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SENATE BILL NO. 765

Offered January 12, 2011

Prefiled December 8, 2010

A BILL to amend and reenact §§ 2.2-4002, 2.2-4103, as it is currently effective, 28.2-409, and 28.2-410 of the Code of Virginia; to amend the Code of Virginia by adding a section numbered 28.2-203.2; and to repeal §§ 28.2-1000.1 and 28.2-1000.2 of the Code of Virginia, relating to menhaden fishing.

Patrons—Northam; Delegate: Purkey

Referred to Committee on Agriculture, Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That §§ 2.2-4002, 2.2-4103, as it is currently effective, 28.2-409, and 28.2-410 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding a section numbered 28.2-203.2 as follows:

§ 2.2-4002. Exemptions from chapter generally.

A. Although required to comply with § 2.2-4103 of the Virginia Register Act (§ 2.2-4100 et seq.), the following agencies shall be exempted from the provisions of this chapter, except to the extent that they are specifically made subject to §§ 2.2-4024, 2.2-4030 and 2.2-4031:

1. The General Assembly.

2. Courts, any agency of the Supreme Court, and any agency that by the Constitution is expressly granted any of the powers of a court of record.

3. The Department of Game and Inland Fisheries in promulgating regulations regarding the management of wildlife and for all case decisions rendered pursuant to any provisions of Chapters 2 (§ 29.1-200 et seq.), 3 (§ 29.1-300 et seq.), 4 (§ 29.1-400 et seq.), 5 (§ 29.1-500 et seq.), and 7 (§ 29.1-700 et seq.) of Title 29.1.

4. The Virginia Housing Development Authority.

5. Municipal corporations, counties, and all local, regional or multijurisdictional authorities created under this Code, including those with federal authorities.

6. Educational institutions operated by the Commonwealth, provided that, with respect to § 2.2-4031, such educational institutions shall be exempt from the publication requirements only with respect to regulations that pertain to (i) their academic affairs, (ii) the selection, tenure, promotion and disciplining of faculty and employees, (iii) the selection of students, and (iv) rules of conduct and disciplining of students.

7. The Milk Commission in promulgating regulations regarding (i) producers' licenses and bases, (ii) classification and allocation of milk, computation of sales and shrinkage, and (iii) class prices for producers' milk, time and method of payment, butterfat testing and differential.

8. The Virginia Resources Authority.

9. Agencies expressly exempted by any other provision of this Code.

10. The Department of General Services in promulgating standards for the inspection of buildings for asbestos pursuant to § 2.2-1164.

11. The State Council of Higher Education for Virginia, in developing, issuing, and revising guidelines pursuant to § 23-9.6:2.

12. The Commissioner of Agriculture and Consumer Services in adopting regulations pursuant to subsection B of § 3.2-6002 and in adopting regulations pursuant to § 3.2-6023.

13. The Commissioner of Agriculture and Consumer Services and the Board of Agriculture and Consumer Services in promulgating regulations pursuant to subsections B and D of § 3.2-3601, subsection B of § 3.2-3701, § 3.2-4002, subsections B and D of § 3.2-4801, §§ 3.2-5121 and 3.2-5206, and subsection A of § 3.2-5406.

14. The Board of Optometry when specifying therapeutic pharmaceutical agents, treatment guidelines, and diseases and abnormal conditions of the human eye and its adnexa for TPA-certification of optometrists pursuant to Article 5 (§ 54.1-3222 et seq.) of Chapter 32 of Title 54.1.

15. The Virginia War Memorial Foundation.

16. The State Board of Education, in developing, issuing, and revising guidelines pursuant to § 22.1-203.2.

17. The Virginia Racing Commission, (i) when acting by and through its duly appointed stewards or in matters related to any specific race meeting or (ii) in promulgating technical rules regulating actual live horse racing at race meetings licensed by the Commission.

18. The Virginia Small Business Financing Authority.

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59 19. The Virginia Economic Development Partnership Authority.
60 20. The Board of Agriculture and Consumer Services in adopting, amending or repealing regulations
61 pursuant to subsection A (ii) of § 59.1-156.
62 21. The Insurance Continuing Education Board pursuant to § 38.2-1867.
63 22. The Board of Health in promulgating the list of diseases that shall be reported to the Department
64 of Health pursuant to § 32.1-35 and in adopting, amending or repealing regulations pursuant to
65 subsection C of § 35.1-14 that incorporate the Food and Drug Administration's Food Code pertaining to
66 restaurants or food service.
67 23. ~~(Expires January 1, 2014) The Secretary of Natural Resources in setting a date of closure for the~~
68 ~~Chesapeake Bay purse seine fishery for Atlantic menhaden for reduction purposes pursuant to~~
69 ~~§ 28.2-1000.2.~~
70 24. The Board of Pharmacy when specifying special subject requirements for continuing education
71 for pharmacists pursuant to § 54.1-3314.1.
72 B. Agency action relating to the following subjects shall be exempted from the provisions of this
73 chapter:
74 1. Money or damage claims against the Commonwealth or agencies thereof.
75 2. The award or denial of state contracts, as well as decisions regarding compliance therewith.
76 3. The location, design, specifications or construction of public buildings or other facilities.
77 4. Grants of state or federal funds or property.
78 5. The chartering of corporations.
79 6. Customary military, militia, naval or police functions.
80 7. The selection, tenure, dismissal, direction or control of any officer or employee of an agency of
81 the Commonwealth.
82 8. The conduct of elections or eligibility to vote.
83 9. Inmates of prisons or other such facilities or parolees therefrom.
84 10. The custody of persons in, or sought to be placed in, mental, penal or other state institutions as
85 well as the treatment, supervision, or discharge of such persons.
86 11. Traffic signs, markers or control devices.
87 12. Instructions for application or renewal of a license, certificate, or registration required by law.
88 13. Content of, or rules for the conduct of, any examination required by law.
89 14. The administration of pools authorized by Chapter 47 (§ 2.2-4700 et seq.) of this title.
90 15. Any rules for the conduct of specific lottery games, so long as such rules are not inconsistent
91 with duly adopted regulations of the State Lottery Board, and provided that such regulations are
92 published and posted.
93 16. Orders condemning or closing any shellfish, finfish, or crustacea growing area and the shellfish,
94 finfish or crustacea located thereon pursuant to Article 2 (§ 28.2-803 et seq.) of Chapter 8 of Title 28.2.
95 17. Any operating procedures for review of child deaths developed by the State Child Fatality
96 Review Team pursuant to § 32.1-283.1.
97 18. The regulations for the implementation of the Health Practitioners' Monitoring Program and the
98 activities of the Health Practitioners' Monitoring Program Committee pursuant to Chapter 25.1
99 (§ 54.1-2515 et seq.) of Title 54.1.
100 19. The process of reviewing and ranking grant applications submitted to the Commonwealth
101 Neurotrauma Initiative Advisory Board pursuant to Chapter 3.1 (§ 51.5-12.1 et seq.) of Title 51.5.
102 20. Loans from the Small Business Environmental Compliance Assistance Fund pursuant to Article 4
103 (§ 10.1-1197.1 et seq.) of Chapter 11.1 of Title 10.1.
104 21. The Virginia Breeders Fund created pursuant to § 59.1-372.
105 22. The types of pari-mutuel wagering pools available for live or simulcast horse racing.
106 23. The administration of medication or other substances foreign to the natural horse.
107 C. Minor changes to regulations published in the Virginia Administrative Code under the Virginia
108 Register Act, Chapter 41 (§ 2.2-4100 et seq.) of this title, made by the Virginia Code Commission
109 pursuant to § 30-150, shall be exempt from the provisions of this chapter.
110 § 2.2-4103. (Effective until January 1, 2014) Agencies to file regulations with Registrar; other duties;
111 failure to file.
112 It shall be the duty of every agency to have on file with the Registrar the full text of all of its
113 currently operative regulations, together with the dates of adoption, revision, publication, or amendment
114 thereof and such additional information requested by the Commission or the Registrar for the purpose of
115 publishing the Virginia Register of Regulations and the Virginia Administrative Code. Thereafter,
116 coincidentally with the issuance thereof, each agency shall from day to day so file, date, and supplement
117 all new regulations and amendments, repeals, or additions to its previously filed regulations. The filed
118 regulations shall (i) indicate the laws they implement or carry out, (ii) designate any prior regulations
119 repealed, modified, or supplemented, (iii) state any special effective or terminal dates, and (iv) be
120 accompanied by a statement or certification, either in original or electronic form, that the regulations are

full, true, and correctly dated. No regulation or amendment or repeal thereof shall be effective until filed with the Registrar.

Orders condemning or closing any shellfish, finfish or crustacea growing area and the shellfish, finfish or crustacea located thereon pursuant to Article 2 (§ 28.2-803 et seq.) of Chapter 8, of Title 28.2, which are exempt from the requirements of the Administrative Process Act (§ 2.2-4000 et seq.) as provided in subsection B of § 2.2-4002, shall be effective on the date specified by the promulgating agency. Such orders shall continue to be filed with the Registrar either before or after their effective dates in order to satisfy the need for public availability of information respecting the regulations of state agencies.

An order setting a date of closure for the Chesapeake Bay purse seine fishery for Atlantic menhaden for reduction purposes pursuant to ~~§ 28.2-1000.2, which is exempt from the requirements of the Administrative Process Act as provided by subsection A of § 2.2-4002,~~ shall be effective on the date specified. Such orders shall be filed with the Registrar for prompt publication.

In addition, each agency shall itself (i) maintain a complete list of all of its currently operative regulations for public consultation, (ii) make available to public inspection a complete file of the full texts of all such regulations, and (iii) allow public copying thereof or make copies available either without charge, at cost, or on payment of a reasonable fee. Each agency shall also maintain as a public record a complete file of its regulations that have been superseded on and after June 1, 1975.

It shall be the duty of every agency to annually file with the Registrar for publication in the Virginia Register of Regulations a list of any guidance documents upon which the agency currently relies. The filing shall be made on or before January 1 of each year in a format to be developed by the Registrar. Each agency shall also (i) maintain a complete list of all of its currently operative guidance documents and make such list available for public inspection, (ii) make available for public inspection the full texts of all such guidance documents to the extent such inspection is permitted by law, and (iii) upon request, make copies of such lists or guidance documents available without charge, at cost, or on payment of a reasonable fee.

Where regulations adopt textual matter by reference to publications other than the Federal Register or Code of Federal Regulations, the agency shall (i) file with the Registrar copies of the referenced publications, (ii) state on the face of or as notations to regulations making such adoptions by reference the places where copies of the referred publications may be procured, and (iii) make copies of such referred publications available for public inspection and copying along with its other regulations.

Unless he finds that there are special circumstances requiring otherwise, the Governor, in addition to the exercise of his authority to see that the laws are faithfully executed, may, until compliance with this chapter is achieved, withhold the payment of compensation or expenses of any officer or employee of any agency in whole or part whenever the Commission certifies to him that the agency has failed to comply with this section or this chapter in stated respects, to respond promptly to the requests of the Registrar, or to comply with the regulations of the Commission.

§ 28.2-203.2. Authority of Commission to adopt regulations for managing Atlantic menhaden fishery.

A. Notwithstanding any provision of Chapter 4 (§ 28.2-400 et seq.), the Commission shall adopt regulations pursuant to § 28.2-201 as necessary to implement the provisions of the Interstate Fishery Management Plan for Atlantic Menhaden.

B. Any regulation proposed by the Commission that may impose a moratorium on the taking of menhaden shall be subject to legislative review under subsection B of § 2.2-4014, as if it were a final regulation.

§ 28.2-409. Menhaden fishing prohibited in certain areas; exception.

A. Except as provided in subsection B of this section *or as otherwise provided by regulation*, it shall be unlawful to take or catch menhaden with purse nets in the following waters:

1. In the Piankatank River and its tributaries above and west of a line beginning at the northernmost, as measured from the low-water mark, edge of land known as Gwynn's Island at or near the mouth of Kibble Pond, thence in a northerly direction in a straight line to the easternmost edge of high land on Stingray Point;

2. In the Rappahannock River and its tributaries above and west of the R.O. Norris, Jr., Bridge;

3. In the York River and its tributaries above and west of a line extending northwardly from the western line of Goodwin Islands through the western line of Ellen Island to the northern bank of the York;

4. In the East, North, Ware and Severn Rivers and their tributaries; and

5. In Cape Charles harbor eastward of a line from the western tip of the jetty on the southern side of the channel to the westernmost tip of the jetty on the northern side of the channel; in Kings Creek and Cherrystone inlet eastward of a line from the western end of the jetty on the north side of Cape Charles harbor to the southern end of Wescoat Point; in Mattawoman and Hungars Creek eastward of a line from the northwesternmost tip of land in Old Town Neck to Great Neck Point; in Nassawadox Creek

182 eastward of a line from Shooting Point to Nassawadox Point; in Occohannock Creek eastward of a line
183 from Sparrow Point to the southernmost tip of Powells Bluff; in Nandua Creek eastward of a line from
184 the northernmost point of Milbys Point to the southwesternmost point of land in Hacks Neck, said line
185 having a true bearing of 027°; in Pungoteague Creek eastward of a line from Bluff Point to the
186 southeasternmost point of Finneys Island; in Onancock Creek eastward of a line from Thicket Point to
187 Ware Point; in Chesconessex Creek eastward of a line from the northernmost point of Sound Beach to
188 the northwesternmost point of Beach Island; in Deep Creek, Hunting Creek and Guilford Creek eastward
189 of a line from the easternmost tip of Russel Island to Halfmoon Point to Peters Point to Simpson Point
190 to Flood Point to Ebb Point to the mouth of Great Gut; in Messongo Creek eastward of a line from
191 South Point to North Point in the Virginia portion of the Pocomoke River northeast of a line from Long
192 Point to Virginia-Maryland spar buoy "A"; in the Great Wicomico River from the mouth of Whay's
193 Creek to Sandy Point; in Dividing Creek, Prentice Creek and Jarvis Creek westward of a line from
194 Hughlett Point to Jarvis Point; in Indian Creek and Henrys Creek westward of a line from the
195 southeasternmost point of land on the eastern side of the mouth of Henrys Creek to the easternmost
196 point of Fleets Bay Neck; in Dymers Creek westward of a line from the southernmost point of Grog
197 Island to the easternmost point of Poplar Neck; in Tabbs Creek westward of the line across the mouth
198 of the creek at its narrowest point; in Horn Harbor and Dyer Creek westward of a line from the
199 southernmost tip of Beach Point to the northernmost point on the south side of the mouth of Dyer
200 Creek; in Back Creek, Clarkston Creek, Chisman Creek, Poquoson River, Bennett Creek, and adjacent
201 waters westward of a line from the southeasternmost point of Goodwin Islands to the westernmost point
202 of Cow Island; in Back River westward of a line from Plumtree Point to the westernmost point of
203 Northend Point; in Little Creek southward of a line from the north point of the west jetty to the north
204 point of the east jetty; in Lynnhaven Bay southward of the Lynnhaven Inlet Bridge on U. S. Route 60.

205 B. ~~During~~ *Except as otherwise provided by regulation, during* the period from the first Monday in
206 May through the third Friday in November, vessels under ~~seventy~~ 70 gross tons ~~which that~~ are licensed
207 in accordance with subdivision 1 of § 28.2-402 are authorized to take or catch menhaden in the
208 following waters: in the Rappahannock River eastward and southward from a line extending from
209 Towles Point to Burnham Wharf and from Orchard Point to Towles Point; in Dividing Creek eastward
210 from a line extending from Jarvis Point to Ditchley Pump House; in Indian Creek eastward from a line
211 directly across the creek at Rappahannock Oyster Company; in Dymers Creek eastward from a line
212 directly across the creek at the eastern end of Standard Products dock.

213 § 28.2-410. Closed season for menhaden fishing; forbidden nets; penalty.

214 Except as provided in § 28.2-409 *or as otherwise provided by regulation*, it is unlawful for any
215 person to take or catch with a purse net in the waters of ~~this the~~ Commonwealth, or waters within its
216 jurisdiction, menhaden between the Saturday following the third Friday in November and the Sunday
217 preceding the first Monday in May. However, in the waters east of the Chesapeake Bay Bridge Tunnel
218 within the three-mile limit of the Virginia shoreline such prohibition shall be between the Friday before
219 Christmas and the Sunday preceding the first Monday in May. It is also unlawful for any person to use
220 any purse net or other net having a stretched mesh of less than 1 3/4 inches. Any person violating any
221 of the provisions of this section is guilty of a Class 1 misdemeanor.

222 2. That §§ 28.2-1000.1 and 28.2-1000.2 of the Code of Virginia are repealed.