

Model Water Quality Trading Agreement

Regulated Entity Point Source to Non-Point Source / Agricultural Trade



November 2020 | FS-1150



Model Water Quality Trading Agreement for a Regulated Entity Point
Source to Non-Point Source/Agricultural Trade

This type of agreement is intended to inform conditions needed when selling to an entity intending to use the credits to satisfy permit requirements issued by the State of Maryland.

Instructions

1. Complete two copies of this Agreement, one for the Buyer and one for the Seller. Both parties should sign both copies.
2. Both parties will need to agree on terms in Exhibit A and continue to meet and agree, annually, throughout the term of this Agreement.
3. This Agreement is provided to aid parties who wish to participate in trading in preparing their own Agreements.

Disclaimer: This Agreement is a sample intended to provide general information and should not be construed as providing legal advice. Both parties should each consider consulting their respective attorneys for a clarification on how any clause in a contract affects their respective legal rights.

THIS WATER QUALITY TRADING AGREEMENT (this "Agreement"), is made this ____ day of _____, _____, by and between _____, ("Buyer") _____, ("Seller").

BACKGROUND

- A. Buyer. The Buyer is subject to a National Pollutant Discharge Elimination System (NPDES) MS4 permit, No. _____ ("Permit") issued by the Maryland Department of the Environment ("MDE").
- B. Buyer's Permit. The Buyer's Permit has been modified to allow the purchase of nitrogen, phosphorus, and/or sediment water quality credits as described in Exhibit A to this Agreement ("Credits") to meet the requirements of its discharge permit.
- C. Seller. The Credits generated by the Seller are from certain land of which the Seller is the owner [or lessee with expressed consent of the owner] containing approximately ____ acres located at _____, also known as Tax Map(s) _____ and Parcel(s) _____ (the "Farm").
- D. Purchase. The Buyer desires to purchase from the Seller, and the Seller desires to sell to the Buyer, Credits generated through the use of Best Management Practices (hereinafter referred to as "BMPs") on the Farm. A BMP may only generate credits when it is installed or placed into operation and all appropriate operation and maintenance guidelines, as established by the Maryland Department of Agriculture (MDA) are being followed. The method of credit generation can be found in Exhibit A.
- E. Watershed. The Credits are verified and certified Credits within the _____.
- F. Trading Program. The provisions of the Maryland Water Quality Trading Program and the Agricultural Nutrient and Sediment Credit Certification Program (Maryland Code, Agriculture Article, §§8-901 and 8-904; Environment Article, §§9-313, 9-315, 9-319, and 9-325; Code of Maryland Regulations, 15.20.12.00., et. seq. and 26.08.11.00, et. seq.) are referred to collectively in this Agreement as the "Trading Program." The terms in this Agreement not specifically defined herein shall have the definitions provided in the Trading Program.

AGREEMENT

NOW, THEREFORE, in consideration of mutual promises set forth herein, the sufficiency of which is hereby acknowledged, and intending to be legally bound, the parties hereto agree as follows:

- 1. Participation in the Trading Program. The Parties represent and warrant that they are authorized to enter into this Agreement and have taken all of the necessary steps with the MDA and MDE to participate in the Trading Program.
- 2. Initial Term. The Buyer and the Seller agree that this Agreement is for a term of ____ years, starting on the date of the execution of this Agreement and ending on _____.
- 3. Optional Renewal Term. Not less than sixty (60) days before the end of the initial term, either of the parties may provide notice of a desire to renew this Agreement. The parties by mutual agreement, may renew this Agreement for a term of _____ or a mutually agreed upon term. In

order to renew this Agreement, the Parties shall agree on the type, quantity, and price of Credits; complete the renewal term Credit table in Exhibit A; and initial where provided to indicate acceptance. During the renewal term, the terms and conditions of this Agreement shall apply unless modified and agreed upon by the Parties in writing.

4. Sale of Credits. Upon the execution of this Agreement, the Buyer shall pay the Seller for the Credits that may be applied in year one of this Agreement as described in Exhibit A with an initial payment within ____ days and subsequent payments on or before _____. For every year of this Agreement following the initial year, the Parties agree, on or before _____, the Buyer shall pay the Seller the total amount due for the Credits that may be applied in that year of the Agreement as described in Exhibit A. Buyer and Seller understand that at the time of the Seller's credit certification, a reserve ratio of 5% was applied to the total number of generated credits to create a reserve pool of credits that may be used by the State in accordance with COMAR 26.08.11.08(C)(3).
5. Seller's Obligations. In addition to the duties outlined in this Agreement, the Seller is also obligated to do the following throughout the initial term and any renewal terms of this Agreement:
 - A. Maintain all of the BMPs used to meet baseline requirements and/or generate the Credits sold to the Buyer in accordance with the standards required by the Maryland Department of Agriculture;
 - B. Provide access to MDA, MDE, and/or authorized verifiers and allow all required annual inspections to be performed to verify baseline requirements and that the Credits are able to be traded;
 - C. Continue to implement a current Nutrient Management Plan ("NMP") and allow review by the MDA, MDE, and/or authorized verifiers of the Farm's current NMP and documentation evidencing that it continues to be implemented in accordance with COMAR 15.20.07 and 15.20.08;
 - D. Continue to implement a current Soil Conservation and Water Quality Plan ("SCWQP") and allow review by the MDA, MDE, and/or authorized verifiers of the Farm's SCWQP and associated documentation evidencing that it addresses all nitrogen, phosphorus, and sediment runoff and emission issues as specified;
 - E. If applicable, maintain an adequate manure storage and runoff system as required in an Animal Waste Management System Plan, or in the case of a Confined Animal Feeding Operation, a Comprehensive Nutrient Management Plan or SCWQP and NMP as required by permit; and
 - F. Remain compliant with all relevant local, state, and federal laws.
6. Buyer's Obligations. In addition to the duties outlined in this Agreement, the Buyer is also obligated to do the following throughout the initial term and any renewal terms of this Agreement:
 - A. Arrange and pay for an authorized verifier approved by MDA, who does not hold an interest in the agricultural operation generating the Credits or was not involved in the original application or qualification of the Credits, to conduct an annual inspection to verify the Credits;
 - B. Provide all inspection and verification report forms to the Seller, if applicable, the owner of the Farm, the MDA, MDE, and/or authorized verifiers within 30 days of the site visit; and
 - C. Remain compliant with all relevant local, state, and federal laws.
7. Verification and Compliance. The Parties mutually agree to make best efforts to obtain all necessary verifications and governmental approvals required to fulfill this Agreement.

- A. Upon receipt of a verification report that the Seller believes was issued in error, the Seller shall have the right to dispute the information in the report in writing within 30 days of receiving the report and shall provide a copy of the written appeal to the MDA, MDE, the authorized verifier, and the Buyer.
 - B. If the verification report is not issued in error, the Parties agree to take all reasonable steps to remedy any deficiencies within the time period required by the MDA, MDE, and/or authorized verifier. The Parties further agree to allow for and participate in additional inspections and provide written substantiations that corrective measures have been taken. If the Seller is unwilling to remedy the noted deficiencies within the required time period, the Buyer shall have the right to withhold any payments due and owing under this Agreement until the deficiencies are corrected to the satisfaction of the MDA, MDE, and/or the authorized verifier.
8. Default and Termination for Default. The Buyer or the Seller shall be in default of this Agreement if either breaches any provision of this Agreement and the breach is not cured by the breaching party within thirty (30) days of receipt of notice of said breach from the non-breaching party, unless the parties agree in writing to a different time to cure the breach. Upon the breaching party's failure to timely cure a breach, the non-breaching party shall have the right to terminate this Agreement for default, and to pursue such remedies as may be available in law or equity.
- A. In the event of a termination due to the Seller's breach, the Seller shall return any money paid by the Buyer for Credits that are unable to be utilized by the Buyer and shall pay all costs incurred by the Buyer to replace any Credits promised and mutually agreed upon, as indicated by both parties on Exhibit A, that were not provided.
 - B. In the event of a termination due to Buyer's breach which is not timely cured, the Seller shall have the right to sell the Credits to another qualified buyer.
 - C. The Parties agree that they have a duty to mitigate damages. Parties will use reasonable efforts to minimize any damages incurred as a result of the other Party's non-performance of this Agreement. Such reasonable efforts may include, but shall not be limited to, requesting reserve credits from governmental agencies and/or purchasing credits from another trading partner.
9. Warranties.
- A. The Buyer acknowledges and agrees that the Seller makes no representation, warranty, or covenant regarding:
 - 1. The suitability of the Credits for the Buyer; and
 - 2. The likelihood of the Credits satisfying the requirements of the Buyer's Permit (or any successor permit); and
 - B. The Buyer acknowledges and agrees that it will be solely responsible for adhering to the Permit requirements and any enforcement action related to a violation of Permit requirements.
 - C. The Buyer and the Seller acknowledge and agree that this Agreement shall not result in the Seller being liable for a violation of the Buyer's Permit even if a failure to generate the Credits causes a Permit violation.
10. Successors and Assigns. This Agreement shall not be assigned by any party without the prior written consent of the other party, as well as any necessary consents or approvals of the applicable governmental agencies.
11. Attorneys' Fees. The prevailing party in any action or proceeding for the enforcement, protection, or establishment of any right or remedy under this Agreement or for the interpretation of this

Agreement shall be entitled to recover its reasonable attorneys' fees and costs in connection with such action or proceeding from the non-prevailing party.

12. Force Majeure. Neither Party will be liable for any failure or delay in performing an obligation under this Agreement that is due to acts of God; war, insurrection, or civil disturbance; natural disasters like earthquakes, fire, and floods; transportation disruptions; strikes and labor disturbances or labor shortages; government shutdowns; or any other emergency beyond the parties' control, making it impractical, illegal, or impossible to perform their obligations under this Agreement.
13. Amendments. This Agreement may not be amended, modified, superseded, or cancelled, nor may any term or condition hereof be waived, except by a written agreement signed by both the Buyer and the Seller.
14. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Maryland.
15. Change in Law. In the event of any material change in the applicable laws or regulations, the Parties agree to work together to amend this Agreement to conform to such change in law, while maintaining as closely as practical the provisions and intent of this Agreement.
16. Headings. Headings have been set forth for convenience of reference only and shall not be used in construing this Agreement. References to persons or things shall be deemed to refer to such persons or things in the singular or plural and in the masculine, feminine or neutral gender as the context shall require.
17. Agency. Nothing in this Agreement shall be deemed to create any agency, partnership, joint venture, or fiduciary relationship (or duties) between the parties.
18. Severability. This Agreement shall be deemed to be severable, so that if any provision hereof shall be determined by a court of competent jurisdiction to be invalid or unenforceable, the remaining provisions hereof shall continue to remain valid and enforceable in accordance with their terms.
19. Notice. All notices shall be in writing and delivered by electronic mail transmission (email); U.S. mail; or personal delivery to the addresses below:

BUYER

Email:

Address:

SELLER

Email:

Address:

All notices shall be deemed to have been given on the day such notice is sent electronically; three (3) days after such notice is mailed via the U.S. Postal Service; or notice is personally delivered.

20. Entirety. This Agreement contains the entire agreement and understanding between the parties concerning the subject matter hereof, and supersedes any and all prior understandings or agreements, written or oral, between the parties respecting the subject matter hereof.
21. Further Assurances. The Parties agree to do such further acts and to execute and deliver additional agreements and instruments as the other may reasonably require to consummate, evidence, or confirm this Agreement.

IN WITNESS WHEREOF, the Buyer and the Seller, or a duly authorized representative, hereby execute this Agreement on the day and year first written above.

BUYER

By: _____
Print Name

By: _____
Signature

SELLER

By: _____
Print Name

By: _____
Signature

Exhibit A

The following is a description of the Credits to be sold by the Seller and purchased by the Buyer in the Water Quality Trading Agreement during the **Initial Term** of the Agreement starting on _____ and ending on _____. (Note: Contracts can be for terms of one to ten + years. At a minimum, permittees are required to secure certified credits, to be generated on an annual basis, for the duration of the authorized discharge, which is typically 5 years.)

	Year 1	Year 2	Year 3	Year 4	Year 5
Type of Credits (N, P, and/or S)					
Amount of Credits Required					
Unit Price (when disseminating this Agreement parties may choose to redact)					
Registration Numbers/ Series of Credits					
Method of Credit Generation					
Total Price of Credits (when disseminating parties may choose to redact)					

The following is a description of the Credits to be sold by the Seller and purchased by the Buyer in the Nutrient Credit Trading Agreement during the **Renewal Term** of the Agreement starting on _____ and ending on _____.

	Year 1	Year 2	Year 3	Year 4	Year 5
Type of Credits (N, P, and/or S)					
Amount of Credits Required					
Unit Price (when disseminating this Agreement parties may choose to redact)					
Registration Numbers/ Series of Credits					
Method of Credit Generation					
Total Price of Credits (when disseminating parties may choose to redact)					

Buyer's Initials _____ / Date _____

Seller's Initials _____ /Date _____

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