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SENATE BILL NO. 776

Senate Amendments in [] - February 7, 2020

A BILL to amend and reenact §§ 28.2-104.1, 28.2-1301, 28.2-1302, and 28.2-1308 of the Code of Virginia, relating to wetlands protection; living shorelines.

Patron Prior to Engrossment—Senator Lewis

Referred to Committee on Agriculture, Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That §§ 28.2-104.1, 28.2-1301, 28.2-1302, and 28.2-1308 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.

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.

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 in areas where the best available science shows that such approaches are 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.

§ 28.2-1301. Powers and duties of the Commission.

A. The Commission may receive gifts, grants, bequests, and devises of wetlands and money which shall be held for the uses prescribed by the donor, grantor, or testator and in accordance with the provisions of this chapter. The Commission shall manage any wetlands it receives so as to maximize their ecological value as provided in Article 2 (§ 28.2-1503 et seq.) of Chapter 15 of this title.

B. The Commission shall preserve and prevent the despoliation and destruction of wetlands while accommodating necessary economic development in a manner consistent with wetlands preservation and any standards set by the Commonwealth in addition to those identified in § 28.2-1308 to ensure protection of shorelines and sensitive coastal habitats from sea level rise and coastal hazards, including guidelines and minimum standards promulgated by the Commission pursuant to subsection C.

C. In order to perform its duties under this section and to assist counties, cities, and towns in regulating wetlands, the Commission shall promulgate and periodically update (i) guidelines which that scientifically evaluate vegetated and nonvegetated wetlands by type and describe the consequences of use of these wetlands types and (ii) minimum standards for protection and conservation of wetlands. The Virginia Institute of Marine Science shall provide advice and assistance to the Commission in

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59 developing these guidelines *and minimum standards* by evaluating wetlands by type and continuously
60 maintaining and updating an inventory of vegetated wetlands.

61 D. In developing guidelines, *standards*, or regulations under this chapter the Commission shall
62 consult with all affected state agencies. Consistent with other legal rights, consideration shall be given to
63 the unique character of the Commonwealth's tidal wetlands which are essential for the production of
64 marine and inland wildlife, waterfowl, finfish, shellfish and flora; serve as a valuable protective barrier
65 against floods, tidal storms and the erosion of the Commonwealth's shores and soil; are important for the
66 absorption of silt and pollutants; and are important for recreational and aesthetic enjoyment of the
67 people and for the promotion of tourism, navigation and commerce.

68 **§ 28.2-1302. Adoption of wetlands zoning ordinance; terms of ordinance.**

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

73 Wetlands Zoning Ordinance

74 § 1. The governing body of _____, acting pursuant to Chapter 13 (§ 28.2-1300 et seq.) of Title
75 28.2 of the Code of Virginia, adopts this ordinance regulating the use and development of wetlands.

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

77 "Back Bay and its tributaries" means the following, as shown on the United States Geological Survey
78 Quadrangle Sheets for Virginia Beach, North Bay, and Knotts Island: Back Bay north of the
79 Virginia-North Carolina state line; Capsies Creek north of the Virginia-North Carolina state line; Deal
80 Creek; Devil Creek; Nawney Creek; Redhead Bay, Sand Bay, Shipp's Bay, North Bay, and the waters
81 connecting them; Beggars Bridge Creek; Muddy Creek; Ashville Bridge Creek; Hells Point Creek; Black
82 Gut; and all coves, ponds and natural waterways adjacent to or connecting with the above-named bodies
83 of water.

84 "Commission" means the Virginia Marine Resources Commission.

85 "Commissioner" means the Commissioner of Marine Resources.

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

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

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

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

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

120 "Vegetated wetlands of Back Bay and its tributaries" or "vegetated wetlands of the North Landing

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

131 "Wetlands" means both vegetated and nonvegetated wetlands.

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

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

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

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

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

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

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

145 6. Conservation, repletion and research activities of the Commission, the Virginia Institute of Marine
 146 Science, the Department of Game and Inland Fisheries and other conservation-related agencies;

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

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

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

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

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

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

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

163 B. The permit application shall include the following: the name and address of the applicant; a
 164 detailed description of the proposed activities; a map, drawn to an appropriate and uniform scale,
 165 showing the area of wetlands directly affected, the location of the proposed work thereon, the area of
 166 existing and proposed fill and excavation, the location, width, depth and length of any proposed channel
 167 and disposal area, and the location of all existing and proposed structures, sewage collection and
 168 treatment facilities, utility installations, roadways, and other related appurtenances or facilities, including
 169 those on adjacent uplands; *a statement indicating whether use of a living shoreline as defined in*
 170 *§ 28.2-104.1 for a shoreline management practice is suitable, including reasons for the determination;* a
 171 description of the type of equipment to be used and the means of equipment access to the activity site;
 172 the names and addresses of owners of record of adjacent land and known claimants of water rights in or
 173 adjacent to the wetland of whom the applicant has notice; an estimate of cost; the primary purpose of
 174 the project; any secondary purposes of the project, including further projects; the public benefit to be
 175 derived from the proposed project; a complete description of measures to be taken during and after the
 176 alteration to reduce detrimental offsite effects; the completion date of the proposed work, project, or
 177 structure; and such additional materials and documentation as the wetlands board may require.

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

181 § 5. All applications, maps, and documents submitted shall be open for public inspection at the office

182 designated by the applicable governing body and specified in the advertisement for public hearing
183 required under § 6 of this ordinance.

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

195 § 7. A. Approval of a permit application shall require the affirmative vote of three members of a
196 five-member board or four members of a seven-member board.

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

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

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

213 § 8. The board may require a reasonable bond or letter of credit in an amount and with surety and
214 conditions satisfactory to it, securing to the Commonwealth compliance with the conditions and
215 limitations set forth in the permit. The board may, after a hearing held pursuant to this ordinance,
216 suspend or revoke a permit if the applicant has failed to comply with any of the conditions or
217 limitations set forth in the permit or has exceeded the scope of the work described in the application.
218 The board may, after a hearing, suspend a permit if the applicant fails to comply with the terms and
219 conditions set forth in the application.

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

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

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

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

- 234 1. The anticipated public and private benefit of the proposed activity exceeds its anticipated public
235 and private detriment.
- 236 2. The proposed development conforms with the standards prescribed in § 28.2-1308 of the Code of
237 Virginia and guidelines promulgated pursuant to § 28.2-1301 of the Code of Virginia.
- 238 3. The proposed activity does not violate the purposes and intent of this ordinance or Chapter 13
239 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia.

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

243 § 11. The permit shall be in writing, signed by the chairman of the board or his authorized

244 representative, and notarized. A copy of the permit shall be transmitted to the Commissioner.
245 § 12. No permit shall be granted without an expiration date established by the board. Upon proper
246 application, the board may extend the permit expiration date.

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

250 **§ 28.2-1308. Standards for use and development of wetlands; utilization of guidelines.**

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

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

256 2. Development in Tidewater Virginia, to the maximum extent practical, shall be concentrated in
257 wetlands of lesser ecological significance, in vegetated wetlands which have been irreversibly disturbed
258 before July 1, 1972, in nonvegetated wetlands which have been irreversibly disturbed prior to January 1,
259 1983, and in areas of Tidewater Virginia outside of wetlands.

260 B. The provisions of guidelines and minimum standards promulgated by the Commission pursuant to
261 § 28.2-1301 shall be considered in applying the standards listed in subsection A of this section.

262 C. When any activity authorized by a permit issued pursuant to this chapter is conditioned upon
263 compensatory mitigation for adverse impacts to wetlands, the applicant may be permitted to satisfy all or
264 part of such mitigation requirements by the purchase or use of credits from any wetlands mitigation
265 bank, including any banks owned by the permit applicant, that has been approved and is operating in
266 accordance with applicable federal and state guidance, laws, or regulations for the establishment, use and
267 operation of mitigation banks as long as (i) the bank is in the same fourth order subbasin, as defined by
268 the hydrologic unit boundaries of the National Watershed Boundary Dataset or by the hydrologic unit
269 system or dataset utilized and depicted or described in the bank's approved mitigation banking
270 instrument, as the impacted site, or in an adjacent subbasin within the same river watershed, as the
271 impacted site, or it meets all the conditions found in clauses (a) through (d) and either clause (e) or (f)
272 of this subsection; (ii) the bank is ecologically preferable to practicable on-site and off-site individual
273 mitigation options, as defined by federal wetland regulations; and (iii) the banking instrument, if
274 approved after July 1, 1996, has been approved by a process that included public review and comment.
275 When the bank is not located in the same subbasin or adjacent subbasin within the same river watershed
276 as the impacted site, the purchase or use of credits shall not be allowed unless the applicant
277 demonstrates to the satisfaction of the Commission that (a) the impacts will occur as a result of a
278 Virginia Department of Transportation linear project or as the result of a locality project for a locality
279 whose jurisdiction encompasses multiple river watersheds; (b) there is no practical same river watershed
280 mitigation alternative; (c) the impacts are less than one acre in a single and complete project within a
281 subbasin; (d) there is no significant harm to water quality or fish and wildlife resources within the river
282 watershed of the impacted site; and either (e) impacts within the Chesapeake Bay watershed are
283 mitigated within the Chesapeake Bay watershed as close as possible to the impacted site or (f) impacts
284 within subbasins 02080108, 02080208, and 03010205, as defined by the National Watershed Boundary
285 Dataset, are mitigated in-kind within those subbasins as close as possible to the impacted site. After July
286 1, 2002, the provisions of clause (f) shall apply only to impacts within subdivisions of the listed
287 subbasins where overlapping watersheds exist, as determined by the Department of Environmental
288 Quality, provided the Department has made such a determination by that date. For the purposes of this
289 subsection, the hydrologic unit boundaries of the National Watershed Boundary Dataset or other
290 hydrologic unit system may be adjusted by the Department of Environmental Quality to reflect
291 site-specific geographic or hydrologic information provided by the bank sponsor.

292 D. Where an agreed-upon permit condition requires the contribution of in-lieu fees to offset permitted
293 wetland losses, the wetlands board shall credit the applicant for any in-lieu fee payments made to the
294 Virginia Aquatic Resources Trust Fund or another dedicated wetlands restoration fund with reference to
295 the same activity.

296 For the purposes of this section, "river watershed" means the Potomac River Basin, Shenandoah
297 River Basin, James River Basin, Rappahannock River Basin, Roanoke and Yadkin Rivers Basin,
298 Chowan River Basin (including the Dismal Swamp and Albemarle Sound), Tennessee River Basin, Big
299 Sandy River Basin, Chesapeake Bay and its Small Coastal Basins, Atlantic Ocean, York River Basin,
300 and the New River Basin.

301 [2. That the provisions of this act shall not become effective unless an appropriation effectuating
302 the purposes of this act is included in a general appropriation act passed in 2020 by the General
303 Assembly that becomes law.]