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HOUSE BILL NO. 1281

Offered January 20, 2012

A BILL to amend and reenact §§ 62.1-44.15:20 and 62.1-44.15:21 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 62.1-44.15:24, relating to assumption of the administration of the programs authorized under § 404 of the federal Clean Water Act.

Patron—Byron

Referred to Committee on Agriculture, Chesapeake and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That §§ 62.1-44.15:20 and 62.1-44.15:21 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 62.1-44.15:24 as follows:

§ 62.1-44.15:20. Virginia Water Protection Permit.

A. Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to:

1. Excavate in a wetland or surface water;

2. On or after October 1, 2001, conduct the following in a wetland or in surface water:

a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions or that significantly alters or degrades existing stream function;

b. Filling or dumping;

c. Permanent flooding or impounding; or

d. New activities that cause significant alteration or degradation of existing wetland acreage or functions; or

3. Alter the physical, chemical, or biological properties of state waters, including wetlands, and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board.

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. 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. If written comments are not submitted by an agency within this time period, the Board shall assume that the agency has no comments on the proposed permit and deem that the agency has waived its right to comment. After the expiration of the 45-day period, any such agency shall have no further opportunity to comment.

D. Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act. Issuance of a Virginia Water Protection Permit shall also constitute a permit for the discharge of dredged or fill material under § 404 of the Clean Water Act where authorized by federal law.

E. No locality may impose wetlands permit requirements duplicating state or federal wetlands permit requirements. In addition, no locality shall impose or establish by ordinance, policy, plan, or any other means provisions related to the location of wetlands or stream mitigation in satisfaction of aquatic resource impacts regulated under a Virginia Water Protection Permit or under a permit issued by the U.S. Army Corps of Engineers pursuant to § 404 of the Clean Water Act. However, a locality's determination of allowed uses within zoning classifications or its approval of the siting or construction of wetlands or stream mitigation banks or other mitigation projects shall not be affected by the provisions of this subsection.

F. The Board shall assess compensation implementation, inventory permitted wetland impacts, and work to prevent unpermitted impacts to wetlands.

§ 62.1-44.15:21. Impacts to wetlands.

A. 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

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59 of state waters or fish and wildlife resources.

60 B. Permits shall contain requirements for compensating impacts ~~on~~ to wetlands or surface waters.
61 Such compensation requirements shall be sufficient to achieve no net loss of existing wetland acreage
62 and functions or stream function and may be met through wetland creation or restoration, stream
63 restoration or enhancement, purchase or use of mitigation bank credits pursuant to § 62.1-44.15:23, or
64 contribution to a Board-approved fund dedicated to achieving no net loss of wetland acreage and
65 functions or stream function. When utilized in conjunction with creation, restoration, or mitigation bank
66 credits, compensation may incorporate (i) preservation or restoration of upland buffers adjacent to
67 wetlands or other state waters or (ii) preservation of wetlands.

68 C. The Board shall utilize the U.S. Army Corps of Engineers' "Wetlands Delineation Manual,
69 Technical Report Y-87-1, January 1987, Final Report" and any subsequent guidance from the U.S. Army
70 Corps of Engineers for implementing the 1987 Wetlands Delineation Manual, as the approved method
71 for delineating wetlands and surface waters. The Board shall adopt appropriate guidance and regulations
72 to ensure consistency with the U.S. Army Corps of Engineers' implementation of delineation practices.
73 The Board shall also adopt guidance and regulations for review and approval of the geographic area of a
74 delineated wetland or surface water. Any such approval of a delineation shall remain effective for a
75 period of five years; however, if the Board issues a permit pursuant to this article for an activity in the
76 delineated wetland or surface water within the five-year period, the approval shall remain effective for
77 the term of the permit. Any delineation accepted by the U.S. Army Corps of Engineers as sufficient for
78 its exercise of jurisdiction pursuant to § 404 of the Clean Water Act shall be determinative of the
79 geographic area of that delineated wetland or surface water.

80 D. The Board shall develop general permits for such activities in wetlands and surface waters as it
81 deems appropriate. General permits shall include such terms and conditions as the Board deems
82 necessary to protect state waters and fish and wildlife resources from significant impairment. The Board
83 is authorized to waive the requirement for a general permit or deem an activity in compliance with a
84 general permit when it determines that an isolated wetland is of minimal ecological value. The Board
85 shall develop general permits for:

86 1. Activities causing wetland impacts of less than one-half of an acre;

87 2. Facilities and activities of utilities and public service companies regulated by the Federal Energy
88 Regulatory Commission or State Corporation Commission. No Board action on an individual or general
89 permit for such facilities shall alter the siting determination made through Federal Energy Regulatory
90 Commission or State Corporation Commission approval. The Board and the State Corporation
91 Commission shall develop a memorandum of agreement pursuant to §§ 56-46.1, 56-265.2, 56-265.2:1,
92 and 56-580 to ensure that consultation on wetland impacts occurs prior to siting determinations;

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

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

96 5. ~~Activities governed by nationwide or regional permits approved by the Board and issued by the~~
97 ~~U.S. Army Corps of Engineers. Conditions contained in the general permits shall include, but not be~~
98 ~~limited to, filing with the Board any copies of preconstruction notification, postconstruction report, and~~
99 ~~certificate of compliance required by the U.S. Army Corps of Engineers Impacts to wetlands caused by~~
100 ~~activities governed under Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2; normal agricultural activities;~~
101 ~~normal silvicultural activities; normal residential gardening, lawn, and landscape maintenance; or other~~
102 ~~similar activities that are incidental to an occupant's ongoing residential use of property and of minimal~~
103 ~~ecological impact, and discharges from septic tanks authorized by Virginia Department of Health~~
104 ~~permits. Such general permits shall be permits by rule automatically authorizing these activities.~~

105 E. Within 15 days of receipt of an individual permit application, the Board shall review the
106 application for completeness and either accept the application or request additional specific information
107 from the applicant. Within 120 days of receipt of a complete application, the Board shall issue the
108 permit, issue the permit with conditions, deny the permit, or decide to conduct a public meeting or
109 hearing. If a public meeting or hearing is held, it shall be held within 60 days of the decision to conduct
110 such a proceeding, and a final decision as to the permit shall be made within 90 days of completion of
111 the public meeting or hearing.

112 F. Within 15 days of receipt of a general permit application, the Board shall review the application
113 for completeness and either accept the application or request additional specific information from the
114 applicant. A determination that an application is complete shall not mean the Board will issue the permit
115 but means only that the applicant has submitted sufficient information to process the application. The
116 Board shall deny, approve, or approve with conditions any application for coverage under a general
117 permit within 45 days of receipt of a complete preconstruction application. The application shall be
118 deemed approved if the Board fails to act within 45 days.

119 G. ~~No Virginia Water Protection Permit shall be required for impacts to wetlands caused by activities~~
120 ~~governed under Chapter 13 (§ 28.2-100 et seq.) of Title 28.2 or normal agricultural activities or normal~~

121 silvicultural activities. This section shall also not apply to normal residential gardening, lawn and
 122 landscape maintenance, or other similar activities that are incidental to an occupant's ongoing residential
 123 use of property and of minimal ecological impact. The Board shall develop criteria governing this
 124 exemption and shall specifically identify the activities meeting these criteria in its regulations.

125 H. No Virginia Water Protection Permit shall be required for impacts caused by the construction or
 126 maintenance of farm or stock ponds, but other permits may be required pursuant to state and federal
 127 law. For purposes of this exclusion, farm or stock ponds shall include all ponds and impoundments that
 128 do not fall under the authority of the Virginia Soil and Water Conservation Board pursuant to Article 2
 129 (§ 10.1-604 et seq.) of Chapter 6 pursuant to normal agricultural or silvicultural activities. *Permit*
 130 *processing timelines set out in this section shall be suspended by the Board for the period of time*
 131 *required to consult with state or federal agencies to determine whether an individual or general permit*
 132 *application is consistent with federal law.*

133 § 62.1-44.15:24. Administration of the dredge and fill permitting program under § 404 of the Clean
 134 Water Act.

135 A. The Board is authorized to perform all duties necessary to issue § 404 permits consistent with the
 136 requirements of the Clean Water Act and its implementing regulations.

137 B. The Board shall not issue a Virginia Water Protection permit constituting a § 404 permit unless it
 138 determines that the proposed activity is consistent with the provisions of this article and federal law
 139 including the National Environmental Policy Act (42 U.S.C. § 4321 et seq.), the National Historic
 140 Preservation Act, (16 U.S.C. § 470 et seq.), the Endangered Species Act (16 U.S.C. § 1531 et seq.), the
 141 § 404(b)(1) guidelines promulgated by the Environmental Protection Agency, and other states' water
 142 quality standards.

143 C. The Board may require persons to demonstrate financial capability to compensate for impacts to
 144 state waters. Financial capability may be demonstrated by the creation of an escrow account, a
 145 submission of a bond, a corporate guarantee based upon audited financial statements, or such other
 146 instruments as the Board may deem appropriate.

147 2. That the provisions of this act shall not become effective unless (i) the U.S. Environmental
 148 Protection Agency determines that the Commonwealth has the authority to administer the
 149 individual and general permit program under § 404 of the Clean Water Act (33 U.S.C. § 1344) and
 150 (ii) adequate funds have been appropriated to administer the program and adequate positions
 151 have been authorized by the date that the U.S. Environmental Protection Agency has determined
 152 that the Commonwealth has the authority to administer the permit program.

153 3. That the State Water Control Board shall develop and implement regulations and procedures
 154 necessary to assume and administer the individual and general permit program for the discharge
 155 of dredged or fill material into the navigable waters within the State under § 404 of the Clean
 156 Water Act, including the provisions necessary to comply with the Coastal Zone Management Act
 157 (16 U.S.C. § 1451 et seq.); the Marine Protection, Research and Sanctuaries Act (16 U.S.C. § 1431
 158 et seq.); the National Historic Preservation Act (16 U.S.C. § 470 et seq.); the National
 159 Environmental Policy Act (42 U.S.C. § 4321 et seq.); and the Endangered Species Act (16 U.S.C.
 160 § 1531 et seq.) in the issuance of such permits.

161 4. That the State Water Control Board may adopt general permits that contain the requirements
 162 of any nationwide or regional permit adopted by the U.S. Army Corps of Engineers and any
 163 conditions contained in the certification provided by the Board pursuant to § 401 of the Clean
 164 Water Act. The Board shall adopt general permits automatically authorizing impacts to wetlands
 165 caused by activities governed under Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of
 166 Virginia; normal agricultural activities; normal silvicultural activities; normal residential
 167 gardening, lawn, and landscape maintenance; or other similar activities that are incidental to an
 168 occupant's ongoing residential use of property and of minimal ecological impact, and discharges
 169 from septic tanks authorized by Virginia Department of Health permits. The adoption of these
 170 general permits shall be exempt from Article 2 (§ 2.2-4006 et seq.) of the Administrative Process
 171 Act.

172 5. That nothing in this act shall be deemed to constrict the Board's exercise of jurisdiction over
 173 all state waters authorized by Chapter 3.1 (§ 62.1-44.2 et seq.) of Title 62.1 of the Code of
 174 Virginia.

175 6. That any regulations and permits promulgated or issued pursuant to Article 2.2
 176 (§ 62.1-44.15:20 et seq.) of Chapter 3.1 of Title 62.1 of the Code of Virginia shall remain in full
 177 force and effect until amended, repealed, or rescinded by the Board.