

PERMANENCE OF CREDITS USED FOR NPDES PERMIT ISSUANCE AND COMPLIANCE

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INTRODUCTION

- The Bay TMDL expects the Bay jurisdictions to offset all new or increased loads and identifies trading as a potential tool that the Bay jurisdictions could use to implement the Bay TMDL.
- Trading and offset programs should be consistent with:
 - the Clean Water Act and its implementing regulations
 - EPA's 2003 Water Quality Trading Policy
 - EPA's 2007 Water Quality Trading Toolkit for NPDES Permit Writers
 - Chesapeake Bay TMDL per the Clean Water Act, 33 U.S.C. §§ 1251 et seq.
- Credit permanence is defined as the duration for which a credit purchaser should purchase N, P and/or sediment credits from certified projects and/or practices to meet the obligations of its NPDES permit.

CREDIT PERMANENCE: TWO CASES

1. Credit permanence for an **existing** point source to meet its permit limits
 - Source was in existence at the time of the TMDL
 - Source received a wasteload allocation (WLA) that has been incorporated into its NPDES permit
2. Credit permanence for **new or expanded** source offsets
 - Bay TMDL defines all new point sources as having a WLA of zero
 - A permit could not be issued without securing an offset of the entire load
 - Existing sources that are expanding also are expected to offset increased loads

In both instances, credits should be created and used within the periods that are used to determine compliance with effluent limitations.

NPDES PERMIT HOLDER CREDIT PURCHASES FOR OFFSETS OF NEW OR EXPANDED SOURCES

- Credit purchaser should provide certainty through a demonstrated commitment that it can meet its NPDES compliance obligations
- Key aspects of certainty:
 - Credits should be secured for the duration of the authorization to discharge
 - Credits should be created and used within the periods that are used to determine compliance
 - Procurement of credits should be documented in the permit, fact sheet, and administrative record and include:
 - Demonstration that credits are quantifiable, verifiable, and enforceable
 - Buyer-seller contract that includes verification and plan if the credit-producing projects lose effectiveness
 - Available and existing monitoring and modeling data related to credit generation and usage

LENGTH OF TIME THAT A NPDES PERMITTED CREDIT PURCHASER IS EXPECTED TO SECURE CREDITS

- Permits should require that credits for new loads be available and secured for the duration of the authorization to discharge
- Credits should be created and used within the periods that are used to determine compliance with effluent limitations
- Each Bay jurisdiction has discretion to decide how to assure credit availability in the future but, at a minimum, credits need to be secured for one permit term

OBLIGATION TO SATISFY PERMIT LIMITS

- There may be a situation where a seller does not provide credits that were committed in a contract between the seller and the buyer
- The NPDES permittee continues to be responsible for meeting the limits of its permit including all terms and conditions.
 - If the credit purchaser's permit indicated that credits would be used to meet a limit, the limit requirements remain in place regardless of issues with the credit seller
 - EPA expects NPDES credit purchasers to exhibit due diligence when entering into credit purchase agreements because the facility with a NPDES permit remains liable and is legally responsible for meeting its compliance obligations, even when a seller defaults