

VIRGINIA ACTS OF ASSEMBLY -- 2021 SPECIAL SESSION I

CHAPTER 265

An Act to amend and reenact §§ 62.1-44.15:23 and 62.1-44.15:23.1 of the Code of Virginia, relating to wetland and stream mitigation banks; proximity of impacted site.

[H 1983]

Approved March 18, 2021

Be it enacted by the General Assembly of Virginia:

1. That §§ 62.1-44.15:23 and 62.1-44.15:23.1 of the Code of Virginia are amended and reenacted as follows:

§ 62.1-44.15:23. Wetland and stream mitigation banks.

A. For purposes of this section:

"Physiographic province" means one of the five physiographic provinces of Virginia designated as the Appalachian Plateaus, Blue Ridge, Coastal Plain, Piedmont, and Ridge and Valley physiographic provinces as identified on Figure 2 in the Overview of the Physiography and Vegetation of Virginia prepared by the Department of Conservation and Recreation, Division of Natural Heritage and dated February 2016. The Department of Environmental Quality may adjust the boundaries of a physiographic province to reflect site-specific boundaries based on relative elevation, relief, geomorphology, and lithology provided by the bank sponsor.

"Primary service area" means the fourth order subbasin in which the bank is located, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset or the hydrologic unit system or dataset utilized and depicted or described in the bank's approved mitigation banking instrument, and any adjacent fourth order subbasin within the same river watershed.

"River watershed" means the Potomac River Basin; Shenandoah River Basin; James River Basin; Rappahannock River Basin; Roanoke and Yadkin Rivers Basin; Chowan River Basin, including the Dismal Swamp and Albemarle Sound; Tennessee River Basin/Big Sandy River Basin Complex; Chesapeake Bay and its Small Coastal Basins; Atlantic Ocean; York River Basin; and New River Basin.

"Secondary service area" means the area outside the primary service area but within the same physiographic province in which the bank is located and any adjacent physiographic province within the same river watershed.

"Tree canopy" includes all of the area of canopy coverage by self-supporting and healthy woody plant material exceeding five feet in height.

B. When a Virginia Water Protection Permit is conditioned upon compensatory mitigation for adverse impacts to wetlands or streams, the applicant may be permitted to satisfy all or part of such mitigation requirements by the purchase or use of credits from any wetland or stream mitigation bank in the Commonwealth, or in Maryland on property wholly surrounded by and located in the Potomac River if the mitigation banking instrument provides that the Board shall have the right to enter and inspect the property and that the mitigation bank instrument and the contract for the purchase or use of such credits may be enforced in the courts of the Commonwealth, 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 (i) the bank is in the same fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset or by the hydrologic unit system or dataset utilized and depicted or described in the bank's approved mitigation banking instrument, as the impacted site, or in an adjacent subbasin within the same river watershed as the impacted site, is located in the bank's primary or secondary service area as provided in subsection C or it meets all the conditions found in clauses (a) through (d) and either clause (e) or (f) of this subsection; (ii) the bank is ecologically preferable to practicable onsite and offsite individual mitigation options as defined by federal wetland regulations; and (iii) the banking instrument, if approved after July 1, 1996, has been approved by a process that included public review and comment. When the bank impacted site is not located in the same subbasin or adjacent subbasin within the same river watershed as the impacted site bank's primary or secondary service area, the purchase or use of credits shall not be allowed unless the applicant demonstrates to the satisfaction of the Department of Environmental Quality that (a) 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 encompasses multiple river watersheds; (b) there is no practical same river watershed mitigation alternative; (c) the impacts are less than one acre in a single and complete project within a subbasin; (d) there is no significant harm to water quality or fish and wildlife resources within the river watershed of the impacted site; and either (e) impacts within the Chesapeake Bay watershed are mitigated within the Chesapeake Bay watershed as close as possible to the impacted site or (f) impacts within subbasins 02080108, 02080208, and 03010205, as defined by the National Watershed Boundary

Dataset, are mitigated in-kind within those subbasins, as close as possible to the impacted site. For the purposes of this subsection, the hydrologic unit boundaries of the National Watershed Boundary Dataset or other hydrologic unit system may be adjusted by the Department of Environmental Quality to reflect site-specific geographic or hydrologic information provided by the bank sponsor.

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

C. For impacts to a site for which no credits are available to purchase (i) in the primary service area of any mitigation provider or (ii) at a price below 200 percent of the current price of credits applicable to that site from a Board-approved fund dedicated to achieving no net loss of wetland acreage and functions, a permit applicant may be permitted to purchase or use credits from the secondary service area of a mitigation provider to satisfy all or any part of such applicant's mitigation requirements. For purposes of this subsection, the permit applicant shall provide a determination of credit availability and credit price no later than the time such applicant submits to the Department (a) its proof of credit acquisition or (b) a later change to such proof.

If a permit applicant purchases or uses credits from a secondary service area, the permit applicant shall:

1. Acquire three times the credits it would have had to acquire from a bank in the primary service area for wetland impacts and two times the number of credits it would have had to acquire in the primary service area for stream impacts;

2. When submitting proof of acquisition of credits for a subdivision or development, provide to the Department a plan that the permit applicant will implement that is certified by a licensed professional engineer, surveyor, or landscape architect for the planting, preservation, or replacement of trees on the development site such that the minimum tree canopy percentage 20 years after development is projected to be as follows:

a. Ten percent tree canopy for a site zoned for business, commercial, or industrial use;

b. Ten percent tree canopy for a residential site zoned for 20 or more units per acre;

c. Fifteen percent tree canopy for a residential site zoned for more than eight but fewer than 20 units per acre;

d. Twenty percent tree canopy for a residential site zoned for more than four but not more than eight units per acre;

e. Twenty-five percent tree canopy for a residential site zoned for more than two but not more than four units per acre; and

f. Thirty percent tree canopy for a residential site zoned for two or fewer units per acre.

For a mixed-use development, the tree canopy percentage required pursuant to this subdivision shall be that which is applicable to the predominant use.

The tree canopy requirements established under this subsection shall not supersede any additional requirements imposed by a locality pursuant to § 15.2-961 or 15.2-961.1.

~~B. D.~~ The Department of Environmental Quality is authorized to serve as a signatory to agreements governing the operation of mitigation banks. The Commonwealth, and its officials, agencies, and employees shall not be liable for any action taken under any agreement developed pursuant to such authority.

~~C. E.~~ State agencies and localities are authorized to purchase credits from mitigation banks.

~~D. F.~~ A locality may establish, operate and sponsor wetland or stream single-user mitigation banks within the Commonwealth that have been approved and are operated in accordance with the requirements of subsection A B, provided that such single-user banks may only be considered for compensatory mitigation for the sponsoring locality's municipal, joint municipal or governmental projects. For the purposes of this subsection, the term "sponsoring locality's municipal, joint municipal or governmental projects" means projects for which the locality is the named permittee, and for which there shall be no third-party leasing, sale, granting, transfer, or use of the projects or credits. Localities may enter into agreements with private third parties to facilitate the creation of privately sponsored wetland and stream mitigation banks having service areas developed through the procedures of subsection A B.

§ 62.1-44.15:23.1. Wetland and Stream Replacement Fund established.

There is hereby created in the state treasury a special nonreverting fund to be known as the Wetland and Stream Replacement Fund, hereafter referred to as "the Fund." The Fund shall be established on the books of the Comptroller. All contributions to the Board pursuant to clause (iii) of subsection B of § 62.1-44.15:21 shall be paid into the state treasury and credited to the Fund. Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund. The Fund shall be administered and utilized by the Department of Environmental Quality. The Fund may be used as an additional mechanism for compensatory mitigation for impacts to

aquatic resources (i) that result from activities authorized under (a) Section 404 and 401 of the Clean Water Act (33 U.S.C. § 1251 et seq.), (b) the Virginia Water Protection Permit Regulation (9VAC25-210 et seq.), or (c) Section 10 of the Rivers and Harbors Act (33 U.S.C. § 403); (ii) that result from unauthorized activities in waters of the United States or state waters; and (iii) in other cases, as the appropriate regulatory agencies deem acceptable. Moneys in the Fund shall be used for the purpose of purchasing mitigation bank credits in compliance with the provisions of subsection ~~A~~ *B* of § 62.1-44.15:23 as soon as practicable if qualifying credits are available. If such credits are not available within three years of the collection of moneys for a specific impact, then funds shall be utilized either (1) to purchase credits from a Board-approved fund that have met the success criteria, if qualifying credits are available, (2) for the planning, construction, monitoring, and preservation of wetland and stream mitigation projects and preservation, enhancement, or restoration of upland buffers adjacent to wetlands or other state waters when used in conjunction with creation or restoration of wetlands and streams, or (3) for other water quality improvement projects as deemed acceptable by the Department of Environmental Quality. Such projects developed under clause (2) shall be developed in accordance with guidelines, responsibilities, and standards established by the Department of Environmental Quality for use, operation, and maintenance consistent with 33 CFR Part 332, governing compensatory mitigation for activities authorized by U.S. Army Corps of Engineer permits. Expenditures and disbursements from the Fund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Director of the Department of Environmental Quality. The Department may charge a reasonable fee to administer the Fund.