

VIRGINIA ACTS OF ASSEMBLY -- 2014 SESSION

CHAPTER 332

An Act to amend and reenact §§ 28.2-1308, 33.1-223.2:1, and 62.1-44.15:23 of the Code of Virginia, relating to wetland and stream mitigation banks.

[H 654]

Approved March 27, 2014

Be it enacted by the General Assembly of Virginia:

1. That §§ 28.2-1308, 33.1-223.2:1, and 62.1-44.15:23 of the Code of Virginia are amended and reenacted as follows:

§ 28.2-1308. Standards for use and development of wetlands; utilization of guidelines.

A. The following standards shall apply to the use and development of wetlands and shall be considered in the determination of whether any permit required by this chapter should be granted or denied:

1. Wetlands of primary ecological significance shall not be altered so that the ecological systems in the wetlands are unreasonably disturbed; and

2. Development in Tidewater Virginia, to the maximum extent practical, shall be concentrated in wetlands of lesser ecological significance, in vegetated wetlands which have been irreversibly disturbed before July 1, 1972, in nonvegetated wetlands which have been irreversibly disturbed prior to January 1, 1983, and in areas of Tidewater Virginia outside of wetlands.

B. The provisions of guidelines promulgated by the Commission pursuant to § 28.2-1301 shall be considered in applying the standards listed in subsection A of this section.

C. When any activity authorized by a permit issued pursuant to this chapter 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, 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)~~ (i) the bank is in the same fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset *or by the hydrologic unit system or dataset utilized and depicted or described in the bank's approved mitigation banking instrument*, as the impacted site, or in an adjacent subbasin within the same river watershed, as the impacted site, or it meets all the conditions found in clauses ~~(1)~~ (a) through ~~(4)~~ (d) and either clause ~~(5)~~ (e) or ~~(6)~~ (f) of this subsection; ~~(2)~~ (ii) the bank is ecologically preferable to practicable on-site and off-site individual mitigation options, as defined by federal wetland regulations; and ~~(3)~~ (iii) 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 subbasin or adjacent subbasin 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 Commission that ~~(1)~~ (a) 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 encompasses multiple river watersheds; ~~(2)~~ (b) there is no practical same river watershed mitigation alternative; ~~(3)~~ (c) the impacts are less than one acre in a single and complete project within a subbasin; ~~(4)~~ (d) there is no significant harm to water quality or fish and wildlife resources within the river watershed of the impacted site; and either ~~(5)~~ (e) impacts within the Chesapeake Bay watershed are mitigated within the Chesapeake Bay watershed as close as possible to the impacted site or ~~(6)~~ (f) impacts within subbasins 02080108, 02080208, and 03010205, as defined by the National Watershed Boundary Dataset, are mitigated in-kind within those subbasins as close as possible to the impacted site. After July 1, 2002, the provisions of clause ~~(6)~~ (f) shall apply only to impacts within subdivisions of the listed subbasins where overlapping watersheds exist, as determined by the Department of Environmental Quality, provided the Department has made such a determination by that date. *For the purposes of this subsection, the hydrologic unit boundaries of the National Watershed Boundary Dataset or other hydrologic unit system may be adjusted by the Department of Environmental Quality to reflect site-specific geographic or hydrologic information provided by the bank sponsor.*

For the purposes of this section, "river watershed" means the Potomac River Basin, Shenandoah River Basin, James River Basin, Rappahannock River Basin, Roanoke and Yadkin Rivers Basin, Chowan River Basin (including the Dismal Swamp and Albemarle Sound), Tennessee River Basin, Big Sandy River Basin, Chesapeake Bay and its Small Coastal Basins, Atlantic Ocean, York River Basin, and the New River Basin.

§ 33.1-223.2:1. Wetlands mitigation banking.

When authorization is required by federal or state law for any project affecting wetlands and such authorization is conditioned upon compensatory mitigation for adverse impacts to wetlands, the

Commissioner of Highways is authorized to expend funds for the purchase of, or is authorized to use, credits from any wetlands mitigation bank, including any owned by the Department, 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) (i) the bank is in the same fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset or by the hydrologic unit system or dataset utilized and depicted or described in the bank's approved mitigation banking instrument, as the impacted site, or in an adjacent subbasin within the same river watershed, as the impacted site, or it meets all the conditions found in clauses (1) (a) through (1) (d) and either clause (1) (e) or (1) (f) of this section; (2) (ii) the bank is ecologically preferable to practicable on-site and off-site individual mitigation options, as defined by federal wetland regulations; and (3) (iii) 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 subbasin or adjacent subbasin within the same river watershed as the impacted site, the purchase or use of credits shall not be allowed unless the Commissioner demonstrates to the satisfaction of the agency requiring compensatory mitigation that (1) (a) the impacts will occur as a result of a Virginia Department of Transportation linear project; (1) (b) there is no practical same river watershed mitigation alternative; (1) (c) the impacts are less than one acre in a single and complete project within a subbasin; (1) (d) there is no significant harm to water quality or fish and wildlife resources within the river watershed of the impacted site; and either (1) (e) impacts within the Chesapeake Bay watershed are mitigated within the Chesapeake Bay watershed as close as possible to the impacted site or (1) (f) impacts within subbasins 02080108, 02080208, and 03010205, as defined by the National Watershed Boundary Dataset, are mitigated in-kind within those subbasins, as close as possible to the impacted site. After July 1, 2002, the provisions of clause (1) (f) shall apply only to impacts within subdivisions of the listed subbasins where overlapping watersheds exist, as determined by the Department of Environmental Quality, provided the Department has made such a determination by that date. *For the purposes of this subsection, the hydrologic unit boundaries of the National Watershed Boundary Dataset or other hydrologic unit system may be adjusted by the Department of Environmental Quality to reflect site-specific geographic or hydrologic information provided by the bank sponsor.*

For the purposes of this section, "river watershed" means the Potomac River Basin, Shenandoah River Basin, James River Basin, Rappahannock River Basin, Roanoke and Yadkin Rivers Basin, Chowan River Basin (including the Dismal Swamp and Albemarle Sound), Tennessee River Basin, Big Sandy River Basin, Chesapeake Bay and its Small Coastal Basins, Atlantic Ocean, York River Basin, and the New River Basin.

§ 62.1-44.15:23. Wetland and stream mitigation banks.

A. When a Virginia Water Protection Permit is conditioned upon compensatory mitigation for adverse impacts to wetlands or streams, the applicant may be permitted to satisfy all or part of such mitigation requirements by the purchase or use of credits from any wetland or stream 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) (i) the bank is in the same fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset or by the hydrologic unit system or dataset utilized and depicted or described in the bank's approved mitigation banking instrument, as the impacted site, or in an adjacent subbasin within the same river watershed as the impacted site, or it meets all the conditions found in clauses (1) (a) through (1) (d) and either clause (1) (e) or (1) (f) of this subsection; (2) (ii) the bank is ecologically preferable to practicable onsite and offsite individual mitigation options as defined by federal wetland regulations; and (3) (iii) 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 subbasin or adjacent subbasin 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 (1) (a) 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 encompasses multiple river watersheds; (1) (b) there is no practical same river watershed mitigation alternative; (1) (c) the impacts are less than one acre in a single and complete project within a subbasin; (1) (d) there is no significant harm to water quality or fish and wildlife resources within the river watershed of the impacted site; and either (1) (e) impacts within the Chesapeake Bay watershed are mitigated within the Chesapeake Bay watershed as close as possible to the impacted site or (1) (f) impacts within subbasins 02080108, 02080208, and 03010205, as defined by the National Watershed Boundary Dataset, are mitigated in-kind within those subbasins, as close as possible to the impacted site. *For the purposes of this subsection, the hydrologic unit boundaries of the National Watershed Boundary Dataset or other hydrologic unit system may be adjusted by the Department of Environmental Quality to*

reflect site-specific geographic or hydrologic information provided by the bank sponsor.

For the purposes of this section, "river watershed" means the Potomac River Basin, Shenandoah River Basin, James River Basin, Rappahannock River Basin, Roanoke and Yadkin Rivers Basin, Chowan River Basin (including the Dismal Swamp and Albemarle Sound), Tennessee River Basin/Big Sandy River Basin Complex, Chesapeake Bay and its Small Coastal Basins, Atlantic Ocean, York River Basin, and the New River Basin.

B. The Department of Environmental Quality is authorized to serve as a signatory to agreements governing the operation of 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.

C. State agencies and localities are authorized to purchase credits from mitigation banks.

D. A locality may establish, operate and sponsor wetland or stream single-user mitigation banks within the Commonwealth that have been approved and are operated in accordance with the requirements of subsection A, provided that such single-user banks may only be considered for compensatory mitigation for the sponsoring locality's municipal, joint municipal or governmental projects. For the purposes of this subsection, the term "sponsoring locality's municipal, joint municipal or governmental projects" means projects for which the locality is the named permittee, and for which there shall be no third-party leasing, sale, granting, transfer, or use of the projects or credits. Localities may enter into agreements with private third parties to facilitate the creation of privately sponsored wetland and stream mitigation banks having service areas developed through the procedures of subsection A.