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SENATE BILL NO. 1100

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Agriculture, Chesapeake and Natural Resources
on February 16, 2011)

(Patron Prior to Substitute—Senator Hanger)

A BILL to amend and reenact §§ 62.1-44.19:15 and 62.1-44.19:18 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 10.1-2128.2, relating to the Water Quality Improvement Fund; nutrient offsets.

Be it enacted by the General Assembly of Virginia:

1. That §§ 62.1-44.19:15 and 62.1-44.19:18 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 10.1-2128.2 as follows:

§ 10.1-2128.2. Nutrient Offset Fund established; purposes.

A. There is hereby created in the state treasury a special nonreverting fund to be known as the Nutrient Offset Fund, hereafter referred to as "the Subfund," which shall be a subfund of the Virginia Water Quality Improvement Fund and administered by the Director of the Department of Environmental Quality. The Subfund shall be established on the books of the Comptroller. All amounts appropriated and such other moneys as may be made available to the Subfund from any other source, public or private, shall be paid into the state treasury and credited to the Subfund. Interest earned on moneys in the Subfund shall remain in the Subfund and be credited to it. Any moneys remaining in the Subfund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Subfund. Moneys in the Subfund shall be used solely for the purposes stated in subsection B. Expenditures and disbursements from the Subfund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request of the Director of the Department of Environmental Quality.

B. The Director of the Department of Environmental Quality shall use moneys in the Subfund only to purchase nutrient offsets that achieve equivalent point or nonpoint source reductions in the same tributary beyond those reductions already required by or funded under federal or state law. The Director of the Department of Environmental Quality may enter into long-term contracts with producers of nutrient offsets to purchase such offsets using moneys from the Subfund. Priority shall be given to nutrient offsets produced from facilities that generate electricity from animal waste.

C. The Director of the Department of Environmental Quality shall make nutrient offsets purchased pursuant to subsection B available for sale to owners or operators of new or expanded facilities pursuant to § 62.1-44.19:15, and to permitted facilities pursuant to § 62.1-44.19:18.

D. For the purposes of this section, a "nutrient offset" means a nutrient reduction certified by the Department of Environmental Quality as a load allocation, point source nitrogen credit, or point source phosphorus credit under the Chesapeake Bay Watershed Nutrient Credit Exchange Program (§ 62.1-44.19:12 et seq.).

§ 62.1-44.19:15. New or expanded facilities.

A. An owner or operator of a new or expanded facility shall comply with the applicable requirements of this section as a condition of the facility's coverage under the general permit.

1. An owner or operator of a facility authorized by a Virginia Pollutant Discharge Elimination System permit first issued before July 1, 2005, that expands his facility to discharge 100,000 gallons or more per day, or an equivalent load directly into tidal waters, or 500,000 gallons or more per day, or an equivalent load, directly into nontidal waters shall demonstrate to the Department that he has acquired waste load allocations sufficient to offset any increase in his delivered total nitrogen and delivered total phosphorus loads resulting from any expansion beyond his waste load allocations or permitted design capacity as of July 1, 2005, and will install state-of-the-art nutrient removal technology at the time of the expansion.

2. An owner or operator of a facility authorized by a Virginia Pollutant Discharge Elimination System permit first issued before July 1, 2005, that expands his facility to discharge 100,000 gallons or more per day up to and including 499,999 gallons per day, or an equivalent load, directly into nontidal waters, shall demonstrate to the Department that he has acquired waste load allocations sufficient to offset any increase in his delivered total nitrogen and delivered total phosphorus loads resulting from any expansion beyond his permitted capacity as of July 1, 2005, and will install, at a minimum, biological nutrient removal technology at the time of the expansion.

3. An owner or operator of a facility authorized by a Virginia Pollutant Discharge Elimination System permit first issued before July 1, 2005, that expands his facility to discharge 40,000 gallons or more per day up to and including 99,999 gallons per day, or an equivalent load, directly into tidal or nontidal waters, shall demonstrate to the Department that he has acquired waste load allocations

sufficient to offset any increase in his delivered total nitrogen and delivered total phosphorus loads resulting from any expansion beyond his permitted capacity as of July 1, 2005.

4. An owner or operator of a facility authorized by a Virginia Pollutant Discharge Elimination System permit first issued on or after July 1, 2005, to discharge 40,000 gallons or more per day, or an equivalent load, shall demonstrate to the Department that he has acquired waste load allocations sufficient to offset his delivered total nitrogen and delivered total phosphorus loads, and will install (i) at a minimum, biological nutrient removal technology at any facility authorized to discharge up to and including 99,999 gallons per day, or an equivalent load, directly into tidal and nontidal waters, or up to and including 499,999 gallons per day, or an equivalent load, to nontidal waters; and (ii) state-of-the-art nutrient removal technology at any facility authorized to discharge 100,000 gallons or more per day, or an equivalent load, directly into tidal waters, or 500,000 gallons or more per day, or an equivalent load, directly into nontidal waters.

5. An owner or operator of a facility treating domestic sewage authorized by a Virginia Pollutant Discharge Elimination System permit with a discharge greater than 1,000 gallons per day up to and including 39,999 gallons per day that has not commenced the discharge of pollutants prior to January 1, 2011, shall demonstrate to the Department that he has acquired waste load allocations sufficient to offset his delivered total nitrogen and delivered total phosphorus loads prior to commencing the discharge, except when the facility is for short-term temporary use only or when treatment of domestic sewage is not the primary purpose of the facility.

B. Waste load allocations required by this section to offset new or increased delivered total nitrogen and delivered total phosphorus loads shall be acquired in accordance with this subsection.

1. Such allocations may be acquired from one or a combination of the following:

a. Acquisition of all or a portion of the waste load allocations from one or more permitted facilities in the same tributary;

b. Acquisition of nonpoint source load allocations through the use of best management practices acquired through a public or private entity acting on behalf of the land owner. Such best management practices shall achieve reductions beyond those already required by or funded under federal or state law, or the Virginia tributaries strategies plans, and shall be installed in the same tributary in which the new or expanded facility is located and included as conditions of the facility's individual Virginia Pollutant Discharge Elimination System permit; ~~or~~

c. *Acquisition of allocations purchased through the Nutrient Offset Fund established pursuant to § 10.1-2128.2; or*

d. Acquisition of allocations ~~in accordance with the terms of the general permit or~~ through such other means as may be approved by the Department on a case-by-case basis.

2. The Board shall give priority to allocations acquired in accordance with subdivisions B 1 a and B, 1 b, and 1 d. The Board shall approve allocations acquired in accordance with subdivision B 1 ed only after the owner or operator has demonstrated that he has made a good faith effort to acquire sufficient allocations in accordance with subdivisions B 1 a and B, 1 b, and 1 d and that such allocations are not reasonably available taking into account timing, cost, and other relevant factors.

3. Notwithstanding the priority provisions in subdivision B 2, the Board may grant a waste load allocation in accordance with subdivision B 1 e d to an owner or operator of a facility authorized by a Virginia Pollution Abatement permit to land apply domestic sewage if (i) the Virginia Pollution Abatement permit was issued before July 1, 2005; (ii) the waste load allocation does not exceed such facility's permitted design capacity as of July 1, 2005; (iii) the waste treated by the existing facility is going to be treated and discharged pursuant to a Virginia Pollutant Discharge Elimination System permit for a new discharge; and (iv) the owner or operator installs state-of-the-art nutrient removal technology at such facility. Such facilities cannot generate credits or waste load allocations, based upon the removal of land application sites, that can be acquired by other permitted facilities to meet the requirements of this article.

C. Until such time as the ~~Board~~ Director finds that no allocations are reasonably available in an individual tributary, the general permit shall provide for the acquisition of allocations through payments into the ~~Virginia Water Quality Improvement Nutrient Offset~~ Fund established in ~~§ 10.1-2128~~ § 10.1-2128.2. Such payments shall be promptly applied by the Department to achieve equivalent point or nonpoint source reductions in the same tributary beyond those reductions already required by or funded under federal or state law or the Virginia tributaries strategies plans. The general permit shall base the cost of each pound of allocation on (i) the estimated cost of achieving a reduction of one pound of nitrogen or phosphorus at the facility that is securing the allocation, or comparable facility, for each pound of allocation acquired; or (ii) the average cost of reducing two pounds of nitrogen or phosphorus from nonpoint sources in the same tributary for each pound of allocation acquired, whichever is higher. Upon each reissuance of the general permit, the Board may adjust the cost of each pound of allocation based on current costs and cost estimates.

§ 62.1-44.19:18. Nutrient allocation compliance and reporting.

A. Each permitted facility shall be in compliance with its individual waste load allocations if: (i) its annual mass load is less than the applicable waste load allocation assigned to the facility in the general permit; (ii) the permitted facility acquires sufficient point source nitrogen or phosphorus credits in accordance with subdivision A 1; or (iii) in the event it is unable to meet the individual waste load allocation pursuant to clauses (i) or (ii), the permitted facility acquires sufficient nitrogen or phosphorus credits through payments made in accordance with subdivision A 2; provided, however, that the acquisition of nitrogen or phosphorus credits pursuant to this section shall not alter or otherwise affect the individual waste load allocations for each permitted facility.

1. A permittee may acquire point source nitrogen or phosphorus credits from one or more permitted facilities only if (i) the credits are generated and applied to a compliance obligation in the same calendar year, (ii) the credits are generated by one or more permitted facilities in the same tributary, except that permitted facilities in the Eastern Shore basin may also acquire credits from permitted facilities in the Potomac and Rappahannock tributaries, (iii) the credits are acquired no later than June 1 immediately following the calendar year in which the credits are applied, and (iv) no later than June 1 immediately following the calendar year in which the credits are applied, the permittee certifies on a form supplied by the Department that he has acquired sufficient credits to satisfy his compliance obligations.

2. A permittee may acquire nitrogen or phosphorus credits through payments made into the ~~Virginia Water Quality Improvement~~ *Nutrient Offset* Fund established in ~~§ 10.1-2128~~ § 10.1-2128.2 only if, no later than June 1 immediately following the calendar year in which the credits are applied, the permittee certifies on a form supplied by the Department that he has diligently sought, but has been unable to acquire, sufficient credits to satisfy his compliance obligations through the acquisition of point source nitrogen or phosphorus credits with other permitted facilities in the same tributary, and that he has acquired sufficient credits to satisfy his compliance obligations through one or more payments made in accordance with the terms of the general permit.

B. Until such time as the ~~Board~~ *Director* finds that no credits are reasonably available in an individual tributary, the general permit shall provide for the acquisition of nitrogen and phosphorus credits through payments into the ~~Virginia Water Quality Improvement~~ *Nutrient Offset* Fund in accordance with subdivision A 2. Such payments shall be promptly applied to achieve equivalent point or nonpoint source reductions in the same tributary beyond those reductions already required by or funded under federal or state law, or the Virginia tributaries strategies plans. The general permit shall base the cost of each nitrogen or phosphorus credit on the average cost of reducing one pound of nitrogen or phosphorus from Virginia publicly owned wastewater treatment facilities for each credit acquired. Upon each reissuance of the general permit, the Board may adjust the cost of each nitrogen and phosphorus credit based on (i) the current average cost of reducing a pound of nitrogen or phosphorus from Virginia publicly owned wastewater treatment facilities for each credit acquired and (ii) any additional incentives reasonably necessary to ensure that there is timely and continuing progress toward attaining and maintaining each tributary's combined waste load allocation.

C. On or before February 1, annually, each permittee shall either individually or through the Association file a report with the Department. The report shall identify (i) the annual mass load of total nitrogen and the annual mass load of total phosphorus discharged by each permitted facility during the previous calendar year, (ii) the delivered total nitrogen load and delivered total phosphorus load discharged by each permitted facility during the previous year, and (iii) the number of total nitrogen and total phosphorus credits for the previous calendar year to be purchased or sold by the permittee. The report shall contain the certification required by federal and state law and be signed by each permittee for each of the permittee's facilities covered by the general permit.

D. On or before April 1, annually, the Department shall prepare a report containing the annual mass load of total nitrogen and annual mass load of total phosphorus discharged by each permitted facility, the number of point source nitrogen and phosphorus credits for the previous calendar year for sale or purchase by each such facility, and to the extent there are insufficient point source credits available for exchange to provide for full compliance by every permittee, the number of credits to be purchased pursuant to this section. Upon completion of the report, the Department shall promptly publish notice of the report and make the report available to any person requesting it.

E. On or before July 1, annually, the Department shall publish notice of all nitrogen and phosphorus credit exchanges and purchases for the previous calendar year and make all documents relating to the exchanges and purchases available to any person requesting them.