

VIRGINIA ACTS OF ASSEMBLY -- 2011 SESSION

CHAPTER 523

An Act to amend and reenact § 10.1-603.8:1 of the Code of Virginia, relating to stormwater nonpoint nutrient offsets.

[S 1099]

Approved March 25, 2011

Be it enacted by the General Assembly of Virginia:

1. That § 10.1-603.8:1 of the Code of Virginia is amended and reenacted as follows:

§ 10.1-603.8:1. Stormwater nonpoint nutrient offsets.

A. As used in this section:

"Nonpoint nutrient offset" means nutrient reductions certified as nonpoint nutrient offsets under the Chesapeake Bay Watershed Nutrient Exchange Program (§ 62.1-44.19:12 et seq.).

"Permit issuing authority" has the same meaning as in § 10.1-603.2 and includes any locality that has adopted a local stormwater management program.

"Tributary" has the same meaning as in § 62.1-44.19:13.

B. A ~~permit issuing authority may~~ *Permit issuing authorities are authorized to* allow compliance with stormwater nonpoint nutrient runoff water quality criteria established pursuant to § 10.1-603.4, in whole or in part, through the use of the permittee's acquisition of nonpoint nutrient offsets in the same tributary.

C. No permit issuing authority shall allow the use of nonpoint nutrient offsets to address water quantity control requirements. No permit issuing authority shall allow the use of nonpoint nutrient offsets *or other off-site options* in contravention of local water quality-based limitations: (i) consistent with determinations made pursuant to subsection B of § 62.1-44.19:7, (ii) contained in a municipal separate storm sewer system (MS4) program plan approved by the Department, or (iii) as otherwise may be established or approved by the Board.

D. A permit issuing authority ~~may only~~ *shall* allow the use of ~~nonpoint nutrient offsets off-site options in accordance with subsection I~~ when ~~the~~:

1. The permit applicant demonstrates to the satisfaction of the permit issuing authority that (i) alternative site designs have been considered that may accommodate on-site best management practices, (ii) on-site best management practices have been considered in alternative site designs to the maximum extent practicable, (iii) appropriate on-site best management practices will be implemented, and (iv) full compliance with postdevelopment nonpoint nutrient runoff compliance requirements cannot practicably be met on site. *For purposes of this subdivision, if an applicant demonstrates on-site control of at least 75 percent of the required phosphorous nutrient reductions, the applicant shall be deemed to have met the requirements of clauses (i) through (iv);*

2. *Less than five acres of land will be disturbed; or*

3. *The postconstruction phosphorous control requirement is less than 10 pounds per year.*

E. Documentation of the permittee's acquisition of nonpoint nutrient offsets shall be provided to the permit issuing authority in a certification from an offset broker documenting the number of phosphorus nonpoint nutrient offsets acquired and the associated ratio of nitrogen nonpoint nutrient offsets at the offset generating facility. The offset broker shall pay the permit issuing authority a water quality enhancement fee equal to six percent of the amount paid by the permittee for the nonpoint nutrient offsets. If a locality is not the permit issuing authority, such fee shall be deposited into the Virginia Stormwater Management Fund established by § 10.1-603.4:1. If the permit issuing authority is a locality, such fees shall be used solely in the locality where the associated stormwater permit applies for inspection and maintenance of stormwater best management practices, stormwater educational programs, or programs designed to protect or improve local water quality.

F. Nonpoint nutrient offsets used pursuant to subsection B shall be generated in the same or adjacent eight digit hydrologic unit code as defined by the United States Geological Survey as the permitted site. Nonpoint nutrient offsets outside the same or adjacent eight digit hydrologic unit code may only be used if it is determined by the permit issuing authority that no nonpoint nutrient offsets are available within the same or adjacent eight digit hydrologic unit code when the permit issuing authority accepts the final site design. In such cases, and subject to other limitations imposed in this section, nonpoint nutrient offsets generated within the same tributary may be used. In no case shall nonpoint nutrient offsets from another tributary be used.

G. For that portion of a site's compliance with stormwater nonpoint nutrient runoff water quality criteria being obtained through nonpoint nutrient offsets, a permit issuing authority shall (i) use a 1:1 ratio of the nonpoint nutrient offsets to the site's remaining postdevelopment nonpoint nutrient runoff compliance requirement and (ii) assure that the nonpoint nutrient offsets are secured in perpetuity.

H. No permit issuing authority may grant an exception to, or waiver of, postdevelopment nonpoint nutrient runoff compliance requirements unless off-site options have been considered and found not available.

I. In considering off-site options, the permit issuing authority shall give priority to the use of nonpoint nutrient offsets unless a local fee-in-lieu-of, pro-rata share, or similar program has been approved by the Board as being substantially equivalent in nutrient reduction benefits. However, prior to approval by the Board, there shall be a rebuttable presumption that any local government fee-in-lieu-of, pro-rata share, or similar program is substantially equivalent in nutrient reduction benefits. The Board shall establish criteria for determining whether any such local program is substantially equivalent, which shall be used during the local stormwater management program approval process in § 10.1-603.3. The permit issuing authority shall require that nonpoint nutrient offsets and other off-site options approved by the Department or applicable state board, including locality pollutant loading pro rata share programs established pursuant to § 15.2-2243, achieve the necessary nutrient reductions prior to the commencement of the permittee's land-disturbing activity. A pollutant loading pro rata share program established by a locality pursuant to § 15.2-2243 and approved by the Department or applicable state board prior to January 1, 2011, including those that may achieve nutrient reductions after the commencement of the land-disturbing activity, may continue to operate in the approved manner for a transition period ending June 30, 2014. The permittee shall have the right to select between the use of nonpoint nutrient offsets or other off-site options, except during the transition period in those localities to which the transition period applies. The locality may use funds collected for nutrient reductions pursuant to a locality pollutant loading pro rata share program under § 15.2-2243 for nutrient reductions in the same tributary within the same locality as the land-disturbing activity or for the acquisition of nonpoint nutrient offsets. In the case of a phased project, the permittee may acquire or achieve the off-site nutrient reductions prior to the commencement of each phase of the land-disturbing activity in an amount sufficient for each such phase.

J. The Board may establish by regulation a stormwater nutrient program for portions of the Commonwealth that do not drain into the Chesapeake Bay.

K. Nutrient reductions obtained through nonpoint nutrient offsets shall be credited toward compliance with any nutrient allocation assigned to a municipal separate storm sewer system in a Virginia Stormwater Management Program Permit or Total Maximum Daily Load applicable to the location where the activity for which the nonpoint nutrient offsets are used takes place. If the activity for which the nonpoint nutrient offsets are used does not discharge to a municipal separate storm sewer system, the nutrient reductions shall be credited toward compliance with the applicable nutrient allocation.

L. A permit issuing authority shall allow the full or partial substitution of nonpoint nutrient offsets for existing on-site nutrient controls when (i) the nonpoint nutrient offsets will compensate for 10 or fewer pounds of the annual phosphorous requirement associated with the original land-disturbing activity or (ii) existing on-site controls are not functioning as anticipated after reasonable attempts to comply with applicable maintenance agreements or requirements and the use of nonpoint nutrient offsets will account for the deficiency. The party responsible for maintenance shall be released from maintenance obligations related to the on-site phosphorous controls for which the nonpoint nutrient offsets are substituted.

M. To the extent available, with the consent of the permittee, the permit issuing authority may include the use of nonpoint nutrient offsets or other off-site measures in resolving enforcement actions to compensate for (i) nutrient control deficiencies occurring during the period of noncompliance and (ii) permanent nutrient control deficiencies.

N. This section shall not be construed as limiting the authority established under § 15.2-2243; however, under any pollutant loading pro rata share program established thereunder, the subdivider or developer shall be given appropriate credit for nutrient reductions achieved through nonpoint nutrient offsets or other off-site options.

2. That the provisions of this act shall be implemented by permit issuing authorities without the need to amend any local government ordinance, stormwater management plan, or Virginia Soil and Water Conservation Board regulatory action.