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## SENATE BILL NO. 1099

## AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Agriculture, Conservation and Natural Resources)

(Patron Prior to Substitute—Senator Hanger)

Senate Amendments in [ ] — February 8, 2011

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

**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 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 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 the priority established in subsection 1 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.

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

63 I. *A permit issuing authority shall give priority to nonpoint nutrient offsets when the options*  
64 *identified in subdivisions D 2 and D 3 will be used.* In considering off-site options in other situations,  
65 the permit issuing authority shall give priority to the use of (i) nonpoint nutrient offsets unless and (ii)  
66 off-site options approved by the Board as achieving the required permanent nutrient reductions as of the  
67 time of the permittee's land-disturbing activity. An alternative off-site option such as a local  
68 fee-in-lieu-of, pro-rata share, or similar program has been approved by the Board as being substantially  
69 equivalent in based on its nutrient reduction benefits. However, prior to approval by the Board, there  
70 shall be a rebuttable presumption that any local government fee-in-lieu-of, pro-rata share, or similar  
71 program is substantially equivalent in nutrient reduction benefits and other off-site options available  
72 through the Board's regulations may be used when the options identified in clauses (i) and (ii) are not  
73 available; however, the option in clause (i) or (ii) shall be substituted for such alternative option if  
74 available prior to commencement of the associated land-disturbing activity. When the options identified  
75 in clauses (i) and (ii) are both available, the permittee shall have the right to select the option to be  
76 used. The Board shall establish criteria for determining whether any such local program is substantially  
77 equivalent, which shall be used during the local stormwater management program approval process in  
78 ~~§ 10.1-603.3~~ Off-site nutrient reductions shall be acquired or achieved by the permittee prior to the  
79 commencement of the associated land-disturbing activity or, in the case of a phased project, prior to the  
80 commencement of land-disturbing activity for each phase. [ This subsection I shall apply only when the  
81 nonpoint nutrient offsets are generated in the same locality as the site of the land-disturbing activity.]

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

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

90 L. *A permit issuing authority shall allow the full or partial substitution of nonpoint nutrient offsets*  
91 *for existing on-site nutrient controls when (i) the nonpoint nutrient offsets will compensate for 10 or*  
92 *fewer pounds of the annual phosphorous requirement associated with the original land-disturbing*  
93 *activity or (ii) existing on-site controls are not functioning as anticipated and the use of nonpoint*  
94 *nutrient offsets will account for the deficiency.*

95 M. *To the extent available, acquisition of nonpoint nutrient offsets may be utilized in compliance*  
96 *actions to compensate for (i) nutrient control deficiencies occurring during the period of noncompliance*  
97 *and (ii) permanent nutrient control deficiencies.*

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