



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

From: Alan Girard, MSGC WIP Workgroup Chair

Subject: Report and Recommendation on Maryland's Draft Accounting for Growth Policy<sup>1</sup>

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The Maryland Sustainable Growth Commission WIP Workgroup (WWG) is responsible for advising the Commission on the development of Maryland's Accounting for Growth (AfG) Policy. The Policy is intended to satisfy both EPA's requirements under the Chesapeake Bay TMDL and those of the Sustainable Growth and Agricultural Preservation Act of 2012 (SB236). Under the Bay TMDL, Maryland is expected to hold the line against pollution from population growth and new development, which by current estimates is expected to add more than 2 million pounds of nutrient pollution to the Bay each year (11 million pounds of pollution are planned for reduction annually under Maryland's Phase II WIP). The Commission has a responsibility to comment on the Policy in its capacity to make recommendations for changes in state law, regulations, policies, and procedures it believes are necessary to achieve smart and sustainable growth in Maryland.

The WWG supports development of the Policy in its advisory capacity to the state's Bay Workgroup and the Commission, as well as through dialogue with workgroup members, agency staff, and interested parties. Four WWG reports related to the Policy have been made to the Commission so far. This report makes recommendations based on the WWG meeting on October 24 to discuss the State's current thinking on possible changes to AfG Policy elements described in the *July Discussion Draft* of the policy and the *August Draft Regulations for Discussion Purposes*. As with previous reports, the WWG addresses both the merits of the AfG policy for

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<sup>1</sup> The observations and recommendations herein do not necessarily represent the views of the State agency representatives on the WIP Workgroup.

accomplishing Bay restoration and its impact on growth and development in Maryland. Notes that summarize discussions to date among WWG members and interested parties are available by request. Some WWG representatives may submit comments independent of the Workgroup per the invitation to do so by MDE.

**The WIP Workgroup recommends the Commission support the following four specific recommendations.**

Recommendation #1: The WWG recommends that the Commission support the following four AfG Policy Principles:

1. New or increased loads from future development should be minimized.
2. Loads from new development should be permanently offset.
3. Activities that offset pollution from new growth should be verified and enforced.
4. Regulations that implement the Policy should be simple, transparent, and easily understood by the public.

Recommendation #2: The WWG recommends that the Commission support simultaneous development of a uniform strategy for implementing offset requirements and trading policies throughout Maryland, even if this delays the proposal of the Tier III regulations past the end of 2012.

The State is considering whether to develop the AfG Policy only for new residential subdivisions in Tier III (as defined and required in SB236) through regulations by the end of 2012 with the expectation that the complete AfG and trading regulations that affect development beyond Tier III (the rest of the state) would be developed during the remainder of 2013. MDE indicates that additional work is needed to develop the Policy fully with respect to trading and the regulation of aggregators. It also indicates that it is awaiting further guidance from the U.S. EPA. However, MDE does not clarify what other issues remain unresolved with the generally applicable Policy beyond Tier III areas, except to note that redevelopment and infill would not be involved in Tier III.

Although some members of the WWG oppose delaying the proposal of the Tier III regulations, there is consensus that a piecemeal approach is undesirable. The WWG recommends that the Commission not support separating Tier III from the rest of the Policy and instead support the development of a single, complete strategy for implementing AfG offset requirements and trading policies throughout all of Maryland. A single proposal would relieve uncertainty as to how policy elements for each area of the state (Tier III and everywhere else) would interact. It

would still provide additional time to address and resolve the remaining issues necessary for effective implementation of the AfG effort, including reporting, verification, and enforcement requirements and possible fee-in-lieu alternatives. Separation of the two initiatives could undermine each one and compromise overall results in the long run.

In supporting simultaneous development of a single strategy for the AfG Policy, the Commission should underscore the importance of expediting development of the Policy despite near term challenges. Pollution caused by new growth that is not accounted for burdens Maryland's citizens and state and local governments with the responsibility to bear all associated costs of offsetting the new load. The Commission should recommend that MDE in its November presentation to the General Assembly (as required by SB236) commit to actions and a timetable that are expected to resolve issues with the current draft AfG Policy and the trading policies. The actions and timetable should commit the State to finalize the regulation so that the program is in place by December 31, 2013, as set forth in Maryland's Phase II WIP.

Recommendation #3: The WWG recommends that the Commission support a requirement to offset post-development pollution loads permanently.

The State has recently proposed that the developer be responsible for ensuring pollution is offset over a 30-year term. The State's rationale is that this would facilitate the availability of offsets in the developing trading market. It also suggests that, after the first 30 years, responsibility for ensuring the continuation of the offset would shift to the local jurisdiction in which the offset is established, but provides no further details.

While the need for a robust trading market is acknowledged, the WWG recommends against a policy that does not assure permanent reductions. In particular, practices that are not themselves permanent are viewed by many workgroup members as introducing a great deal of uncertainty into the program. Permitting non-permanent practices as offsets may be premature without an analysis of Maryland's offset generation capacity (an unfulfilled request made by the WWG in 2011). Moreover, a 30-year term for developer responsibility for offsets is viewed as "a ticking time bomb" that leaves considerable uncertainty over how permanent pollution impacts caused by development would continue to be offset after the term ends. Local governments are particularly concerned about how they would implement and fund the responsibility to maintain pollution reduction levels after 30 years.

The WWG recognizes potential benefits of a 30-year term option, including reduced costs from increased competition among a wider variety of offset opportunities. Some members recommend further analysis of the feasibility of including non-permanent offsets as part of the policy. However, we believe the failure of the proposal to specifically delineate how new loads will be offset in perpetuity and the mandated burdens it may place on local governments renders it unsupportable in its current form. The WWG therefore recommends that the Commission

support a requirement to offset permanent post-development pollution loads only with practices that will reduce pollution permanently.

Recommendation #4: The WWG recommends that the Commission support the following proposed AfG Policy elements.

1. In addition to nitrogen, offset activities should be required to account for new or increased phosphorus loads associated with development on the condition that the feasibility of compliance with a phosphorus offset requirement is fully explained.
2. Development activity associated with the agricultural industry should not be categorically excluded from the Policy.
3. Applicability of the Policy to development disturbances of less than one acre is appropriate contingent on findings that these disturbances are significant and that the implementation and enforcement of related regulations are feasible and not administratively burdensome.
4. Area-specific loading rates and field-verified efficiency data should be used for calculating impacts from on-site wastewater disposal systems.
5. Regional loading rates should be used for calculating development impacts from stormwater and developers should be allowed to demonstrate that their use of more effective BMPs achieve greater pollution reduction than ESD to the MEP.

The WWG offers the following observations about other proposed elements of the Policy.

1. **Offset Ratios.** The WWG has had extensive discussion on the merits of requiring impacts from development to be offset at a ratio greater than 1:1 to account for significant uncertainty over whether the Policy will produce the intended outcome of no net increase in pollution. The proposal being considered by the State requires a 1:1 offset, excludes the air and forest load from the offset calculation, expands the redevelopment and infill exemptions, and limits offset terms to 30 years. Many WWG members find that these proposals, in the aggregate, further increase doubt about the Policy's overall effectiveness, and suggest that higher offset ratios should be required for sprawl development in order to incentivize smart and sustainable growth. Other members believe including the forest load in the required offset unfairly burdens the development sector with a requirement to offset pre-existing pollution. The State maintains that there is concern an offset ratio greater than 1:1 may not have an adequate scientific justification and may not be supported by the State's existing statutory authority.
2. **Air Offsets.** The State is considering whether to eliminate the mobile atmospheric deposition of nitrogen (primarily caused by increased transportation associated with new development) from the calculation of the load to be offset, which it proposed in the earlier

draft Policy. The State supports its elimination on the grounds that there is a relatively small impact on the overall load and that the method it uses to calculate the load is crude. Some WWG members suggest that mobile atmospheric deposition is or is planned to be accounted for in other regulatory strategies, including the Maryland stormwater rule and greenhouse gas initiatives. Others believe fully accounting for pollution from new or increased loads associated with development must include impacts from mobile atmospheric deposition, which is a major source of Bay pollution, in order to responsibly address all aspects of the load from growth.

3. **Offset Timing.** A change in the Policy is being considered to permit offsets to be established to match phased-in construction schedules rather than at the time a permit for the discharge of stormwater for a phased project is issued. The change could provide greater temporal consistency between delivered loads and pollution offset activities, enabling developers to ensure offsets are installed at the time construction occurs rather than at the time permits are received, which with phased-in projects can precede actual pollution impacts by years. There is speculation that this would ease developers' cash flow challenges. Uncertainty remains over the mechanics of this proposal and its ability to provide assurance pollution would be fully accounted.
4. **Fee-In-Lieu (FIL).** An option to pay in to the Bay Restoration Fund (BRF) is being considered as an alternative to purchasing offset credits from the market. Funds received would primarily support the establishment of high-performing septic systems through the Fund, which would account for nitrogen load (phosphorus is not released in significant amounts from septic systems because it is less soluble than nitrogen and binds to soil; different, additional practices would be required to offset phosphorus). Proponents of FIL argue that offset generation capacity is currently unknown and the initial market for offset credits may be modest at best. If so, new development could have difficulty satisfying offset requirements. Opponents remain unconvinced the proposal would provide reasonable assurance that net pollution loads from growth would not increase, citing the absence of details on how FIL would be implemented and inadequacies in the performance of other existing FIL programs. Some suggestions were raised on how FIL might be made more acceptable, including permitting its use only in certain geographies, limiting access to projects that have first minimized new loads, phasing FIL out after a short period to address near term market uncertainties, requiring that funded BMPs be in place within a defined and limited time frame, and permitting only a certain percentage of projects to be eligible for the FIL option. Some members urged that FIL funds should be required to be invested within the jurisdiction in which the development project is proposed. A suggestion was also offered that the funds be directed to local jurisdictions rather than the BRF.
5. **Edge of Stream Loads.** The State clarified that its intention is to use delivered loads as the standard by which pollution from development is accounted, and that it would use the land-river delivery factors from the Chesapeake Bay Program to calculate delivered load.

The earlier version of the Policy had been understood by some to employ edge of streams loads, which are generally believed to be more effective at accounting for impacts to local water quality. Several WWG members are concerned that delivered loads, while they protect the Bay, do not fully account for pollution from development to local rivers and streams.