

CHAPTER 94

An Act to amend and reenact § 62.1-44.15:5 of the Code of Virginia, relating to wetlands mitigation banks.

[S 629]

Approved March 12, 2004

Be it enacted by the General Assembly of Virginia:**1. That § 62.1-44.15:5 of the Code of Virginia is amended and reenacted as follows:**

§ 62.1-44.15:5. Virginia Water Protection Permit.

A. Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act.

B. The Board shall, after providing an opportunity for public comment, issue a Virginia Water Protection Permit if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act and the State Water Control Law and will protect instream beneficial uses.

C. The preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural, and aesthetic values is a beneficial use of Virginia's waters. Conditions contained in a Virginia Water Protection Permit may include, but are not limited to, the volume of water which may be withdrawn as a part of the permitted activity. Domestic and other existing beneficial uses shall be considered the highest priority uses.

D. Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this subsection, it shall be unlawful to excavate in a wetland. On and after October 1, 2001, except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this subsection, it shall also be unlawful to conduct the following activities in a wetland: (i) new activities to cause draining that significantly alters or degrades existing wetland acreage or functions, (ii) filling or dumping, (iii) permanent flooding or impounding, or (iv) new activities that cause significant alteration or degradation of existing wetland acreage or functions. Permits shall address avoidance and minimization of wetland impacts to the maximum extent practicable. A permit shall be issued only if the Board finds that the effect of the impact, together with other existing or proposed impacts to wetlands, will not cause or contribute to a significant impairment of state waters or fish and wildlife resources. Permits shall contain requirements for compensating impacts on wetlands. Such compensation requirements shall be sufficient to achieve no net loss of existing wetland acreage and functions, and may be met through wetland creation or restoration, purchase or use of mitigation bank credits pursuant to subsection E, or contributing to a fund that is approved by the Board and is dedicated to achieving no net loss of wetland acreage and functions. When utilized in conjunction with creation, restoration or mitigation bank credits, compensation may incorporate (i) preservation or restoration of upland buffers adjacent to wetlands or other state waters or (ii) preservation of wetlands. The Board shall assess compensation implementation, inventory permitted wetland impacts, and work to prevent unpermitted impacts. Within 15 days of receipt of an individual permit application, the Board shall review the application for completeness and either accept the application or request additional specific information from the applicant. Within 120 days of receipt of a complete application, the Board shall issue the permit, issue the permit with conditions, deny the permit or decide to conduct a public meeting or hearing. If a public meeting or hearing is held, it shall be held within 60 days of the decision to conduct such a proceeding and a final decision as to the permit shall be made within 90 days of completion of the public meeting or hearing.

The Board shall develop general permits for such activities in wetlands as it deems appropriate. General permits shall include such terms and conditions as the Board deems necessary to protect state waters and fish and wildlife resources from significant impairment. The Board shall deny, approve or approve with conditions any application for coverage under a general permit within 45 days of receipt of a complete preconstruction application. The application shall be deemed approved if the Board fails to act within 45 days. The Board is authorized to waive the requirement for a general permit, or deem an activity in compliance with a general permit, when it determines that an isolated wetland is of minimal ecological value.

The Board shall develop general permits for:

1. Activities causing wetland impacts of less than one-half of an acre;
2. Facilities and activities of utilities and public service companies regulated by the Federal Energy Regulatory Commission or State Corporation Commission. No Board action on an individual or general permit for such facilities shall alter the siting determination made through Federal Energy Regulatory Commission or State Corporation Commission approval. The Board and the State Corporation

Commission shall develop a memorandum of agreement pursuant to §§ 56-46.1, 56-265.2, 56-265.2:1 and 56-580 to ensure that consultation on wetland impacts occurs prior to siting determinations;

3. Coal, natural gas, and coalbed methane gas mining activities authorized by the Department of Mines, Minerals and Energy, and sand mining;

4. Virginia Department of Transportation or other linear transportation projects; and

5. Activities governed by nationwide or regional permits approved by the Board and issued by the U.S. Army Corps of Engineers. Conditions contained in the general permits shall include, but not be limited to, filing with the Board copies of any preconstruction notification, postconstruction report and certificate of compliance required by the U.S. Army Corps of Engineers.

The Board shall utilize the U.S. Army Corps of Engineers' "Wetlands Delineation Manual, Technical Report Y-87-1, January 1987, Final Report" as the approved method for delineating wetlands. The Board shall adopt appropriate guidance and regulations to ensure consistency with the U.S. Army Corps of Engineers' implementation of delineation practices. The Board shall also adopt guidance and regulations for review and approval of the geographic area of a delineated wetland. Any such approval of a delineation shall remain effective for a period of five years; however, if the Board issues a permit pursuant to this subsection for an activity in the delineated wetland within the five-year period, the approval shall remain effective for the term of the permit. Any delineation accepted by the U.S. Army Corps of Engineers as sufficient for its exercise of jurisdiction pursuant to § 404 of the Clean Water Act shall be determinative of the geographic area of that delineated wetland.

This subsection shall not apply to activities governed under Chapter 13 (§ 28.2-100 et seq.) of Title 28.2 or normal agricultural activities or normal silvicultural activities. This subsection shall also not apply to normal residential gardening, lawn and landscape maintenance, or other similar activities which are incidental to an occupant's ongoing residential use of property and of minimal ecological impact; the Board shall develop criteria governing this exemption and shall specifically identify the activities meeting these criteria in its regulations.

No locality may impose wetlands permit requirements duplicating state or federal wetlands permit requirements.

E. When a Virginia Water Protection Permit is conditioned upon compensatory mitigation for adverse impacts to wetlands, the applicant may be permitted to satisfy all or part of such mitigation requirements by the purchase or use of credits from any wetlands mitigation bank *in the Commonwealth, or in Maryland on property wholly surrounded by and located in the Potomac River if the mitigation banking instrument provides that the Board shall have the right to enter and inspect the property and that the mitigation bank instrument and the contract for the purchase or use of such credits may be enforced in the courts of the Commonwealth*, including any banks owned by the permit applicant, that has been approved and is operating in accordance with applicable federal and state guidance, laws or regulations for the establishment, use and operation of mitigation banks as long as: (1) the bank is in the same U.S.G.S. cataloging unit, as defined by the Hydrologic Unit Map of the United States (U.S.G.S. 1980), or an adjacent cataloging unit within the same river watershed, as the impacted site, or it meets all the conditions found in clauses (i) through (iv) and either clause (v) or (vi) of this subsection; (2) the bank is ecologically preferable to practicable on-site and off-site individual mitigation options, as defined by federal wetland regulations; and (3) the banking instrument, if approved after July 1, 1996, has been approved by a process that included public review and comment. When the bank is not located in the same cataloging unit or adjacent cataloging unit within the same river watershed as the impacted site, the purchase or use of credits shall not be allowed unless the applicant demonstrates to the satisfaction of the Department of Environmental Quality that (i) the impacts will occur as a result of a Virginia Department of Transportation linear project or as the result of a locality project for a locality whose jurisdiction crosses multiple river watersheds; (ii) there is no practical same river watershed mitigation alternative; (iii) the impacts are less than one acre in a single and complete project within a cataloging unit; (iv) there is no significant harm to water quality or fish and wildlife resources within the river watershed of the impacted site; and either (v) impacts within the Chesapeake Bay watershed are mitigated within the Chesapeake Bay watershed as close as possible to the impacted site or (vi) impacts within U.S.G.S. cataloging units 02080108, 02080208, and 03010205, as defined by the Hydrologic Unit Map of the United States (U.S.G.S. 1980), are mitigated in-kind within those hydrologic cataloging units, as close as possible to the impacted site. After July 1, 2002, the provisions of clause (vi) shall apply only to impacts within subdivisions of the listed cataloging units where overlapping watersheds exist, as determined by the Department of Environmental Quality, provided the Department has made such a determination by that date. The Department of Environmental Quality is authorized to serve as a signatory to agreements governing the operation of wetlands mitigation banks. The Commonwealth, its officials, agencies, and employees shall not be liable for any action taken under any agreement developed pursuant to such authority. State agencies are authorized to purchase credits from wetland mitigation banks.

F. Prior to the issuance of a Virginia Water Protection Permit, the Board shall consult with, and give full consideration to the written recommendations of, the following agencies: the Department of Game and Inland Fisheries, the Department of Conservation and Recreation, the Virginia Marine Resources

Commission, the Department of Health, the Department of Agriculture and Consumer Services and any other interested and affected agencies. Such consultation shall include the need for balancing instream uses with offstream uses. Agencies may submit written comments on proposed permits within 45 days after notification by the Board. The Board shall assume that if written comments are not submitted by an agency within this time period, the agency has no comments on the proposed permit.

G. No Virginia Water Protection Permit shall be required for any water withdrawal in existence on July 1, 1989; however, a permit shall be required if a new § 401 certification is required to increase a withdrawal.

H. No Virginia Water Protection Permit shall be required for any water withdrawal not in existence on July 1, 1989, if the person proposing to make the withdrawal has received a § 401 certification before January 1, 1989, with respect to installation of any necessary withdrawal structures to make such withdrawal; however, a permit shall be required before any such withdrawal is increased beyond the amount authorized by the certification.

I. On and after July 1, 2000, and prior to the adoption of regulations promulgated pursuant to subsection D, absent the issuance of a permit by the U.S. Army Corps of Engineers pursuant to § 404 of the Clean Water Act, no person shall excavate in a wetland without compensating for the impact to the wetland to the satisfaction of the Board in a manner sufficient to achieve no net loss of existing wetland acreage and functions.

J. The Board may issue an Emergency Virginia Water Protection Permit for a new or increased withdrawal when it finds that because of drought there is an insufficient public drinking water supply that may result in a substantial threat to human health or public safety. Such a permit may be issued to authorize the proposed activity only after conservation measures mandated by local or state authorities have failed to protect public health and safety and notification of the agencies designated in subsection F, and only for the amount of water necessary to protect public health and safety. These agencies shall have five days to provide comments or written recommendations on the issuance of the permit. Notwithstanding the provisions of subsection B, no public comment shall be required prior to issuance of the emergency permit. Not later than 14 days after the issuance of the emergency permit, the permit holder shall apply for a Virginia Water Protection Permit authorized under the other provisions of this section. The application for the Virginia Water Protection Permit shall be subject to public comment for a period established by the Board. Any Emergency Virginia Water Protection Permit issued under this subsection shall be valid until the Board approves or denies the subsequent request for a Virginia Water Protection Permit or for a period of one year, whichever occurs sooner. The fee for the emergency permit shall be 50 percent of the fee charged for a comparable Virginia Water Protection Permit.