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SENATE BILL NO. 582

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Chesapeake and Its Tributaries
on December 16, 1998)

(Patron Prior to Substitute—Senator Whipple)

A BILL to amend and reenact §§ 28.2-1308, 33.1-223.2:1, and 62.1-44.15:5 of the Code of Virginia, relating to wetlands mitigation banking.

Be it enacted by the General Assembly of Virginia:

1. That §§ 28.2-1308, 33.1-223.2:1, and 62.1-44.15:5 of the Code of Virginia are amended and reenacted as follows:

§ 28.2-1308. Standards for use and development of wetlands; utilization of guidelines.

A. The following standards shall apply to the use and development of wetlands and shall be considered in the determination of whether any permit required by this chapter should be granted or denied:

1. Wetlands of primary ecological significance shall not be altered so that the ecological systems in the wetlands are unreasonably disturbed; and

2. Development in Tidewater Virginia, to the maximum extent practical, shall be concentrated in wetlands of lesser ecological significance, in vegetated wetlands which have been irreversibly disturbed before July 1, 1972, in nonvegetated wetlands which have been irreversibly disturbed prior to January 1, 1983, and in areas of Tidewater Virginia outside of wetlands.

B. The provisions of guidelines promulgated by the Commission pursuant to § 28.2-1301 shall be considered in applying the standards listed in subsection A of this section.

C. When any activity authorized by a permit issued pursuant to this chapter is conditioned upon compensatory mitigation for adverse impacts to wetlands, the applicant may be permitted to satisfy all or part of such mitigation requirements by the purchase *or use* of credits from any wetlands mitigation bank, *including any banks owned by the permit applicant*, that has been approved and is operating in accordance with applicable federal *and state* guidance, laws, *or regulations* for the establishment, use and operation of mitigation banks as long as: (1) the bank is in the same U.S.G.S. cataloging unit, as defined by the Hydrologic Unit Map of the United States (U.S.G.S. 1980), or an adjacent cataloging unit ~~within the same river watershed~~, *as to the impacted site, or it meets all the conditions found in clauses (i) through (v) of this subsection*; (2) the bank is ecologically preferable to practicable on-site and off-site individual mitigation options, as defined by federal wetland regulations; and (3) the banking instrument, if approved after July 1, 1996, has been approved by a process that included public review and comment. *In no instance shall the purchase or use of credits from a bank be allowed for the mitigation of impacts to wetlands outside the river watershed in which the bank is located unless the applicant demonstrates to the satisfaction of the Commission that (i) the impacts will occur as a result of a Virginia Department of Transportation linear project or as the result of a locality project for a locality whose jurisdiction crosses multiple river watersheds; (ii) there is no practical same river watershed mitigation alternative; (iii) the impacts are less than one acre within a cataloging unit; (iv) there is no significant harm to water quality or fish and wildlife resources within the river watershed of the impacted site; and (v) impacts within the Chesapeake Bay watershed are mitigated within the Chesapeake Bay watershed as close as possible to the impacted site.*

§ 33.1-223.2:1. Wetlands mitigation banking.

When authorization is required by federal or state law for any project affecting wetlands and such authorization is conditioned upon compensatory mitigation for adverse impacts to wetlands, the Commonwealth Transportation Commissioner is authorized to expend funds for the purchase of, *or is authorized to use*, credits from any wetlands mitigation bank, *including any owned by the Department*, that has been approved and is operating in accordance with applicable federal *and state* guidance, law *or regulations* for the establishment, use and operation of mitigation banks as long as: (1) the bank is in the same U.S.G.S. cataloging unit, as defined by the Hydrologic Unit Map of the United States (U.S.G.S. 1980), or an adjacent cataloging unit ~~within the same river watershed~~, *as to the impacted site, or it meets all the conditions found in clauses (i) through (v) of this subsection*; (2) the bank is ecologically preferable to practicable on-site and off-site individual mitigation options, as defined by federal wetland regulations; and (3) the banking instrument, if approved after July 1, 1996, has been approved by a process that included public review and comment. *In no instance shall the purchase or use of credits from a bank be allowed for the mitigation of impacts to wetlands outside the river watershed in which the bank is located unless the Commissioner demonstrates to the satisfaction of the agency requiring compensatory mitigation that (i) the impacts will occur as a result of a Virginia Department of Transportation linear project; (ii) there is no practical same river watershed mitigation*

alternative; (iii) the impacts are less than one acre within a cataloging unit; (iv) there is no significant harm to water quality or fish and wildlife resources within the river watershed of the impacted site; and (v) impacts within the Chesapeake Bay watershed are mitigated within the Chesapeake Bay watershed as close as possible to the impacted site.

§ 62.1-44.15:5. Virginia Water Protection Permit.

A. After the effective date of regulations adopted by the Board pursuant to this section, issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act.

B. The Board shall issue a Virginia Water Protection Permit for an activity requiring § 401 certification if it has determined that the proposed activity is consistent with the provisions of the Clean Water Act and will protect instream beneficial uses. The preservation of instream flows for purposes of the protection of navigation, maintenance of waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural, and aesthetic values is a beneficial use of Virginia's waters. Conditions contained in a Virginia Water Protection Permit may include, but are not limited to, the volume of water which may be withdrawn as a part of the permitted activity. Domestic and other existing beneficial uses shall be considered the highest priority uses. When a Virginia Water Protection Permit is conditioned upon compensatory mitigation for adverse impacts to wetlands, the applicant may be permitted to satisfy all or part of such mitigation requirements by the purchase or use of credits from any wetlands mitigation bank, including any banks owned by the permit applicant, that has been approved and is operating in accordance with applicable federal and state guidance, laws or regulations for the establishment, use and operation of mitigation banks as long as: (1) the bank is in the same U.S.G.S. cataloging unit, as defined by the Hydrologic Unit Map of the United States (U.S.G.S. 1980), or an adjacent cataloging unit within the same river watershed, as to the impacted site, or it meets all the conditions found in clauses (i) through (v) of this subsection; (2) the bank is ecologically preferable to practicable on-site and off-site individual mitigation options, as defined by federal wetland regulations; and (3) the banking instrument, if approved after July 1, 1996, has been approved by a process that included public review and comment. In no instance shall the purchase or use of credits from a bank be allowed for the mitigation of impacts to wetlands outside the river watershed in which the bank is located unless the applicant demonstrates to the satisfaction of the Department of Environmental Quality that (i) the impacts will occur as a result of a Virginia Department of Transportation linear project or as the result of a locality project for a locality whose jurisdiction crosses multiple river watersheds; (ii) there is no practical same river watershed mitigation alternative; (iii) the impacts are less than one acre within a cataloging unit; (iv) there is no significant harm to water quality or fish and wildlife resources within the river watershed of the impacted site; and (v) impacts within the Chesapeake Bay watershed are mitigated within the Chesapeake Bay watershed as close as possible to the impacted site.

C. Prior to the issuance of a Virginia Water Protection Permit, the Board shall consult with, and give full consideration to the written recommendations of, the following agencies: the Department of Game and Inland Fisheries, the Department of Conservation and Recreation, the Virginia Marine Resources Commission, the Department of Health, the Department of Agriculture and Consumer Services and any other interested and affected agencies. Such consultation shall include the need for balancing instream uses with offstream uses. Agencies may submit written comments on proposed permits within forty-five days after notification by the Board. The Board shall assume that if written comments are not submitted by an agency within this time period, the agency has no comments on the proposed permit.

D. No Virginia Water Protection Permit shall be required for any water withdrawal in existence on July 1, 1989; however, a permit shall be required if a new § 401 certification is required to increase a withdrawal.

No Virginia Water Protection Permit shall be required for any water withdrawal not in existence on July 1, 1989, if the person proposing to make the withdrawal has received a § 401 certification before January 1, 1989, with respect to installation of any necessary withdrawal structures to make such withdrawal; however, a permit shall be required before any such withdrawal is increased beyond the amount authorized by the certification.