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HOUSE BILL NO. 787

Offered January 13, 2016

Prefiled January 12, 2016

A BILL to amend and reenact § 62.1-44.15:35 of the Code of Virginia, relating to the use of nutrient credits for construction activities.

Patron—Adams

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 of the Code of Virginia is amended and reenacted as follows:****§ 62.1-44.15:35. 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 may~~ be generated ~~in the same or adjacent eight-digit hydrologic unit code as defined by the United States Geological Survey as the permitted site throughout the Commonwealth~~ except as otherwise limited in subsection C. ~~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 credits are available within the same or adjacent eight-digit hydrologic unit code when the VSMP authority accepts the final site design. In such cases, and subject to other limitations imposed in this section, credits available within the same tributary may be used. In no case shall credits from another tributary be used.~~

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

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

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

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

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

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

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

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

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