower costs. Forest conservation mitigation, which is generally limited to within counties, was posited to yield very low margins once all the necessary resources are used to develop, market, and sell credits. A suggestion was made to expand markets beyond counties to two primary sectors of the state – one above the fault line and one below.

Others stakeholders favored the strategy as drafted to preserve a county’s ability to prevent other counties from consuming local offset potential, and to support and promote local government efforts to manage growth and related water quality impacts based on unique local circumstances over which the jurisdiction has significant control. Offset generation capacity within counties can be a valuable asset in the credit marketplace and counties may have a strong interest in managing land use in a way that is sensitive to the limited nature of that capacity.

7. **Phosphorus and Sediment Offsets.** Of the Bay’s pollutants, nitrogen has been a primary focus of the Bay Workgroup, which has asserted that BMPs are generally more successful at reducing phosphorus and sediment than nitrogen, so that offsetting the more-difficult-to-treat nitrogen load will also offset the phosphorus and sediment loads. The State should provide technical data supporting these claims and the decision to exclude phosphorus and sediment from the offset policy. Development industry research that shows a negligible impact of phosphorus and sediment from construction compliant with current rules and regulations should be corroborated as part of the analysis.

Comments Already Addressed in Draft or Existing Policies

1. **Post Development Load/Land Use Change.** The Bay Cabinet unanimously decided that the post development load on a site will be the amount of load required to be offset regardless of the predevelopment land use. This decision was made in order to be consistent with the policy that prohibits the purchase of credits sought as a result of a change in land use. Some stakeholders suggested that offset requirements should be limited to the difference between pre and post development loading; however, the discussion draft clarifies that a change in land use resulting from new development is accounted for as a change in pollution source inventory under Maryland’s WIP. To be consistent with the WIP, the full post development load must be accounted for without consideration of the pre-development load. Developers remain interested in generating credits for contributing to nutrient reductions beyond responsibilities outlined under the Bay TMDL.
2. **Loading Rates.** The draft strategy includes “Edge of Stream” loading rates of land uses to account for the amount of nutrient pollution that is lost from a site to the nearest water body. Some stakeholders supported the use of Edge of Stream loading rates to maximize equity and fully protect local water quality. Others supported the use of delivered loads, because these could more accurately reflect the effect on the mainstem of the Bay and better account for degrees of treatment that occur within a stream. The Discussion Draft points out that, under the existing Trading Policies, delivery factors are applied to account for differences in delivered loads between trading partners due to location. Additional detail on

these delivery factors could help build the public's confidence in how a standardized loading rate is employed as part of the program and address concerns that "Edge of Stream" loading rates exceed TMDL goals. One stakeholder suggested that mobile emissions and vehicle miles traveled (VMTs) loading should not be part of the post development load calculation and that mobile emissions should be targeted more directly outside of the proposed offset program.

3. **Applicability to Development Types.** The draft strategy applies to all development types, not just residential development. While it is noted the proposed effective date of the policy is December 31, 2014, any anticipated grandfathering provisions should be fully described.
4. **Third Party Enforcement/Verification.** Existing trading policy requires practices to be installed and verified before they can be offered for sale as credits. This policy decision was made to provide reasonable assurance that practices installed based on the sale of nutrient credits deliver the intended performance. The development of enforcement and verification mechanisms should be sensitive to the need to not hinder the development of a robust marketplace.
5. **Infill Development.** Loads from new development inside Targeted Growth and Revitalization Areas must be offset as part of Maryland's commitment to account for growth under the draft strategy. Redevelopment inside Targeted Growth and Revitalization Areas will not require the purchase of offset credits for stormwater because current regulations generally ensure that post-development stormwater load will be smaller than the pre-development load. To the extent development in Targeted Growth and Revitalization Areas is served by wastewater treatment plants that have sufficient capacity under their nutrient caps, no wastewater offset would be required. To the extent wastewater or stormwater offsets are needed in Targeted Growth and Revitalization Areas, credits can be purchased anywhere in the state, helping provide the most cost-effective offsets. Some stakeholders suggested that while redevelopment should not be subject to the same offset requirements as development occurring outside a Targeted Growth and Revitalization Area, some consideration should be given to a redevelopment project's impact.

Sustainable Growth Commission: Watershed Implementation Plan Workgroup

Compiled Comments on proposed Growth Offset Policy

July 10, 2012

1,000 Friends of Maryland

Thank you for the opportunity to review the proposed WIP Growth Offset Policy. 1000 Friends of Maryland strongly supports the policy as drafted. We encourage the department to move forward with implementation swiftly and aggressively so local efforts to implement the Sustainable Growth Act (SB236) and the WIP proceed concurrently.

To meet bay restoration goals, Maryland's TMDL process must fully address existing and future growth. It is clear that if all other sources of pollution are reduced or eliminated the Bay will continue to degrade because of the increase pollutant loads from development. Runoff from urban and suburban lands is the only source of pollution in the watershed that is still increasing.¹ In fact, in 2007 the Environmental Protection Agency found that increased pollution loads from continued development were outpacing pollution reductions from all other sectors combined.²

To reverse this startling trend, new development must fully account for its pollution loads. We agree that the offset requirement must correspond to the "smartness" of the development, and would oppose efforts to decrease the offset obligation for large lot, rural development. In addition, we support requiring no offset for redevelopment or wastewater discharged to a WWTP operating below its nutrient cap, and requiring all other development to offset 100% of the post-development load.

Footnotes:

¹ Chesapeake Bay Program, http://www.chesapeakebay.net/landuse_urbansuburban.aspx?menuitem=19557, last accessed 7/25/10.

² Environmental Protection Agency, "Development Growth Outpacing Progress in Watershed Efforts to Restore the Chesapeake Bay," September 10, 2007.

Chesapeake Bay Foundation

MD Draft Offset Policy – Initial Comments from CBF. The following is not a formal position or position statement and is intended only to facilitate the work of the Maryland Sustainable Growth Commission.

- CBF believes the policy should require offsets at a ratio of at least 2:1 outside of Priority Funding Areas.
 - 2:1 is consistent with the state's Phase I and Phase II WIP

- Current 1:1 proposal would require a smaller offset per acre for harmful sprawl development, suggesting the policy is generally not strong enough and potentially could result in a disincentive for smart growth projects
- CBF supports the use of EOS loads as most protective of local water quality, and to facilitate a straightforward and equitable offset policy across the state.
- CBF supports the use of a uniform baseline site condition for calculating loads. We would oppose a policy that employs existing land use/site conditions as the baseline.
 - Existing site conditions are not reflective of reduction requirements under the WIP
 - The use of existing site conditions could accelerate the loss of farmland to sprawl
- The policy must require offsets from all types of development, not just residential loads.
- Offsets must be permanent.
 - VA requires permanent offsets
 - Easements and/or covenants should be required where the BMP cannot be acquired in fee simple.
 - Endowment/bond/escrow for ongoing maintenance should be required.
 - Local governments should have tax/lien authority on development to recover costs if escrow is insufficient or practice is terminated.
- CBF opposes a “fee-in-lieu” option for offsets.
 - Wetland fee-in-lieu programs have a generally poor track record
 - Offsets are already a “fee-in-lieu”
 - Would remove local government responsibility to manage offset capacity wisely
 - No guarantee that these offsets will be completed at the price paid by the developer
 - If offsets aren’t available, how would the fee-in-lieu get spent and pollution reduced?
 - Would concentrate offsets in large regional banks, potentially endangering local WQ
- We remain unconvinced that N offsets will adequately address P and S. Without proof, we recommend a separate offset for P/S
 - VA based stormwater offset reg on P, indicating they thought THAT was protective!
- CBF appreciates the value of uniform, statewide loading numbers, and support the use of uniform rates as the starting point; however, we recommend that a state-sanctioned site-level “modifier” formula be included that allows for:

- Site-specific innovation and best management practices to prevent and minimize loads prior to utilizing offsets;
 - Consistency with basin-specific trading areas and factors;
 - Consistency with agricultural “baseline” formulas.
- We oppose a generic, private-sector “alternative calculation” option.

Chester River Association

On behalf of the Chester River Association I want to thank you for the opportunity to comment on this proposal and believe that you have made an important contribution toward the goal of providing for sustainable development in Maryland. In this regard I have two relatively minor comments and one major one:

1. On slide # 6, “Calculation of Post-Development N Loads,” you have collapsed direct loads into two categories, Waste Water and Storm Water. As the TMDLs and WIPs typically break this into three categories; Waste Water Treatment Plants, Septic Systems, and Storm Water; I would suggest that you follow the typology already established in the TMDLs.

2. On slide # 7, “New Growth, Pounds to Offset,” you have indicated widely differing offset requirements but failed to provide the basis for those #s. While I agree with you that we want to incentivize smart growth and higher density development, I believe it is dangerous to make it appear that you are basing the offset ratios on the desire for smart growth rather than on the demonstrated impacts on water quality. The public needs to understand that this program is based on good science and where we have a scientific basis for these ratios we should show it. – Good Public Policy Requires Transparency –

3. On slide # 12, “Trading Geographies,” the current draft is rather confusing and appears to impose a constraint, limiting offsets to within the same county, which is not required by either State or Federal law. More importantly, I don’t believe that there is any scientific basis for such a requirement and it may impose significant additional costs. If for example, new development in the town of Chestertown (in Kent County, Maryland) should require an offset, there is really no scientific basis for outlawing an offsetting Nitrogen reduction from just two miles upstream on the opposite side of the Chester River in Queen Anne’s County, Maryland. I assure you that our fish, crabs and oysters (wonderful as they may be) cannot tell the difference between a Kent County nitrogen reduction and a Queen Anne’s County reduction. Furthermore, they really can’t tell the difference between an offset costing \$5/pound (possibly from Switchgrass) and one costing \$500/pound (from additional storm water retrofits).

While trades involving two or more counties could impose some administrative burden, any additional costs involved could be paid by the purchaser/aggregator and that should not in itself be an insurmountable problem. Both counties will, of course, still be subject to the regulations of MDE and DNR.

Given the current political climate, there is a constant danger that the public may reject our water quality management strategy because of the high costs involved and we must, therefore, be careful to minimize the cost of achieving and maintaining our environmental goals wherever possible. – Sustainable Environmental Protection Requires Attention to Cost-Effectiveness –

Maryland Association of Counties

The Maryland Association of Counties (MACo) offers the following comments concerning the proposed conceptual framework for growth offsets:

- *Simplicity:* Any offset program must be simple to understand and administer. MACo remains concerned that the complex monitoring and enforcement duties of the proposed offset program will be pushed onto the county governments. MACo and the counties would oppose the imposition of another unfunded mandate and the State should be responsible for the .
- *Offset Percentage:* Achieving a 1:1 offset will be challenging in many circumstances but should be considered as a baseline requirement for development outside of target growth areas IF adequate flexibility exists for achieving such an offset. For flexibility to exist, a broad range of acceptable offset practices must be established, including a robust and practical nutrient trading program. A fee-in-lieu program should also be considered. MACo opposes establishing an offset requirement greater than 100%.
- *Calculation of Nitrogen Loads:* The offset should be based on property's pre-existing nutrient load, not the post-development load. Further reductions under the property's pre-existing nutrient load should be encouraged through a system of credits and nutrient trading. Additionally, mobile emissions and vehicle miles traveled (VMTs) loading should not be part of the post development load calculation. Instead, mobile emissions should be targeted more directly and not as part of the proposed offset program.
- *Redevelopment:* While redevelopment should be encouraged and not be subject to the same offset requirements as development occurring outside a targeted growth area, MACo is concerned about a blanket exemption. Certain redevelopment projects can significantly increase nutrient runoff in a given area and there should be some consideration with regards to a redevelopment project's impact.
- *Permanency of Offsets:* Mandating that an offset be "permanent" is unrealistic and presents significant tracking and logistical challenges. Preserving land from development through a perpetual easement or similar restriction is the only practical and cost-effective way of ensuring that an offset is "permanent." Other discussed offsets should be viewed as having a short-term or long-term effect. Short-term effects should be avoided and long-term effects should be promoted.

Maryland Farm Bureau

Although at this point the accounting for growth scenarios tend to have more of a specific impact on other constituents, the ag community is sure to be impacted directly through the nutrient trading programs and indirectly through economic impact to rural areas as a result of development (residential and commercial) limitations. Having said that we do have some thoughts regarding the proposals.

- Page 9 of the PowerPoint presentation made to the workgroup dealt with “Jobs, Population and Load”. The full SGC should be well briefed on what, if any, policy implications the numbers in that chart would have regarding state economic development assistance to rural areas.
- With regard to agricultural nutrient offsets, discussions of any 3rd party enforcement/verification cause great concern to the ag community.
- The cost per pound of nitrogen “removed” from all sectors/sources should be clearly laid out for the full SGC as well as the general public. If estimates show that it will cost \$196/lb of N removed (tradable credit essentially) people need to see that to enable sound policy decisions.

Maryland State Builders Association

1. Simplicity AND accuracy.

For many projects, a simple calculation (HH X loading rate) is most appropriate. The loading rates for the simple calculation method (slide 7) need to be divided into 2 categories, above the fault line and below the fault line, in recognition of the lower delivered loads above the fault line. Applicants should have the option to undertake an advanced calculation for their project if they believe their loads are different.

2. Offset should be based on increases over the parcel baseline, not 100% of post-development.

The restoration of the bay is predicated upon improving technologies and needs to accommodate the profit motive as an incentive to drive reductions by all sectors, especially developers. Developers should have the option to undertake a calculation to measure the relative change of loading from pre and post developed condition and allow projects that reduce loads to below the parcel’s TMDL allocation to trade those credits. This will incent developers to find low cost, effective solutions and will drive loading reductions.

3. Offset should be based on delivered load, not edge of stream.

We should be looking at delivered loads, not edge of stream loads.

4. Need a fee in lieu option.

In is not possible to evaluate the costs to housing and jobs without a cost per pound of reduction. Further, there isn’t a supply to meet the demand presumed in 6 months and farmers are concerned about meeting their baseline. The State should set a fee in lieu option similar to other programs and States.

5. Infill, other Smart Growth type development should not require offset.

The offset program will increase permitting complexities and project costs. Areas targeted for growth, including infill, should not be required to provide offsets.

6. What about other land uses? Mixed Use? Commercial? Schools? Parks? Etc?

How are other land uses required to offset their loads? All land uses need to be considered.

Maryland State Builders Association Response to July 16, 2012 Draft WIP Workgroup Summary Comments and Recommendation Memo

Summary Comments

1. **Offset Ratios.** *The determination of ratios should not be made until the cost per pound of Nitrogen is established. Based upon the latest offset calculator issued by MDE in conjunction with the costs/pound of Nitrogen from North Carolina's program, the cost to consumers will exceed \$15K per household. (Suggest that the fastest way to establish the cost is to create a fee-in-lieu option) Encourage the Commission to hold on evaluating the ratios until the costs are known.*
2. **Offset Permanence.** *How is the "long-term impact of the development activity" defined? Is it the annual load times # of years? If so, how many years? What methodology do we use to determine annual load? What does "Practices should be permanent" mean? Is this suggesting an easement or covenant? If so, what are the terms? What entity is the landowner entering into an agreement with? What is the scope of the "administrative mechanisms"? With septic, we've found that the ratio of local staff resources needed to execute septic conversions is high and we would expect stormwater to be even higher. The number of SW facilities and BMPs could be orders of magnitude greater than the number of septic conversions, thereby creating an enormous public administrative responsibility.*
3. **Simplicity.** *Agreed – keep it simple. Any efforts to "ensure the public understands the need to prevent pollution" should be credited as a reduction.*
4. **Cost estimates.** *Absolutely. This information is fundamentally necessary for this decision.*
5. **Fee-in-lieu.** *Actually, both are needed. In order to create a sufficient supply of credits sooner to meet future demand and to avoid de facto building moratoria, a centrally administered fee in lieu program is needed and efforts need to be made to incent potential suppliers of credits. The wetland fee in lieu option has not been a failure. Wetlands have been created, maintained and enhanced with this program while developers, who were required to prove that on-site mitigation was not environmentally feasible, were able to move forward. There are many examples where Forest Conservation fee in lieu has been very successful. Perhaps the fee in lieu could be directed to local MS4s (where applicable) to help fund their programs. Maryland has a rich history of using FIL to execute environmental policies.*

The market for potential suppliers needs to be opened up beyond the ag sector. Any landowner should have the ability to generate a supply of marketable/tradable offsets.

6. **Trading Geography.** *The greater the geography for potential suppliers, the greater the market activity will be. As we have found with forest conservation, which is generally limited to within the County, there is a very low margin once all the necessary resources are utilized to develop, market and sell the credits. We should open the market to two sectors within the State – above the fault line and below the fault line – and require trading within those areas.*
7. **Loading Rates.** *Delivered loads should be utilized for the same reason as we have greater protection for critical areas – the actual impact to the Chesapeake Bay is different for each subwatershed. The farther the activity is from the Chesapeake Bay, the lower the effective impact of the nutrient will be through natural processes. Much of the Nitrogen reduction happens instream (between the “edge of stream” and “delivered load”), which is already factored into the Bay TMDL. Using EOS exceeds the already ambitious goals of the TMDL. If standard loading rates are utilized, at a minimum, create two rates for each use; one for below the fault line and one for above the fault line, generally around Interstate 95.*
8. **Phosphorus and Sediment Offsets.** *Recent actions in Maryland to reduce these sources include Phosphorous/Fertilizer legislation, New E/SC Regulations/Grading Limit/Stabilization Requirements and Agricultural Nutrient Management provisions. The development industry research has shown a negligible impact of P and TSS from the construction industry.*

Comments Already Addressed in Draft or Existing Policies

1. **Post Development Load/Land Use Change.** *The purpose of the TMDL is to reduce loads to specified levels – the TMDL. We have other programs and standards to “preserve active farmland” and the government should not be expected to influence mentalities. The development of the TMDL is predominantly a mathematical/science exercise. The execution and documentation of the TMDL, in order to be effective, needs to also be mathematical/science based. If a farmer is responsible for bringing his farm up to baseline conditions before he can sell, a non-farmer landowner should be able to sell credits if he is above the baseline. Developers and builders are increasingly interested in developing properties (new or redevelopment) in a way that optimizes nutrient reductions ONLY IF they can simultaneously create a tradable commodity in the form of an offset. Credit generation should be an option to help housing remain a viable business in MD.*
2. **Applicability to Development Types.** *What is the triggering mechanism? Land disturbance? Preliminary Plan? Projects that have filed Preliminary Plans should be grandfathered.*
3. **Third Party Enforcement/Verification.** *Agreed, but don’t let this slow down the process of creating supply.*
4. **Infill Development.** *This will adversely impact non-redevelopment infill projects and the premises upon which this argument is based is flawed. First, redevelopment is not required to treat 100% - only 50%, whereas new development is required to treat 100%, the first 1” of which using ESD. Infill or at*

least already-developed infill (defined as less than 40% impervious and 75% surrounded by developed properties) should both be exempted from offset requirements.

NAIOP Maryland Chapters – The Association for Commercial Real Estate

Development Nitrogen Offsets – Preliminary Comments on Draft MDE Framework

Dear Mr. Costello:

On behalf of NAIOP's 700 member commercial real estate companies I am writing with preliminary comments on the development offsets framework outlined in the May 30, 2012 presentation to the growth commission's WIP workgroup and MDE's Accounting for Growth Discussion Draft dated July 12, 2012. We appreciate your interest in working with the commercial real estate industry on matters of policy and technical implementation of the TMDL. Our initial comments and questions related to the offsets framework are below.

1. Development Offset Requirements Should Be Limited To The Difference Between The Pre and Post Development Loading - By requiring that 100% of the post development loading be offset, the framework would require property owners to mitigate not only any additional loading resulting from the development activity but also fully offset all existing Nitrogen loads. This approach would force development to carry a disproportionate share of the cost and operational responsibility for reducing existing nitrogen load. Future Nitrogen loading from development parcels should be net neutral but not required to provide a net zero loading.

2. Reductions In Loading Resulting From Actions Taken By The Property Owner Should Be Credited To The Property Owner - While development should fully offset "increased" loadings, government should not be permitted to require net reductions in the baseline/pre development loading as a condition of development approval and then apply some or all of those Nitrogen reductions to MS4 or other load reduction responsibilities for other sectors. Also, while we see a role for an uncertainty factor or reserve to account for variations in the performance of credited practices, the nutrient trading framework should not permit a set percentage of traded credits to be discounted or retired and claimed as a reduction in load by other sectors.

3. Trading Policies Should Be Reevaluated and A Liquid Market in Place Before Offsets are Required - We believe it will be essential for urban developers to have access to a large, diverse and liquid trading market before development offsets are required. The current nutrient trading framework has not shown it is capable of generating significant credits nor does it seem to be consistent with the draft offsets framework. Issues important to the nutrient trading program should be clarified or reconsidered. For example, it is our understanding that permanent nutrient trades in Virginia are almost exclusively achieved through the conversion of crop land to forest buffers, yet Maryland's nutrient trading policies contain language that seems to discourage or prevent agricultural land conversions.

4. Availability of Offsets and Impact on Planned Growth - It is of concern to us that not enough information is known about the extent to which stormwater and wastewater offsets and credits will be needed in key growth areas and how the, "scarcity of offsets" predicted in MDE's May 30 PowerPoint

will serve as a deterrent to future growth area development. In the instances where wastewater or stormwater offset capacity are limited how does this policy or existing law direct the allocation of capacity? If, as in the discussion draft example, a project approval necessitates amendment to a WWTP discharge permit, what is the process for this to be done on a project by project basis? An inventory and analysis of offset supply versus demand from planned growth should be conducted and the overall influence on the rate, location and extent of planned growth should be presented.

5. Loading Rates Should be Explained and Examples for Commercial Development Added to the Offset Calculator – Loading rates listed on the offset calculator including their relationship to the CBP model loading numbers should be explained. Examples related to commercial development should be added including an explanation of how mobile emissions offset requirements are allocated between residential and commercial uses.

6. Effective Date and Grandfathering – As the capability of the nutrient trading program and the extent of the offset requirements become better understood an appropriate effective date should be set. If an offset program is finalized the requirements should not be applied to projects with preliminary plan approval or to projects seeking renewal of coverage under an existing permit.

7. Offsets Should be Based on Delivered Loads - Edge of stream buffer or edge of field loading rates should never be used unless a location ratio or other factor is applied to account for the actual load delivered to the resource.

8. Fee in Lieu – A fee in lieu of offsets that funds equivalent nutrient reductions should be part of the program.

9. Controlling Mechanism to Reduce Overlap of TMDL Related Taxes Fees and Regulatory Programs is Needed - Our member companies are willing to contribute their fair share toward TMDL compliance and to go beyond that level under certain circumstances but as an industry we believe it is important for some controlling mechanism to eliminate overlap between the fees and regulatory mandates that can result in a disproportionate burden on individual property owners. For example, how do the mobile emissions offsets under the TMDL relate to the vehicle miles traveled air offsets associated with MDE’s proposed greenhouse gas reduction strategies or, how will a new development that fully offsets stormwater and wastewater Nitrogen loads be treated under the stormwater utility and Bay Restoration Fee programs?

Thank you for your consideration. NAIOP’s member companies look forward to working with you throughout TMDL implementation.

Sincerely;

Tom Ballentine, Vice President for Policy

South River Federation

- In the objectives, the goal of the program should not be to “minimize pollutant load from new growth” but to “eliminate” it, per the terms of the TMDL.

- I'm assuming the "no offset" for redevelopment means no stormwater offset, but it is theoretically possible that a redevelopment project could significantly expand its wastewater load, and that should still need to be offset. In terms of re-development, it's still not clear to me whether a developer can get credits for going beyond regulatory compliance (which I think they should be able to).
- I don't think localities should be precluded from assessing offsets to new development on WWTPs. Though they may have permit capacity, expansion at the WWTP is going to require reductions, which could likely be more costly, in other sectors.
- There should be some sort of protection ratio associated with the offsets, whether it be 1.5:1 or 2:1 to ensure no degradation, and perhaps some improvement, in local water quality.