

2018 SESSION

LEGISLATION NOT PREPARED BY DLS
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SENATE BILL NO. 985

Senate Amendments in [] - February 8, 2018

A BILL to establish the Hurricane and Flooding Risk Reduction and Bond Rating Protection Act of 2018.

Patron Prior to Engrossment—Senator Wagner

Unanimous consent to introduce

Referred to Committee on Finance

Whereas, the Commonwealth of Virginia has historically suffered severe floods in mountainous areas, along rivers, and on coasts that have taken hundreds of lives and caused extensive property and environmental damage; and

Whereas, the Commonwealth remains under constant threat of additional such floods; and

Whereas, it is the first responsibility of any state to provide for the safety and security of its citizens; and

Whereas, the Commonwealth is organized to support management but not reduction and elimination of existing and future federally designated flood plains; and

Whereas, Virginia's mountains and rivers have been plagued by deadly and destructive floods throughout all of recorded history; floods have caused almost 200 deaths and \$3.7 billion in damage in those areas since 1969 alone, and the hardest-hit areas in that timeframe have been the basins of the Roanoke, James, Potomac, Tye, Rockfish, Rivanna, Maury, and Shenandoah Rivers and the mountains of the Counties of Nelson, Page, and Rockingham; and

Whereas, for a recent, major example of coastal and estuary flooding, consider Hurricane Isabel (September 18, 2003), which affected the entire Chesapeake Bay areas of Hampton Roads, the Eastern Shore, Northern Neck, and the tidal estuaries of the James, York, Rappahannock, and Potomac. Hurricane Isabel had a peak water level only 0.13 feet (1.5 inches) below the record-setting 1933 hurricane event in Norfolk. Had Hurricane Isabel occurred one week later, its peak water level would have exceeded that record by 0.8 feet (10 inches). The streets of Norfolk and surrounding cities were flooded with over five and one-half feet of water above normal high tide. The same storm 25 years from now may flood Hampton Roads with over six and one-half feet of water above normal high tide according to rising sea level forecasts. The average ground elevation of Norfolk is 10 feet above mean sea level (MSL), and the average ground elevation of Virginia Beach is about 12 feet above MSL; and

Whereas, proven civil engineering and environmental restoration methods to mitigate the effects of hurricanes and floods and reduce or eliminate individual flood plains can be completed at costs far less than their measurable benefits, and such methods include both structural and nonstructural alternatives; and

Whereas, the most threatened flood plains require structural flood barrier measures such as storm surge barriers, flood walls, levees, seawalls, revetments, bulkheads, and beach restoration and protection measures in addition to integrated green infrastructure; and

Whereas, the federal government through the Flood Control Act of 1936 brought flood control projects under federal control and officially recognized the U.S. Army Corps of Engineers (USACE) as the major federal flood control agency. USACE is one of the world's largest public engineering, design, and construction management agencies; and

Whereas, the federal Water Resources Development Act and recurring associated appropriations have directed USACE to plan, issue permits for, partially fund, and build such structures and develop and manage projects in partnership with nonfederal sponsors under its Civil Works program; and

Whereas, USACE Civil Works boundaries are defined by coastlines and river watersheds rather than state boundaries. Virginia is drained by nine major river systems; USACE Civil Works projects in Virginia are, depending upon the location, the responsibility of the North Atlantic Division's Norfolk or Baltimore District, the South Atlantic Division's Wilmington District, or the Great Lakes and Ohio River Division's Nashville or Huntington District; and

Whereas, each USACE Civil Works project must have a nonfederal sponsor. Section 221 of the federal 1970 Flood Control Act defines a nonfederal sponsor for a USACE water resources project as a nonfederal interest that is "a legally constituted public body with full authority and capability to perform the terms of its agreement and to pay damages, if necessary, in the event of failure to perform." Nonfederal sponsors are required to provide political coordination; economic investments such as land, rights of way, transportation and utility infrastructure changes, and cash; and engineering, economic

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60 assessment, and management support to USACE in such projects. These investments all count toward
61 the nonfederal sponsor's share; and

62 Whereas, a sponsor can be a state or any other political subpart of a state or group of states, or an
63 Indian tribe, provided that it has the legal and financial authority and capability to provide the support
64 and investments needed for a project, Louisiana and Texas, for example, have acted at the state level to
65 protect their coasts. A sponsor can also be an interstate agency, established under a compact between
66 two or more states with the consent of Congress under Article I, Section 10 of the United States
67 Constitution. New York and New Jersey have done this with the "New York/New Jersey Harbor &
68 Tributaries Focus Area Feasibility Study," whose nonfederal sponsors are the New York State
69 Department of Environmental Conservation and the New Jersey Department of Environmental
70 Protection; and

71 Whereas, the strategic approach to the USACE Civil Works mission directs coordinated development
72 and management of water and related resources that considers economic benefits, ecosystem quality, and
73 public health and safety; and

74 Whereas, USACE works to establish comprehensive flooding solutions for coastal and riverine
75 watersheds in compliance with all federal water engineering and environmental regulations; and

76 Whereas, USACE is required to assess the benefits and risks of water projects in partnership with the
77 nonfederal sponsor before recommending them to Congress for authorization and funding. Investigations
78 are conducted by USACE in partnership with the nonfederal sponsor and in collaboration with federal,
79 state, and local partners. USACE and the nonfederal sponsor share equally the cost of each investigation;
80 and

81 Whereas, any investigation plan must be forwarded to USACE headquarters for approval. Such
82 approval is required before USACE will recommend any project to Congress for construction
83 authorization and funding; and

84 Whereas, the investigation determines the feasibility of federal investment and establishes federal and
85 nonfederal cost shares for the construction of the project per established guidance based on the authority.
86 The standard for such cost shares in Coastal Storm Risk Management and Flood Risk Management
87 projects is 65 percent for the federal government and 35 percent for the nonfederal sponsor; and

88 Whereas, unlike Louisiana, Texas, New Jersey, and New York, the Commonwealth does not partner
89 with the federal government in flood hazard reduction through the USACE Civil Works program.
90 Virginia currently has no state agency organized and staffed to partner with USACE across the full
91 spectrum of USACE Civil Works Coastal Storm Risk Management and Flood Risk Management
92 projects. One result is that Virginia is not positioned to serve as a nonfederal sponsor for broad and vital
93 aspects of those programs. Another is that Virginia is unable to develop a portfolio of projects within
94 the full scope of those federal programs that reflects the state's priorities for federal funding. Without
95 such a portfolio, the Commonwealth will be unable to sponsor either pre-catastrophe or post-catastrophe
96 legislation. An example of what must be done is seen in "Rebuild Texas," the State of Texas' 301-page
97 request for \$61 billion in federal assistance after Hurricane Harvey that included almost \$37 billion for
98 USACE Civil Works projects, each of which is described and priced in considerable preliminary detail.
99 It was signed on October 31, 2017, two months after Harvey's destruction. Without exhaustive planning
100 led by the Texas General Land Office (state nonfederal sponsor) with the full participation of local
101 governments prior to the disaster, such a request could not have been formulated without years of study;
102 and

103 Whereas, Virginia currently leaves to local governments its flood hazard mitigation planning and
104 execution with the USACE Civil Works program. However, there are two key obstacles:

105 1. Flooding does not recognize political jurisdictions: no single local government, regardless of its
106 wealth, can deal effectively with watershed issues; and

107 2. Most local governments do not have the resources or expertise and funding to participate; and

108 Whereas, as a direct consequence, the 2018 Federal Civil Works Budget for USACE includes
109 funding for only one Virginia flood damage mitigation study (City of Norfolk) and zero construction
110 projects in the state. Such studies are by federal law limited in scope to the borders of the nonfederal
111 sponsor or sponsors; therefore, the City of Norfolk's study could not consider Norfolk's adjacent cities
112 (Portsmouth, Chesapeake, and Virginia Beach) in South Hampton Roads. In contrast, if the state were
113 the nonfederal sponsor of subsequent studies, the studies could include multiple localities for a holistic
114 watershed approach for improved efficiency and effectiveness; and

115 Whereas, Louisiana's Legislative Fiscal Office has reported that Louisiana's state and local tax
116 receipts soared after Katrina. It has credited federal spending, including USACE Civil Works projects,
117 for the increases, despite significant out-migration of residents, the Great Recession, additional floods,
118 and significant damage to pre-Katrina tax sources, including the oil and gas industry, tourism, and its
119 ports. The increased tax receipts enabled the state to actually lower tax rates during the period of the
120 highest federal spending. Similar spending in Virginia without the damage of a storm will raise tax
121 receipts; and

122 Whereas, the Commonwealth, as was Louisiana post-Katrina, is forbidden by federal law from
123 spending post-disaster Stafford Act funds to pay the nonfederal sponsor's share for the construction of
124 authorized USACE Civil Works projects; and

125 Whereas, Virginia's bond rating is at risk. Moody's, a major credit rating service, in November 2017
126 announced its intention to consider in its assessment of bond risk the threat from climate change and
127 actions taken or not taken by states and cities to mitigate storm and flood damage; now, therefore,

128 **Be it enacted by the General Assembly of Virginia:**

129 1. § 1. *This act shall be known as the Hurricane and Flooding Risk Reduction and Bond Rating*
130 *Protection Act of 2018.*

131 § 2. *Establishment of the Commonwealth of Virginia as a nonfederal sponsor of hurricane and*
132 *flooding risk reduction projects.*

133 *The Commonwealth of Virginia is hereby established as a nonfederal sponsor of hurricane and*
134 *flooding risk reduction projects in partnership with the U.S. Army Corps of Engineers (USACE) Civil*
135 *Works program. The goals of this partnership are to support hazard mitigation actions through (i)*
136 *mitigation of risk through structural, nonstructural, and natural and nature-based solutions; (ii)*
137 *improvement of life safety through increased flood risk awareness, support of economic and*
138 *environmental resilience, reduction of flood insurance premiums through the implementation of higher*
139 *standards, and promotion of higher building standards to reduce flood risk; and (iii) enablement of*
140 *Virginia communities currently threatened by flooding to wage more successful campaigns to attract*
141 *economic investment and to retain and support the economic drivers they already possess.*

142 § 3. *To meet these goals are hereby established the Virginia Hurricane and Flood Risk Reduction*
143 *Authority (the Authority) and a board of directors for the Authority (the Board).*

144 § 4. *Board of directors; composition; powers and duties.*

145 *The Board shall be composed of: one representative designated by the Speaker of the House of*
146 *Delegates; one representative designated by the majority leader of the Senate; and nine representatives*
147 *appointed by the Governor. A chairman and a vice-chairman shall be chosen by the Board.*

148 *The Secretary of Transportation, the Secretary of Natural Resources, and the Secretary of Public*
149 *Safety and Homeland Security shall serve as ex officio members of the Board.*

150 *The Governor shall ensure that board appointees include residents of each of the major geographic*
151 *areas of Virginia. Members, who shall serve without compensation, shall serve terms of four years and*
152 *are eligible for reappointment. The Board shall exercise for the Governor executive authority over all*
153 *phases of hurricane and flood risk reduction programs, including investigations, construction, and*
154 *operations and maintenance; it shall be established and meet within 60 days of the effective date of this*
155 *act.*

156 *Nothing in this act restricts local governments or state agencies from acting as nonfederal sponsors*
157 *of projects entirely within their jurisdiction. The current authorities for Virginia local governments and*
158 *state agencies to act in such capacity are retained, but they shall act in collaboration with the Board to*
159 *promote and encourage watershed solutions and ensure that Virginia speaks with one voice to the*
160 *federal government on USACE Civil Works program flooding and storm risk reduction projects.*

161 *The Board shall:*

162 1. *Represent the state's position in policy relative to reducing the risks to its people, public and*
163 *private property, and economy from hurricanes and floods;*

164 2. *Establish a strategic plan aligned where feasible and appropriate with the USACE Civil Works*
165 *Strategic Plan;*

166 3. *Develop a master plan for the integrated and prioritized protection of the Commonwealth's*
167 *coastal, river system, and mountain communities from storms and flood damage through the*
168 *construction and management of risk reduction projects in alignment with activities identified in*
169 *regional or state hazard mitigation plans and in partnership with federal, state, and local partners that*
170 *have knowledge, expertise, and data regarding current and future flood risk;*

171 4. *Enforce compliance with the master plan throughout the state government;*

172 5. *Provide mission guidance, operational direction, and oversight to the Authority;*

173 6. *Design program structure, including organization design, policies, standards, performance*
174 *measures, processes, and terminologies, in consultation with the (i) USACE Districts as well as*
175 *headquarters of the USACE and its North Atlantic Division, South Atlantic Division, and Great Lakes*
176 *and Ohio River Divisions and (ii) Board of Louisiana's Coastal Protection and Restoration Authority*
177 *(CPRA), a state model for this program;*

178 7. *After coordination with USACE HQ and its North Atlantic Division, South Atlantic Division, and*
179 *Great Lakes and Ohio River Divisions, direct the Authority to establish working relationships with the*
180 *Norfolk, Baltimore, Huntington, Nashville, and Wilmington, North Carolina District offices of USACE;*

181 8. *Request assistance through the federal Planning Assistance to States Program. The federal law*
182 *governing that program provides authority for USACE to assist states, local governments, and other*

183 nonfederal entities in the preparation of comprehensive plans for the development, use, and conservation
184 of water and related land resources. Upon written request, USACE will cooperate with the
185 Commonwealth to prepare plans for the development, use, and conservation of water and related land
186 resources within its bounds. Initial requests for assistance shall include the training of Board, and
187 Authority members in the appropriate courses offered by USACE to its own Civil Works leadership and
188 planners;

189 9. Direct the Authority to coordinate investigations, construction, operations, and maintenance of
190 projects with USACE, appropriate local and tribal governments, and regional planning district
191 commissions;

192 10. Direct the Authority to act for Virginia as its representative in any interstate agency established
193 for purposes of storm and flood risk reduction under a compact among Virginia and one or more other
194 states with the consent of Congress under Article I, Section 10 of the United States Constitution;

195 11. Approve or disapprove with comments the annual budget request for the Authority prepared by
196 the executive department to which it is assigned prior to submission to the Governor and General
197 Assembly;

198 12. Direct the Authority as its first order of business after reaching initial operational capability to
199 work with FEMA and USACE and Virginia's agencies to define potential USACE Civil Works projects
200 targeting the most vulnerable areas in the Commonwealth using USACE Civil Works cost/benefit
201 assessments. Candidates shall include mountain, riverine, and coastal Special Flood Hazard Areas
202 (SFHA) in Virginia;

203 13. Direct the Authority to coordinate with USACE and FEMA Region 3 in characterizing relative
204 flood risk among the SFHA. The desired output is information in a GIS format to support federal, state,
205 and regional decision makers, planners, and policy analysts in determining investment priorities,
206 responding to future conditions and flood risk drivers, improving resilience, and reducing risk in the
207 long term;

208 14. Direct the Authority to support USACE Civil Works storm and flood risk reduction projects for
209 which Virginia local governments serve as nonfederal sponsor;

210 15. Direct the Authority to report annually to the Board and to the General Assembly on the status
211 of USACE Civil Works projects with Virginia local governments as a nonfederal sponsor and to
212 recommend measures that the Commonwealth should consider taking in support; and

213 16. Coordinate with Louisiana and Texas to assess and apply lessons learned from their efforts as
214 state sponsors of USACE Civil Works flood and storm damage mitigation projects.

215 § 5. The Authority.

216 The Authority shall be established to fulfill the directives of the Board. The Authority shall employ
217 the professional, technical, secretarial, and clerical employees necessary for the performance of its
218 functions. The Authority shall initially be composed of a Director, a Deputy Director, three staff civil
219 engineers, two staff economists, a staff chief scientist, and five direct administrative support personnel.
220 The Authority as nonfederal sponsor shall comply with the laws, regulations, and policies governing the
221 USACE Civil Works program. Due to the complexity of the program, to the degree feasible, the
222 Authority staff shall have previous experience serving either in the USACE Civil Works program or in a
223 role with a nonfederal sponsor within that program.

224 State nonfederal sponsor responsibilities in the assessment, planning, and execution of USACE Civil
225 Works flooding and storm risk reduction projects shall regularly include transportation systems
226 improvements, utilities relocation and improvements, and environmental planning. The costs of such
227 work are integral to the success of USACE Civil Works projects and are therefore considered in-kind
228 contributions and counted towards the nonfederal share of project assessment, planning, and
229 construction costs.

230 There is no intention for this act to create redundant capabilities or overlapping responsibilities
231 between the Authority and other Commonwealth agencies. The Secretary of Transportation, the
232 Secretary of Natural Resources, and the State Corporation Commission shall each designate a senior
233 official as Authority coordinator for agencies under their leadership and each shall provide professional
234 assistance to the Authority as may be requested by the Director. The costs of professional assistance to
235 the Authority on matters within the existing responsibilities of such agencies shall be assumed under the
236 budgets of those agencies.

237 Given the regional solutions focus of the Authority, it shall establish working relationships with
238 Virginia's planning district commissions.

239 The Authority shall be hosted by a department of the Commonwealth as designated by the Governor.
240 That department shall provide support, including budgeting, work facilities, administrative management,
241 logistics, human resources, legal, contracts, and information resources support, to the Authority.

242 § 6. Virginia manages multiple programs for flood damage mitigation that involve coordination with
243 USACE, FEMA, or both. These include (i) the flood mitigation project assessment, planning,
244 coordination, and construction support activities of the Authority as delineated in this act; (ii) the dam

245 safety program, National Flood Insurance Program, and floodplain management program within the
246 Department of Conservation and Recreation; (iii) assessing, planning, coordinating, and permitting for
247 construction activities managed by the Department of Transportation; and (iv) FEMA's Flood Mitigation
248 Assistance (FMA) grant program and the flooding component of the Threat and Hazard Identification
249 and Risk Assessment program within the Department of Emergency Management.

250 The Governor shall assess and report to the General Assembly no later than November 1, 2018, his
251 findings on the most efficient and effective future distribution of such responsibilities within the executive
252 branch and recommend any changes in law required to execute that determination, including the
253 designation of a department assigned to host the Authority.

254 § 7. The Joint Legislative Audit and Review Commission shall consult with Louisiana's Legislative
255 Fiscal Office to assess the increased state and local tax flows in Louisiana that resulted from
256 post-Katrina federal spending, including USACE Civil Works storm and flooding risk reduction project
257 spending. This will provide a basis for assessing the tax flow effects of similar investments in Virginia.
258 The Joint Legislative Audit and Review Commission shall report to the General Assembly no later than
259 November 1, 2018, on the results of its initial assessment.

260 [2. That the provisions of this act shall not become effective unless an appropriation effectuating
261 the purposes of this act is included in a general appropriation act passed in 2018 by the General
262 Assembly that becomes law.]

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