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HOUSE BILL NO. 2403

Offered January 9, 2019

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A BILL to amend and reenact § 62.1-44.15:21 of the Code of Virginia, relating to impacts to wetlands; permit requirements for compensation.

Patrons—Hodges and Lopez

Referred to Committee on Agriculture, Chesapeake and Natural Resources

Be it enacted by the General Assembly of Virginia:**1. That § 62.1-44.15:21 of the Code of Virginia is amended and reenacted as follows:****§ 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 of state waters or fish and wildlife resources.

B. Permits shall contain requirements for compensating impacts on wetlands. Such compensation requirements shall be sufficient to achieve no net loss of existing wetland acreage and functions and may be met through (i) wetland creation or restoration, (ii) purchase or use of mitigation bank credits pursuant to § 62.1-44.15:23, (iii) contribution to the Wetland and Stream Replacement Fund established pursuant to § 62.1-44.15:23.1 to provide compensation for impacts to wetlands, streams, or other state waters that occur in areas where neither mitigation bank credits nor credits from a Board-approved fund that have met the success criteria are available at the time of permit application, or (iv) contribution to a Board-approved fund dedicated to achieving no net loss of wetland acreage and functions. *The Board shall evaluate the appropriate compensatory mitigation option on a case-by-case basis with consideration for which option is most practicable and ecologically and environmentally preferable, including, in terms of replacement of acreage and functions, which option offers the greatest likelihood of success and reduction of temporal loss of acreage and function. Preference shall be given first to mitigation bank credits, then to permittee-responsible mitigation under a watershed approach conducted before or concurrently with project impacts, over in-lieu fee program credits that have not met success criteria.* When utilized in conjunction with creation, restoration, or mitigation bank credits, compensation may incorporate (a) preservation or restoration of upland buffers adjacent to wetlands or other state waters or (b) preservation of wetlands.

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

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

1. Activities causing wetland impacts of less than one-half of an acre;
2. Facilities and activities of utilities and public service companies regulated by the Federal Energy Regulatory Commission or State Corporation Commission, except for construction of any natural gas transmission pipeline that is greater than 36 inches inside diameter pursuant to a certificate of public convenience and necessity under § 7c of the federal Natural Gas Act (15 U.S.C. § 717f(c)). No Board action on an individual or general permit for such facilities shall alter the siting determination made through Federal Energy Regulatory Commission or State Corporation Commission approval. The Board and the State Corporation Commission shall develop a memorandum of agreement pursuant to §§ 56-46.1, 56-265.2, 56-265.2:1, and 56-580 to ensure that consultation on wetland impacts occurs prior

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59 to siting determinations;

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

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

63 5. Activities governed by nationwide or regional permits approved by the Board and issued by the
64 U.S. Army Corps of Engineers. Conditions contained in the general permits shall include, but not be
65 limited to, filing with the Board any copies of preconstruction notification, postconstruction report, and
66 certificate of compliance required by the U.S. Army Corps of Engineers.

67 E. Within 15 days of receipt of an individual permit application, the Board shall review the
68 application for completeness and either accept the application or request additional specific information
69 from the applicant. Within 120 days of receipt of a complete application, the Board shall issue the
70 permit, issue the permit with conditions, deny the permit, or decide to conduct a public meeting or
71 hearing. If a public meeting or hearing is held, it shall be held within 60 days of the decision to conduct
72 such a proceeding, and a final decision as to the permit shall be made within 90 days of completion of
73 the public meeting or hearing. In addition, for an individual permit application related to an application
74 to the Federal Energy Regulatory Commission for a certificate of public convenience and necessity
75 pursuant to § 7c of the federal Natural Gas Act (15 U.S.C. § 717f(c)) for construction of any natural
76 gas transmission pipeline greater than 36 inches inside diameter, the Board shall complete its
77 consideration within the one-year period established under 33 U.S.C. § 1341(a).

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

85 G. No Virginia Water Protection Permit shall be required for impacts to wetlands caused by activities
86 governed under Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 or normal agricultural activities or normal
87 silvicultural activities. This section shall also not apply to normal residential gardening, lawn and
88 landscape maintenance, or other similar activities that are incidental to an occupant's ongoing residential
89 use of property and of minimal ecological impact. The Board shall develop criteria governing this
90 exemption and shall specifically identify the activities meeting these criteria in its regulations.

91 H. No Virginia Water Protection Permit shall be required for impacts caused by the construction or
92 maintenance of farm or stock ponds, but other permits may be required pursuant to state and federal
93 law. For purposes of this exclusion, farm or stock ponds shall include all ponds and impoundments that
94 do not fall under the authority of the Virginia Soil and Water Conservation Board pursuant to Article 2
95 (§ 10.1-604 et seq.) of Chapter 6 pursuant to normal agricultural or silvicultural activities.

96 I. No Virginia Water Protection Permit shall be required for wetland and open water impacts to a
97 stormwater management facility that was created on dry land for the purpose of conveying, treating, or
98 storing stormwater, but other permits may be required pursuant to local, state, or federal law. The
99 Department shall adopt guidance to ensure that projects claiming this exemption create no more than
100 minimal ecological impact.

101 J. An individual Virginia Water Protection Permit shall be required for impacts to state waters for the
102 construction of any natural gas transmission pipeline greater than 36 inches inside diameter pursuant to a
103 certificate of public convenience and necessity under § 7c of the federal Natural Gas Act (15 U.S.C.
104 § 717f(c)). For purposes of this subsection:

105 1. Each wetland and stream crossing shall be considered as a single and complete project; however,
106 only one individual Virginia Water Protection Permit addressing all such crossings shall be required for
107 any such pipeline. Notwithstanding the requirement for only one such individual permit addressing all
108 such crossings, individual review of each proposed water body crossing with an upstream drainage area
109 of five square miles or greater shall be performed.

110 2. All pipelines shall be constructed in a manner that minimizes temporary and permanent impacts to
111 state waters and protects water quality to the maximum extent practicable, including by the use of
112 applicable best management practices that the Board determines to be necessary to protect water quality.

113 3. The Department shall assess an administrative charge to any applicant for such project to cover
114 the direct costs of services rendered associated with its responsibilities pursuant to this subsection. This
115 administrative charge shall be in addition to any fee assessed pursuant to § 62.1-44.15:6.