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SENATE BILL NO. 704

Offered January 8, 2020

Prefiled January 7, 2020

A BILL to amend and reenact § 3.2-401 of the Code of Virginia and to amend the Code of Virginia by adding in Title 62.1 a chapter numbered 3.8, containing articles numbered 1 through 4, consisting of sections numbered 62.1-44.119 through 62.1-44.131, relating to Chesapeake Bay watershed implementation plan initiatives; civil penalty.

Patrons—Mason and Boysko

Referred to Committee on Agriculture, Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That § 3.2-401 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Title 62.1 a chapter numbered 3.8, containing articles numbered 1 through 4, consisting of sections numbered 62.1-44.119 through 62.1-44.131, as follows:

§ 3.2-401. Exclusions from chapter.

This chapter shall not apply to any agricultural activity to which: (i) Article 12 (§ 10.1-1181.1 et seq.) of Chapter 11 of Title 10.1; or, (ii) a permit issued by the State Water Control Board, or (iii) Chapter 3.8 (§ 62.1-44.119 et seq.) of Title 62.1 applies.

CHAPTER 3.8.

CHESAPEAKE BAY WATERSHED IMPLEMENTATION PLAN INITIATIVES.

Article 1.

Nutrient Management Plans for Chesapeake Bay Cropland.

§ 62.1-44.119. Definitions.

As used in this article, unless the context requires a different meaning:

"Chesapeake Bay cropland" means cropland in the Commonwealth located in the Chesapeake Bay watershed on which fertilizer, manure, sewage sludge, or another compound containing nitrogen or phosphorous is applied.

"Department" means the Department of Conservation and Recreation.

"Nutrient management plan" means a plan prepared by a certified nutrient management planner pursuant to § 10.1-104.2 and regulations adopted thereunder.

"Operator" means any person who exercises managerial control over Chesapeake Bay cropland.

§ 62.1-44.120. Chesapeake Bay cropland; nutrient management plans required.

A. By July 1, 2026, any operator of 50 acres or more of Chesapeake Bay cropland shall submit a site-specific individual nutrient management plan for all Chesapeake Bay cropland under the control of such person to the Department and shall maintain and properly implement an approved nutrient management plan, planning standards, and specifications on all areas where nutrients are applied. However, Chesapeake Bay cropland shall be exempt from the application rate and timing provisions contained in any regulations developed pursuant to § 10.1-104.2 if research involving nutrient application rate and timing is conducted on such lands.

B. The Department shall review any nutrient management plan required to be submitted pursuant to subsection A within 30 days of submission and shall determine whether such nutrient management plan (i) has been prepared by a certified nutrient management planner and (ii) complies with the requirements of § 10.1-104.2 and regulations adopted thereunder. If the Department determines that such nutrient management plan satisfies the conditions of clauses (i) and (ii), the Department shall approve such plan. An approved nutrient management plan shall be revised and resubmitted for approval to the Department every five years thereafter or upon a major change of use of the subject Chesapeake Bay cropland, whichever occurs sooner. If the Department determines that such nutrient management plan fails to satisfy the conditions of either or both clauses (i) and (ii), the Department shall provide to the person who is required to submit the nutrient management plan a list of items required to be corrected, and the person required to submit the nutrient management plan shall have 30 days to resubmit the plan.

C. Any nutrient management plan required pursuant to subsection A shall be made available to the Department upon request.

D. The Department is authorized to assess an administrative charge to cover the costs for services associated with its responsibilities authorized under this section.

E. Any information collected by the Department pursuant to subsection B or C is excluded from the mandatory disclosure provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq.).

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§ 62.1-44.121. Technical assistance and training.

The Department shall (i) provide technical assistance and training on the development and implementation of nutrient management plans, planning standards, and specifications to persons required to submit a nutrient management plan pursuant to subsection A of § 62.1-44.120 and (ii) assess an administrative charge to cover the costs for services associated with its responsibilities authorized under this section.

§ 62.1-44.122. Affirmative defense.

It shall be an affirmative defense to any action brought under this article for failure to submit, maintain, or implement a nutrient management plan that the person required to submit, maintain, or implement a nutrient management plan submitted a complete application, as determined by either the Department or the appropriate soil and water conservation district, for cost-share funding prior to December 31, 2025, and is waiting to receive cost-share funds. Upon request by any person seeking to use such defense, the Department or the appropriate soil and water conservation district shall provide documentation to such person of the date cost-share funds were applied for and, if applicable, confirmation that such person is waiting to receive cost-share funds.

Article 2.

Chesapeake Bay Watershed Livestock Stream Exclusion.

§ 62.1-44.123. Definitions.

As used in this article, unless the context requires a different meaning:

"Department" means the Department of Environmental Quality.

"Perennial stream" means a body of water depicted as perennial on the most recent U.S. Geological Survey 7-1/2-minute topographic quadrangle map (scale 1:24,000) or identified by a method, established in regulations approved by the Department, that does not require field verification.

"Stream exclusion practice" means protection of a body of water by fencing, including temporary fencing, or another physical means sufficient to exclude livestock from such body of water. A stream exclusion practice may include designated livestock stream crossings that satisfy criteria established in regulations adopted by the Department.

§ 62.1-44.124. Bovine livestock stream exclusion required.

Beginning July 1, 2026, any person who owns 20 or more bovines in the Chesapeake Bay watershed shall install and maintain stream exclusion practices sufficient to exclude all such bovines from perennial streams in the watershed.

§ 62.1-44.125. Affirmative defenses.

A. It shall be an affirmative defense to any action brought under this article for failure to install or maintain stream exclusion practices that the person required to install and maintain such practices submitted a complete application, as determined by either the Department of Conservation and Recreation (DCR) or the appropriate soil and water conservation district, for cost-share funding prior to December 31, 2025, and is waiting to receive cost-share funds. Upon request by any person seeking to use this defense, DCR or the appropriate soil and water conservation district shall provide documentation to such person of the date cost-share funds were applied for and confirmation, if applicable, that such person is waiting to receive cost-share funds. The appropriate soil and water conservation district shall enter into a contract with each such person who completes an application for cost-share funds. Such contract shall contain a provision stating that payments thereunder are subject to the availability of funds. The Commonwealth shall annually seek funding necessary to meet its commitments under fully executed contracts.

B. It shall be an affirmative defense to any action brought under this article for failure to install or maintain stream exclusion practices that the practices were previously installed and were damaged or destroyed solely by (i) an act of God, (ii) an act of war, (iii) a willful act or omission of a third party who is not an employee, agent, or contractor of the person who owns the bovines, nor a party to a contract with the person who owns the bovines, or (iv) any combination of such acts. This subsection shall not apply if one year or more has passed since the event that damaged or destroyed the stream exclusion practices.

Article 3.

Adoption and Enforcement of Regulations.

§ 62.1-44.126. Definitions.

As used in this article, "Department" means, with reference to Article 1 (§ 62.1-44.119 et seq.), the Department of Conservation and Recreation, and with reference to Article 2 (§ 62.1-44.123 et seq.), the Department of Environmental Quality.

§ 62.1-44.127. Right of entry.

Any duly authorized agent of the Department may, at reasonable times and under reasonable circumstances, enter any establishment or property, public or private, after notice to the landowner or operator, for the purpose of obtaining information or conducting surveys or investigations necessary in the enforcement of the provisions of this chapter.

§ 62.1-44.128. Information to be furnished to Department.

The Department may require any person to furnish when requested any plans, specifications, or other information necessary to accomplish the purposes of this chapter.

§ 62.1-44.129. Enforcement; injunctive relief; civil penalty.

A. Nothing in this chapter shall affect any enforcement authority pursuant to any law administered by the State Air Pollution Control Board, the State Water Control Board, or the Virginia Waste Management Board, nor shall it affect any enforcement authority of the Department of Environmental Quality pursuant to § 10.1-1186.

B. The Department is authorized to issue orders to require any person to comply with any provision of this chapter, any regulation adopted by the Department, or any order or case decision, as defined in § 2.2-4001, of the Department. Any such order shall be issued only after a proceeding or hearing conducted in accordance with § 2.2-4019 or 2.2-4020, respectively, with reasonable notice to the affected person of the time, place, and purpose of such proceeding or hearing.

C. The Department may provide, in an order issued by the Department against such person, for the payment of a civil penalty for any violation of this chapter, any regulation adopted by the Department, or any order or case decision, as defined in § 2.2-4001, of the Department. Such civil penalty shall not exceed \$2,500 for each violation and shall be paid into the state treasury and deposited by the State Treasurer into the Virginia Natural Resources Commitment Fund (§ 10.1-2128.1).

§ 62.1-44.130. Adoption of regulations.

The Department is authorized to adopt regulations necessary to implement the requirements of this chapter.

Article 4.

Satisfaction of Commitments.

§ 62.1-44.131. Determination of Secretary of Natural Resources.

The Secretary of Natural Resources (the Secretary) shall determine on or before December 31, 2025, whether any of the Commonwealth's commitments in the Chesapeake Bay Total Maximum Daily Load Phase III Watershed Implementation Plan have been satisfied by the (i) coverage of a sufficient portion of Chesapeake Bay cropland by nutrient management plans or (ii) installation of a sufficient number of livestock stream exclusion practices. If the Secretary determines that either commitment has been satisfied, he shall, on or before December 31, 2025, recommend to the Governor that all or part of this chapter be repealed and report such recommendation to the General Assembly.

2. That the Department of Environmental Quality shall adopt regulations to implement the requirements of Chapter 3.8 (§ 62.1-44.119 et seq.) of Title 62.1 of the Code of Virginia, as created by this act. Such regulations may include (i) a method that does not require field verification to identify perennial streams as an alternative to using the U.S. Geological Survey 7-1/2-minute topographic quadrangle map (scale 1:24,000), (ii) criteria for temporary fencing, (iii) criteria for designated livestock stream crossings, and (iv) any other regulations necessary to implement such chapter. The initial adoption of such regulations shall be exempt from the requirements of Article 2 (§ 2.2-4006 et seq. of the Code of Virginia) of the Administrative Process Act. However, the Department shall (a) provide a Notice of Intended Regulatory Action, (b) form a stakeholder advisory group, (c) provide a 60-day public comment period prior to the Department's adoption of the regulations, and (d) provide a written summary of comments received and responses to comments prior to the Department's adoption of the regulations.

3. That the Department of Conservation and Recreation shall establish no later than July 1, 2021, with stakeholder input, a portable stream fencing practice for inclusion in the Virginia Agricultural Best Management Practice Cost-Share Program.