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## HOUSE BILL NO. 1464

Offered January 8, 2020

Prefiled January 8, 2020

A *BILL to amend and reenact § 62.1-44.15:35, as it is currently effective and as it shall become effective, of the Code of Virginia, relating to local authority to restrict nutrient credit usage.*

Patron—Gooditis

Referred to Committee on Agriculture, Chesapeake and Natural Resources

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

**1. That § 62.1-44.15:35, as it is currently effective and as it shall become effective, of the Code of Virginia is amended and reenacted as follows:**

**§ 62.1-44.15:35. (For expiration date, see Acts 2016, cc. 68 and 758, as amended by Acts 2017, c. 345) Nutrient credit use and additional offsite options for construction activities.**

A. As used in this section:

"Nutrient credit" or "credit" means a nutrient credit certified pursuant to Article 4.02 (§ 62.1-44.19:12 et seq.).

"Tributary," within the Chesapeake Bay watershed, has the same meaning as in § 62.1-44.19:13. For areas outside of the Chesapeake Bay watershed, "tributary" includes the following watersheds: Albemarle Sound, Coastal; Atlantic Ocean, Coastal; Big Sandy; Chowan; Clinch-Powell; New Holston (Upper Tennessee); New River; Roanoke; and Yadkin.

"Virginia Stormwater Management Program Authority" or "VSMP authority" has the same meaning as in § 62.1-44.15:24 and includes, until July 1, 2014, any locality that has adopted a local stormwater management program.

B. A VSMP authority is authorized to allow compliance with stormwater nonpoint nutrient runoff water quality criteria established pursuant to § 62.1-44.15:28, in whole or in part, through the use of the applicant's acquisition of nutrient credits in the same tributary.

C. No applicant shall use nutrient credits to address water quantity control requirements. No applicant shall use nutrient credits or other offsite options in contravention of local water quality-based limitations (i) determined pursuant to subsection B of § 62.1-44.19:14, (ii) adopted pursuant to § 62.1-44.15:33 or other applicable authority, (iii) deemed necessary to protect public water supplies from demonstrated adverse nutrient impacts, or (iv) as otherwise may be established or approved by the Board. Where such a limitation exists, offsite options may be used provided that such options do not preclude or impair compliance with the local limitation.

D. A VSMP authority shall allow offsite options in accordance with subsection I when:

1. Less than five acres of land will be disturbed;

2. The postconstruction phosphorous control requirement is less than 10 pounds per year; or

3. The state permit applicant demonstrates to the satisfaction of the VSMP authority that (i) alternative site designs have been considered that may accommodate onsite best management practices, (ii) onsite best management practices have been considered in alternative site designs to the maximum extent practicable, (iii) appropriate onsite best management practices will be implemented, and (iv) full compliance with postdevelopment nonpoint nutrient runoff compliance requirements cannot practicably be met onsite. For purposes of this subdivision, if an applicant demonstrates onsite control of at least 75 percent of the required phosphorous nutrient reductions, the applicant shall be deemed to have met the requirements of clauses (i) through (iv).

E. Documentation of the applicant's acquisition of nutrient credits shall be provided to the VSMP authority and the Department in a certification from the credit provider documenting the number of phosphorus nutrient credits acquired and the associated ratio of nitrogen nutrient credits at the credit-generating entity. Until the effective date of regulations establishing application fees in accordance with § 62.1-44.19:20, the credit provider shall pay the Department a water quality enhancement fee equal to six percent of the amount paid by the applicant for the credits. Such fee shall be deposited into the Virginia Stormwater Management Fund established by § 62.1-44.15:29.

F. Nutrient credits used pursuant to subsection B shall be generated in the same or adjacent eight-digit hydrologic unit code as defined by the United States Geological Survey as the permitted site except as otherwise limited in subsection C. *The governing body of any locality may, by ordinance, restrict the total nutrient credits used pursuant to subsection B that are generated in the locality and used in an adjacent eight-digit hydrologic unit code.* Nutrient credits outside the same or adjacent eight-digit hydrologic unit code may only be used if it is determined by the VSMP authority that no

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59 credits are available within the same or adjacent eight-digit hydrologic unit code when the VSMP  
60 authority accepts the final site design. In such cases, and subject to other limitations imposed in this  
61 section, credits available within the same tributary may be used. In no case shall credits from another  
62 tributary be used.

63 G. For that portion of a site's compliance with stormwater nonpoint nutrient runoff water quality  
64 criteria being obtained through nutrient credits, the applicant shall (i) comply with a 1:1 ratio of the  
65 nutrient credits to the site's remaining postdevelopment nonpoint nutrient runoff compliance requirement  
66 being met by credit use and (ii) use credits certified as perpetual credits pursuant to Article 4.02  
67 (§ 62.1-44.19:12 et seq.).

68 H. No VSMP authority may grant an exception to, or waiver of, postdevelopment nonpoint nutrient  
69 runoff compliance requirements unless offsite options have been considered and found not available.

70 I. The VSMP authority shall require that nutrient credits and other offsite options approved by the  
71 Department or applicable state board, including locality pollutant loading pro rata share programs  
72 established pursuant to § 15.2-2243, achieve the necessary nutrient reductions prior to the  
73 commencement of the applicant's land-disturbing activity. A pollutant loading pro rata share program  
74 established by a locality pursuant to § 15.2-2243 and approved by the Department or applicable state  
75 board prior to January 1, 2011, including those that may achieve nutrient reductions after the  
76 commencement of the land-disturbing activity, may continue to operate in the approved manner for a  
77 transition period ending July 1, 2014. The applicant shall have the right to select between the use of  
78 nutrient credits or other offsite options, except during the transition period in those localities to which  
79 the transition period applies. The locality may use funds collected for nutrient reductions pursuant to a  
80 locality pollutant loading pro rata share program under § 15.2-2243 for nutrient reductions in the same  
81 tributary within the same locality as the land-disturbing activity or for the acquisition of nutrient credits.  
82 In the case of a phased project, the applicant may acquire or achieve the offsite nutrient reductions prior  
83 to the commencement of each phase of the land-disturbing activity in an amount sufficient for each such  
84 phase.

85 J. Nutrient reductions obtained through nutrient credits shall be credited toward compliance with any  
86 nutrient allocation assigned to a municipal separate storm sewer system in a Virginia Stormwater  
87 Management Program Permit or Total Maximum Daily Load applicable to the location where the  
88 activity for which the nutrient credits are used takes place. If the activity for which the nutrient credits  
89 are used does not discharge to a municipal separate storm sewer system, the nutrient reductions shall be  
90 credited toward compliance with the applicable nutrient allocation.

91 K. A VSMP authority shall allow the full or partial substitution of perpetual nutrient credits for  
92 existing onsite nutrient controls when (i) the nutrient credits will compensate for 10 or fewer pounds of  
93 the annual phosphorous requirement associated with the original land-disturbing activity or (ii) existing  
94 onsite controls are not functioning as anticipated after reasonable attempts to comply with applicable  
95 maintenance agreements or requirements and the use of nutrient credits will account for the deficiency.  
96 Upon determination by the VSMP authority that the conditions established by clause (i) or (ii) have  
97 been met, the party responsible for maintenance shall be released from maintenance obligations related  
98 to the onsite phosphorous controls for which the nutrient credits are substituted.

99 L. To the extent available, with the consent of the applicant, the VSMP authority, the Board or the  
100 Department may include the use of nutrient credits or other offsite measures in resolving enforcement  
101 actions to compensate for (i) nutrient control deficiencies occurring during the period of noncompliance  
102 and (ii) permanent nutrient control deficiencies.

103 M. This section shall not be construed as limiting the authority established under § 15.2-2243;  
104 however, under any pollutant loading pro rata share program established thereunder, the subdivider or  
105 developer shall be given appropriate credit for nutrient reductions achieved through nutrient credits or  
106 other offsite options.

107 N. In order to properly account for allowed nonpoint nutrient offsite reductions, an applicant shall  
108 report to the Department, in accordance with Department procedures, information regarding all offsite  
109 reductions that have been authorized to meet stormwater postdevelopment nonpoint nutrient runoff  
110 compliance requirements.

111 O. An applicant or a permittee found to be in noncompliance with the requirements of this section  
112 shall be subject to the enforcement and penalty provisions of this article.

113 **§ 62.1-44.15:35. (For effective date, see Acts 2016, cc. 68 and 758, as amended by Acts 2017, c.**  
114 **345) Nutrient credit use and additional offsite options for construction activities.**

115 A. As used in this section:

116 "Nutrient credit" or "credit" means a type of offsite option that is a nutrient credit certified pursuant  
117 to Article 4.02 (§ 62.1-44.19:12 et seq.).

118 "Offsite option" means an alternative available, away from the real property where land disturbance  
119 is occurring, to address water quality or water quantity technical criteria established pursuant to §  
120 62.1-44.15:28.

"Tributary," within the Chesapeake Bay watershed, has the same meaning as in § 62.1-44.19:13. For areas outside of the Chesapeake Bay watershed, "tributary" includes the following watersheds: Albemarle Sound, Coastal; Atlantic Ocean, Coastal; Big Sandy; Chowan; Clinch-Powell; New Holston (Upper Tennessee); New River; Roanoke; and Yadkin.

B. No offsite option shall be used in contravention of local water quality-based limitations (i) determined pursuant to subsection B of § 62.1-44.19:14, (ii) adopted pursuant to § 62.1-44.15:33 or other applicable authority, (iii) deemed necessary to protect public water supplies from demonstrated adverse nutrient impacts, or (iv) as otherwise may be established or approved by the Board. Where such a limitation exists, offsite options may be used provided that such options do not preclude or impair compliance with the local limitation.

C. Unless prohibited by subsection B, a VESMP authority or a VSMP authority:

1. May allow the use of offsite options for compliance with water quality and water quantity technical criteria established pursuant to § 62.1-44.15:28, in whole or in part; and

2. Shall allow the use of nutrient credits for compliance with the water quality technical criteria when:

a. Less than five acres of land will be disturbed;

b. The phosphorous water quality reduction requirement is less than 10 pounds per year; or

c. It is demonstrated to the satisfaction of the VESMP or VSMP authority that (i) alternative site designs have been considered that may accommodate onsite best management practices, (ii) onsite best management practices have been considered in alternative site designs to the maximum extent practicable, (iii) appropriate onsite best management practices will be implemented, and (iv) compliance with water quality technical criteria cannot practicably be met onsite. The requirements of clauses (i) through (iv) shall be deemed to have been met if it is demonstrated that onsite control of at least 75 percent of the required phosphorous water quality reduction will be achieved.

D. No VSMP or VESMP authority may grant an exception to, or waiver of, post-development nonpoint nutrient runoff compliance requirements unless offsite options have been considered and found not available.

E. The VSMP or VESMP authority shall require that offsite options approved by the Department or applicable state board achieve the necessary phosphorous water quality reductions prior to the commencement of the land-disturbing activity. A pollutant loading pro rata share program established by a locality pursuant to § 15.2-2243 and approved by the Department or applicable state board prior to January 1, 2011, including those that may achieve nutrient reductions after the commencement of the land-disturbing activity, may continue to operate in the approved manner for a transition period ending July 1, 2014. In the case of a phased project, the land disturber may acquire or achieve the offsite nutrient reductions prior to the commencement of each phase of the land-disturbing activity in an amount sufficient for each such phase. The land disturber shall have the right to select between the use of nutrient credits or other offsite options, except during the transition period in those localities to which the transition period applies.

F. With the consent of the land disturber, in resolving enforcement actions, the VESMP authority or the Board may include the use of offsite options to compensate for (i) nutrient control deficiencies occurring during the period of noncompliance and (ii) permanent nutrient control deficiencies.

G. This section shall not be construed as limiting the authority established under § 15.2-2243; however, under any pollutant loading pro rata share program established thereunder, the subdivider or developer shall be given appropriate credit for nutrient reductions achieved through offsite options. The locality may use funds collected for nutrient reductions pursuant to a locality pollutant loading pro rata share program for nutrient reductions in the same tributary within the same locality as the land-disturbing activity, or for the acquisition of nutrient credits.

H. Nutrient credits shall not be used to address water quantity technical criteria. Nutrient credits shall be generated in the same or adjacent fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, as the land-disturbing activity. *The governing body of any locality may, by ordinance, restrict the total nutrient credits used pursuant to subsection B that are generated in the locality and used in an adjacent fourth order subbasin.* If no credits are available within these subbasins when the VESMP or VSMP authority accepts the final site design, credits available within the same tributary may be used. The following requirements apply to the use of nutrient credits:

1. Documentation of the acquisition of nutrient credits shall be provided to the VESMP authority and the Department or the VSMP authority in a certification from the credit provider documenting the number of phosphorus nutrient credits acquired and the associated ratio of nitrogen nutrient credits at the credit-generating entity.

2. Until the effective date of regulations establishing application fees in accordance with § 62.1-44.19:20, the credit provider shall pay the Department a water quality enhancement fee equal to

182 six percent of the amount paid for the credits. Such fee shall be deposited into the Virginia Stormwater  
183 Management Fund established by § 62.1-44.15:29.

184 3. For that portion of a site's compliance with water quality technical criteria being obtained through  
185 nutrient credits, the land disturber shall (i) comply with a 1:1 ratio of the nutrient credits to the site's  
186 remaining post-development nonpoint nutrient runoff compliance requirement being met by credit use  
187 and (ii) use credits certified as perpetual credits pursuant to Article 4.02 (§ 62.1-44.19:12 et seq.).

188 4. A VESMP or VSMP authority shall allow the full or partial substitution of perpetual nutrient  
189 credits for existing onsite nutrient controls when (i) the nutrient credits will compensate for 10 or fewer  
190 pounds of the annual phosphorous requirement associated with the original land-disturbing activity or (ii)  
191 existing onsite controls are not functioning as anticipated after reasonable attempts to comply with  
192 applicable maintenance agreements or requirements and the use of nutrient credits will account for the  
193 deficiency. Upon determination by the VESMP or VSMP authority that the conditions established by  
194 clause (i) or (ii) have been met, the party responsible for maintenance shall be released from  
195 maintenance obligations related to the onsite phosphorous controls for which the nutrient credits are  
196 substituted.

197 I. The use of nutrient credits to meet post-construction nutrient control requirements shall be  
198 accounted for in the implementation of total maximum daily loads and MS4 permits as specified in  
199 subdivisions 1, 2, and 3. In order to ensure that the nutrient reduction benefits of nutrient credits used to  
200 meet post-construction nutrient control requirements are attributed to the location of the land-disturbing  
201 activity where the credit is used, the following account method shall be used:

202 1. Chesapeake Bay TMDL.

203 a. Where nutrient credits are used to meet nutrient reduction requirements applicable to  
204 redevelopment projects, a 1:1 credit shall be applied toward MS4 compliance with the Chesapeake Bay  
205 TMDL waste load allocation or related MS4 permit requirement applicable to the MS4 service area,  
206 including the site of the land-disturbing activity, such that the nutrient reductions of redevelopment  
207 projects are counted as part of the MS4 nutrient reductions to the same extent as when land-disturbing  
208 activities use onsite measures to comply.

209 b. Where nutrient credits are used to meet post-construction requirements applicable to new  
210 development projects, the nutrient reduction benefits represented by such credits shall be attributed to the  
211 location of the land-disturbing activity where the credit is used to the same extent as when  
212 land-disturbing activities use onsite measures to comply.

213 c. A 1: 1 credit shall be applied toward compliance by a locality that operates a regulated MS4 with  
214 its Chesapeake Bay TMDL waste load allocation or related MS4 permit requirement to the extent that  
215 nutrient credits are obtained by the MS4 jurisdiction from a nutrient credit-generating entity as defined  
216 in § 62.1-44.19:13 independent of or in excess of those required to meet the post-construction  
217 requirements.

218 2. Local nutrient-related TMDLs adopted prior to the land-disturbing activity.

219 a. Where nutrient credits are used to meet nutrient reduction requirements applicable to  
220 redevelopment projects, a 1:1 credit shall be applied toward MS4 compliance with any local TMDL  
221 waste load allocation or related MS4 permit requirement applicable to the MS4 service area, including  
222 the site of the land-disturbing activity, such that the nutrient reductions of redevelopment projects are  
223 counted as part of the MS4 nutrient reductions to the same extent as when land-disturbing activities use  
224 onsite measures to comply, provided the nutrient credits are generated upstream of where the  
225 land-disturbing activity discharges to the water body segment that is subject to the TMDL.

226 b. Where nutrient credits are used to meet post-construction requirements applicable to new  
227 development projects, the nutrient reduction benefits represented by such credits shall be attributed to the  
228 location of the land-disturbing activity where the credit is used to the same extent as when  
229 land-disturbing activities use onsite measures to comply, provided the nutrient credits are generated  
230 upstream of where the land-disturbing activity discharges to the water body segment that is subject to  
231 the TMDL.

232 c. A 1: 1 credit shall be applied toward MS4 compliance with any local TMDL waste load allocation  
233 or related MS4 permit requirement to the extent that nutrient credits are obtained by the MS4  
234 jurisdiction from a nutrient credit-generating entity as defined in § 62.1-44.19:13 independent of or in  
235 excess of those required to meet the post-construction requirements. However, such credits shall be  
236 generated upstream of where the land-disturbing activity discharges to the water body segment that is  
237 subject to the TMDL.

238 3. Future local nutrient-related TMDLs.

239 This subdivision applies only to areas where there has been a documented prior use of nutrient  
240 credits to meet nutrient control requirements in an MS4 service area that flows to or is upstream of a  
241 water body segment for which a nutrient-related TMDL is being developed. For a TMDL waste load  
242 allocation applicable to the MS4, the Board shall develop the TMDL waste load allocation with the  
243 nutrient reduction benefits represented by the nutrient credit use being attributed to the MS4, except

244 when the Board determines during the TMDL development process that reasonable assurance of  
245 implementation cannot be provided for nonpoint source load allocations due to the nutrient reduction  
246 benefits being attributed in this manner. The Board shall have no obligation to account for nutrient  
247 reduction benefits in this manner if the MS4 does not provide the Board with adequate documentation of  
248 (i) the location of the land-disturbing activities, (ii) the number of nutrient credits, and (iii) the  
249 generation of the nutrient credits upstream of the site at which the land-disturbing activity discharges to  
250 the water body segment addressed by the TMDL. Such attribution shall not be interpreted as amending  
251 the requirement that the TMDL be established at a level necessary to meet the applicable water quality  
252 standard.