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HOUSE BILL NO. 739

Offered January 12, 2022

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A *BILL to amend and reenact §§ 28.2-104.1 and 28.2-1302 of the Code of Virginia, relating to repair and maintenance of existing shoreline improvements.*

 Patron—Krizek (By Request)

 Referred to Committee on Agriculture, Chesapeake and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That §§ 28.2-104.1 and 28.2-1302 of the Code of Virginia are amended and reenacted as follows:
 § 28.2-104.1. Living shorelines; development of general permit; guidance.

A. As used in this section, unless the context requires a different meaning:

"Living shoreline" means a shoreline management practice that provides erosion control and water quality benefits; protects, restores, or enhances natural shoreline habitat; and maintains coastal processes through the strategic placement of plants, stone, sand fill, and other structural and organic materials. When practicable, a living shoreline may enhance coastal resilience and attenuation of wave energy and storm surge.

B. The Commission, in cooperation with the Department of Conservation and Recreation, the Department of Environmental Quality, and local wetlands boards, and with technical assistance from the Virginia Institute of Marine Science, shall establish and implement a general permit regulation that authorizes and encourages the use of living shorelines as the preferred alternative for stabilizing tidal shorelines in the Commonwealth. The regulation shall provide for an expedited permit review process for qualifying living shoreline projects requiring authorization under Chapters 12 (§ 28.2-1200 et seq.), 13 (§ 28.2-1300 et seq.), and 14 (§ 28.2-1400 et seq.). In developing the general permit, the Commission shall consult with the U.S. Army Corps of Engineers to ensure the minimization of conflicts with federal law and regulation. *However, no permit regulation, local ordinance, or local wetlands board decision shall prohibit the repair or maintenance of an existing shoreline improvement to restore or maintain its original condition or require the replacement of an existing shoreline improvement with a living shoreline that would substantially detract from the established use and enjoyment of property, including interference with established yards, walkways, piers, or other water access.*

C. The Commission, in cooperation with the Department of Conservation and Recreation and with technical assistance from the Virginia Institute of Marine Science, shall develop integrated guidance for the management of tidal shoreline systems to provide a technical basis for the coordination of permit decisions required by any regulatory entity exercising authority over a shoreline management project. The guidance shall:

1. Communicate to stakeholders and regulatory authorities that it is the policy of the Commonwealth to support living shorelines as the preferred alternative for stabilizing tidal shorelines;

2. Identify preferred shoreline management approaches for the shoreline types found in the Commonwealth;

3. Explain the risks and benefits of protection provided by various shoreline system elements associated with each management option; and

4. Recommend procedures to achieve efficiency and effectiveness by the various regulatory entities exercising authority over a shoreline management project.

D. The Commission shall permit only living shoreline approaches to shoreline management unless the best available science shows that such approaches are not suitable. If the best available science shows that a living shoreline approach is not suitable, the Commission shall require the applicant to incorporate, to the maximum extent possible, elements of living shoreline approaches into permitted projects.

§ 28.2-1302. Adoption of wetlands zoning ordinance; terms of ordinance.

Any county, city or town may adopt the following ordinance, which, after October 1, 1992, shall serve as the only wetlands zoning ordinance under which any wetlands board is authorized to operate. Any county, city, or town which has adopted the ordinance prior to October 1, 1992, shall amend the ordinance to conform it to the ordinance contained herein by October 1, 1992.

Wetlands Zoning Ordinance

§ 1. The governing body of _____, acting pursuant to Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia, adopts this ordinance regulating the use and development of wetlands.

§ 2. As used in this ordinance, unless the context requires a different meaning:

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59 "Back Bay and its tributaries" means the following, as shown on the United States Geological Survey
60 Quadrangle Sheets for Virginia Beach, North Bay, and Knotts Island: Back Bay north of the
61 Virginia-North Carolina state line; Capsies Creek north of the Virginia-North Carolina state line; Deal
62 Creek; Devil Creek; Nawney Creek; Redhead Bay, Sand Bay, Shipps Bay, North Bay, and the waters
63 connecting them; Beggars Bridge Creek; Muddy Creek; Ashville Bridge Creek; Hells Point Creek; Black
64 Gut; and all coves, ponds and natural waterways adjacent to or connecting with the above-named bodies
65 of water.

66 "Commission" means the Virginia Marine Resources Commission.

67 "Commissioner" means the Commissioner of Marine Resources.

68 "Governmental activity" means any of the services provided by this _____. (county, city, or town) to
69 its citizens for the purpose of maintaining this _____ (county, city, or town), including but not limited to
70 such services as constructing, repairing and maintaining roads; providing sewage facilities and street
71 lights; supplying and treating water; and constructing public buildings.

72 "Nonvegetated wetlands" means unvegetated lands lying contiguous to mean low water and between
73 mean low water and mean high water, including those unvegetated areas of Back Bay and its tributaries
74 and the North Landing River and its tributaries subject to flooding by normal and wind tides but not
75 hurricane or tropical storm tides.

76 "North Landing River and its tributaries" means the following, as shown on the United States
77 Geological Survey Quadrangle Sheets for Pleasant Ridge, Creeds, and Fentress: the North Landing River
78 from the Virginia-North Carolina line to Virginia Highway 165 at North Landing Bridge; the
79 Chesapeake and Albemarle Canal from Virginia Highway 165 at North Landing Bridge to the locks at
80 Great Bridge; and all named and unnamed streams, creeks and rivers flowing into the North Landing
81 River and the Chesapeake and Albemarle Canal except West Neck Creek north of Indian River Road,
82 Pocaty River west of Blackwater Road, Blackwater River west of its forks located at a point
83 approximately 6400 feet due west of the point where Blackwater Road crosses the Blackwater River at
84 the village of Blackwater, and Millbank Creek west of Blackwater Road.

85 "Person" means any individual, corporation, partnership, association, company, business, trust, joint
86 venture, or other legal entity.

87 "Vegetated wetlands" means lands lying between and contiguous to mean low water and an elevation
88 above mean low water equal to the factor one and one-half times the mean tide range at the site of the
89 proposed project in the county, city, or town in question, and upon which is growing any of the
90 following species: saltmarsh cordgrass (*Spartina alterniflora*), saltmeadow hay (*Spartina patens*), saltgrass
91 (*Distichlis spicata*), black needlerush (*Juncus roemerianus*), saltwort (*Salicornia* spp.), sea lavender
92 (*Limonium* spp.), marsh elder (*Iva frutescens*), groundsel bush (*Baccharis halimifolia*), wax myrtle
93 (*Myrica* sp.), sea oxeye (*Borrchia frutescens*), arrow arum (*Peltandra virginica*), pickerelweed
94 (*Pontederia cordata*), big cordgrass (*Spartina cynosuroides*), rice cutgrass (*Leersia oryzoides*), wildrice
95 (*Zizania aquatica*), bulrush (*Scirpus validus*), spikerush (*Eleocharis* sp.), sea rocket (*Cakile edentula*),
96 southern wildrice (*Zizaniopsis miliacea*), cattail (*Typha* spp.), three-square (*Scirpus* spp.), buttonbush
97 (*Cephalanthus occidentalis*), bald cypress (*Taxodium distichum*), black gum (*Nyssa sylvatica*), tupelo
98 (*Nyssa aquatica*), dock (*Rumex* spp.), yellow pond lily (*Nuphar* sp.), marsh fleabane (*Pluchea*
99 *purpurascens*), royal fern (*Osmunda regalis*), marsh hibiscus (*Hibiscus moscheutos*), beggar's tick (*Bidens*
100 sp.), smartweed (*Polygonum* sp.), arrowhead (*Sagittaria* spp.), sweet flag (*Acorus calamus*), water hemp
101 (*Amaranthus cannabinus*), reed grass (*Phragmites communis*), or switch grass (*Panicum virgatum*).

102 "Vegetated wetlands of Back Bay and its tributaries" or "vegetated wetlands of the North Landing
103 River and its tributaries" means all marshes subject to flooding by normal and wind tides but not
104 hurricane or tropical storm tides, and upon which is growing any of the following species: saltmarsh
105 cordgrass (*Spartina alterniflora*), saltmeadow hay (*Spartina patens*), black needlerush (*Juncus*
106 *roemerianus*), marsh elder (*Iva frutescens*), groundsel bush (*Baccharis halimifolia*), wax myrtle (*Myrica*
107 sp.), arrow arum (*Peltandra virginica*), pickerelweed (*Pontederia cordata*), big cordgrass (*Spartina*
108 *cynosuroides*), rice cutgrass (*Leersia oryzoides*), wildrice (*Zizania aquatica*), bulrush (*Scirpus validus*),
109 spikerush (*Eleocharis* sp.), cattail (*Typha* spp.), three-square (*Scirpus* spp.), dock (*Rumex* sp.),
110 smartweed (*Polygonum* sp.), yellow pond lily (*Nuphar* sp.), royal fern (*Osmunda regalis*), marsh hibiscus
111 (*Hibiscus moscheutos*), beggar's tick (*Bidens* sp.), arrowhead (*Sagittaria* sp.), water hemp (*Amaranthus*
112 *cannabinus*), reed grass (*Phragmites communis*), or switch grass (*Panicum virgatum*).

113 "Wetlands" means both vegetated and nonvegetated wetlands.

114 "Wetlands board" or "board" means a board created pursuant to § 28.2-1303 of the Code of Virginia.

115 § 3. The following uses of and activities in wetlands are authorized if otherwise permitted by law:

116 1. The construction and maintenance of noncommercial catwalks, piers, boathouses, boat shelters,
117 fences, duckblinds, wildlife management shelters, footbridges, observation decks and shelters and other
118 similar structures, provided that such structures are so constructed on pilings as to permit the reasonably
119 unobstructed flow of the tide and preserve the natural contour of the wetlands;

120 2. The cultivation and harvesting of shellfish, and worms for bait;

3. Noncommercial outdoor recreational activities, including hiking, boating, trapping, hunting, fishing, shellfishing, horseback riding, swimming, skeet and trap shooting, and shooting on shooting preserves, provided that no structure shall be constructed except as permitted in subdivision 1 of this section;

4. Other outdoor recreational activities, provided they do not impair the natural functions or alter the natural contour of the wetlands;

5. Grazing, haying, and cultivating and harvesting agricultural, forestry or horticultural products;

6. Conservation, repletion and research activities of the Commission, the Virginia Institute of Marine Science, the Department of Wildlife Resources and other conservation-related agencies;

7. The construction or maintenance of aids to navigation which are authorized by governmental authority;

8. Emergency measures decreed by any duly appointed health officer of a governmental subdivision acting to protect the public health;

9. The normal maintenance and repair of, or addition to, presently existing roads, highways, railroad beds, or facilities abutting on or crossing wetlands, provided that no waterway is altered and no additional wetlands are covered;

10. Governmental activity in wetlands owned or leased by the Commonwealth or a political subdivision thereof;

11. The normal maintenance of man-made drainage ditches, provided that no additional wetlands are covered. This subdivision does not authorize the construction of any drainage ditch; and

12. The construction of living shoreline projects authorized pursuant to a general permit developed under subsection B of § 28.2-104.1.

§ 4. A. Any person who desires to use or develop any wetland within this _____ (county, city, or town), other than for the purpose of conducting the activities specified in § 3 of this ordinance, shall first file an application for a permit directly with the wetlands board or with the Commission.

B. The permit application shall include the following: the name and address of the applicant; a detailed description of the proposed activities; a map, drawn to an appropriate and uniform scale, showing the area of wetlands directly affected, the location of the proposed work thereon, the area of existing and proposed fill and excavation, the location, width, depth and length of any proposed channel and disposal area, and the location of all existing and proposed structures, sewage collection and treatment facilities, utility installations, roadways, and other related appurtenances or facilities, including those on adjacent uplands; a statement indicating whether use of a living shoreline as defined in § 28.2-104.1 for a shoreline management practice is not suitable, including reasons for the determination; a description of the type of equipment to be used and the means of equipment access to the activity site; the names and addresses of owners of record of adjacent land and known claimants of water rights in or adjacent to the wetland of whom the applicant has notice; an estimate of cost; the primary purpose of the project; any secondary purposes of the project, including further projects; the public benefit to be derived from the proposed project; a complete description of measures to be taken during and after the alteration to reduce detrimental offsite effects; the completion date of the proposed work, project, or structure; and such additional materials and documentation as the wetlands board may require. *For purposes of the application, the use of a living shoreline for a shoreline management practice shall be deemed not suitable if the applicant submits within 90 days from when the need for repairing or maintaining an existing shoreline improvement arises evidence to the Commission or a local wetlands board that the proposed work is to repair or maintain an existing shoreline improvement.*

C. A nonrefundable processing fee shall accompany each permit application. The fee shall be set by the applicable governing body with due regard for the services to be rendered, including the time, skill, and administrator's expense involved.

§ 5. All applications, maps, and documents submitted shall be open for public inspection at the office designated by the applicable governing body and specified in the advertisement for public hearing required under § 6 of this ordinance.

§ 6. Not later than 60 days after receipt of a complete application, the wetlands board shall hold a public hearing on the application. The applicant, local governing body, Commissioner, owner of record of any land adjacent to the wetlands in question, known claimants of water rights in or adjacent to the wetlands in question, the Virginia Institute of Marine Science, the Department of Wildlife Resources, the Water Control Board, the Department of Transportation, and any governmental agency expressing an interest in the application shall be notified of the hearing. The board shall mail these notices not less than 20 days prior to the date set for the hearing. The wetlands board shall also cause notice of the hearing to be published at least once a week for two weeks prior to such hearing in a newspaper of general circulation in this _____ (county, city, or town). The published notice shall specify the place or places within this _____ (county, city, or town) where copies of the application may be examined. The costs of publication shall be paid by the applicant.

§ 7. A. Approval of a permit application shall require the affirmative vote of three members of a

182 five-member board or four members of a seven-member board.

183 B. The chairman of the board, or in his absence the acting chairman, may administer oaths and
184 compel the attendance of witnesses. Any person may testify at the public hearing. Each witness at the
185 hearing may submit a concise written statement of his testimony. The board shall make a record of the
186 proceeding, which shall include the application, any written statements of witnesses, a summary of
187 statements of all witnesses, the findings and decision of the board, and the rationale for the decision.

188 C. The board shall make its determination within 30 days of the hearing. If the board fails to act
189 within that time, the application shall be deemed approved. Within 48 hours of its determination, the
190 board shall notify the applicant and the Commissioner of its determination. If the board fails to make a
191 determination within the 30-day period, it shall promptly notify the applicant and the Commission that
192 the application is deemed approved. For purposes of this section, "act" means taking a vote on the
193 application. If the application receives less than four affirmative votes from a seven-member board or
194 less than three affirmative votes from a five-member board, the permit shall be denied.

195 D. If the board's decision is reviewed or appealed, the board shall transmit the record of its hearing
196 to the Commissioner. Upon a final determination by the Commission, the record shall be returned to the
197 board. The record shall be open for public inspection at the same office as was designated under § 5 of
198 this ordinance.

199 § 8. The board may require a reasonable bond or letter of credit in an amount and with surety and
200 conditions satisfactory to it, securing to the Commonwealth compliance with the conditions and
201 limitations set forth in the permit. The board may, after a hearing held pursuant to this ordinance,
202 suspend or revoke a permit if the applicant has failed to comply with any of the conditions or
203 limitations set forth in the permit or has exceeded the scope of the work described in the application.
204 The board may, after a hearing, suspend a permit if the applicant fails to comply with the terms and
205 conditions set forth in the application.

206 § 9. In fulfilling its responsibilities under this ordinance, the board shall preserve and prevent the
207 despoliation and destruction of wetlands within its jurisdiction while accommodating necessary economic
208 development in a manner consistent with wetlands preservation and any standards set by the
209 Commonwealth in addition to those identified in § 28.2-1308 to ensure protection of shorelines and
210 sensitive coastal habitats from sea level rise and coastal hazards, including the provisions of guidelines
211 and minimum standards promulgated by the Commission pursuant to § 28.2-1301 of the Code of
212 Virginia.

213 § 10. A. In deciding whether to grant, grant in modified form or deny a permit, the board shall
214 consider the following:

- 215 1. The testimony of any person in support of or in opposition to the permit application;
216 2. The impact of the proposed development on the public health, safety, and welfare; and
217 3. The proposed development's conformance with standards prescribed in § 28.2-1308 of the Code of
218 Virginia and guidelines promulgated pursuant to § 28.2-1301 of the Code of Virginia.

219 B. The board shall grant the permit if all of the following criteria are met:

220 1. The anticipated public and private benefit of the proposed activity exceeds its anticipated public
221 and private detriment.

222 2. The proposed development conforms with the standards prescribed in § 28.2-1308 of the Code of
223 Virginia and guidelines promulgated pursuant to § 28.2-1301 of the Code of Virginia.

224 3. The proposed activity does not violate the purposes and intent of this ordinance or Chapter 13
225 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia.

226 C. If the board finds that any of the criteria listed in subsection B of this section are not met, the
227 board shall deny the permit application but allow the applicant to resubmit the application in modified
228 form.

229 § 11. The permit shall be in writing, signed by the chairman of the board or his authorized
230 representative, and notarized. A copy of the permit shall be transmitted to the Commissioner.

231 § 12. No permit shall be granted without an expiration date established by the board. Upon proper
232 application, the board may extend the permit expiration date.

233 § 13. No permit granted by a wetlands board shall in any way affect the applicable zoning and land
234 use ordinances of this _____ (county, city, or town) or the right of any person to seek compensation
235 for any injury in fact incurred by him because of the proposed activity.