

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 723

An Act to amend and reenact § 62.1-44.19:20, as it is currently effective and as it shall become effective, of the Code of Virginia, relating to nutrient credit calculations outside the Chesapeake Bay watershed.

[S 959]

Approved March 27, 2023

Be it enacted by the General Assembly of Virginia:

1. That § 62.1-44.19:20, as it is currently effective and as it shall become effective, of the Code of Virginia is amended and reenacted as follows:

§ 62.1-44.19:20. (Contingent expiration date) Nutrient credit certification.

A. The Board may adopt regulations for the purpose of establishing procedures for the certification of point source nutrient credits except that no certification shall be required for point source nitrogen and point source phosphorus credits generated by point sources regulated under the Watershed General Virginia Pollutant Discharge Elimination System Permit issued pursuant to § 62.1-44.19:14. The Board shall adopt regulations for the purpose of establishing procedures for the certification of nonpoint source nutrient credits.

B. Regulations adopted pursuant to this section shall:

1. Establish procedures for the certification and registration of credits, including:

a. Certifying credits that may be generated from effective nutrient controls or removal practices, including activities associated with the types of facilities or practices historically regulated by the Board, such as water withdrawal and treatment and wastewater collection, treatment, and beneficial reuse;

b. Certifying credits that may be generated from agricultural and urban stormwater best management practices, use or management of manures, managed turf, land use conversion, stream or wetlands projects, shellfish aquaculture, algal harvesting, and other established or innovative methods of nutrient control or removal, as appropriate;

c. Establishing a process and standards for wetland or stream credits to be converted to nutrient credits. Such process and standards shall only apply to wetland or stream credits that were established after July 1, 2005, and have not been transferred or used. Under no circumstances shall such credits be used for both wetland or stream credit and nutrient credit purposes;

d. Certifying credits from multiple practices that are bundled as a package by the applicant;

e. Prohibiting the certification of credits generated from activities funded by federal or state water quality grant funds other than controls and practices under subdivision B 1 a; however, baseline levels may be achieved through the use of such grants;

f. Establishing a timely and efficient certification process including application requirements, a reasonable application fee schedule not to exceed \$10,000 per application, and review and approval procedures;

g. Requiring public notification of a proposed nutrient credit-generating entity; and

h. Establishing a timeline for the consideration of certification applications for land conversion projects. The timeline shall provide that within 30 days of receipt of an application the Department shall, if warranted, conduct a site visit and that within 45 days of receipt of an application the Department shall either determine that the application is complete or request additional specific information from the applicant. A determination that an application for a land conversion project is complete shall not require the Department to issue the certification. The Department shall deny, approve, or approve with conditions an application within 15 days of the Department's determination that the application is complete. When the request for credit release is made concurrently with the application for a land conversion project certification, the concurrent release shall be processed on the same timeline. When the request for credit release is from a previously approved land conversion project, the Department shall schedule a site visit, if warranted, within 30 days of the request and shall deny, approve, or approve with conditions the release within 15 days of the site visit or determination that a site visit is not warranted. The timelines set out in this subdivision shall be implemented prior to adoption of regulations. The Department shall release credits from a land conversion project after it is satisfied that the applicant has met the criteria for release in an approved nutrient reduction implementation plan.

2. Establish credit calculation procedures for proposed credit-generating practices, including the determination of:

a. Baselines for credits certified under subdivision B 1 a in accordance with any applicable provisions of the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs;

b. Baselines established for agricultural practices, which shall be those actions necessary to achieve a

level of reduction assigned in the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs as implemented on the tract, field, or other land area under consideration;

c. Baselines for urban practices from new development and redevelopment, which shall be in compliance with postconstruction nutrient loading requirements of the Virginia Stormwater Management Program regulations. Baselines for all other existing development shall be at a level necessary to achieve the reductions assigned in the urban sector in the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs;

d. Baselines for land use conversion, which shall be based on the pre-conversion land use and the level of reductions assigned in the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs applicable to that land use;

e. Baselines for other nonpoint source credit-generating practices, which shall be based on the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs using the best available scientific and technical information;

f. Unless otherwise established by the Board, for certification within the Chesapeake Bay Watershed a credit-generating practice that involves land use conversion, which shall represent controls beyond those in place as of July 1, 2005. For other waters for which a TMDL has been approved, the practice shall represent controls beyond those in place at the time of TMDL approval;

g. Baseline dates for all other credit-generating practices, which shall be based on the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs; and

h. Credit quantities, which shall be established using the best available scientific and technical information at the time of certification;

3. Provide certification of credits on an appropriate temporal basis, such as annual, term of years, or perpetual, depending on the nature of the credit-generating practice. A credit shall be certified for a term of no less than 12 months;

4. Establish requirements to reasonably assure the generation of the credit depending on the nature of the credit-generating activity and use, such as legal instruments for perpetual credits, operation and maintenance requirements, and associated financial assurance requirements. Financial assurance requirements may include letters of credit, escrows, surety bonds, insurance, and where the credits are used or generated by a locality, authority, utility, sanitation district, or permittee operating an MS4 or a point source permitted under this article, its existing tax or rate authority. In lieu of long-term management fund financial assurance mechanisms established or required by regulation for projects generating credits from stream restoration, a third-party long-term steward approved by the Department, such as a public agency, nongovernmental organization or private land manager, may hold long-term management funds in a separate interest-bearing account to be used only for the long-term management of the stream restoration project;

5. Establish appropriate reporting requirements;

6. Provide for the ability of the Department to inspect or audit for compliance with the requirements of such regulations;

7. Provide that the option to acquire nutrient credits for compliance purposes shall not eliminate any requirement to comply with local water quality requirements;

8. Establish a credit retirement requirement whereby five percent of nonpoint source credits in the Chesapeake Bay Watershed other than controls and practices under subdivision B 1 a are permanently retired at the time of certification pursuant to this section for the purposes of offsetting growth in unregulated nutrient loads; and

9. Establish such other requirements as the Board deems necessary and appropriate.

C. ~~Prior to the adoption of such regulations, the~~ The Board shall certify (i) credits that may be generated from effective nutrient controls or removal practices, including activities associated with the types of facilities or practices historically regulated by the Board, such as water withdrawal and treatment and wastewater collection, treatment, and beneficial reuse, ~~on a case-by-case basis using the best available scientific and technical information and~~ (ii) credits that are located in tributaries outside of the Chesapeake Bay watershed as defined in § 62.1-44.15:35, using an average of the nutrient removal rates for each practice identified in Appendix A of the Department's document "Trading Nutrient Reductions from Nonpoint Source Best Management Practices in the Chesapeake Bay Watershed: Guidance for Agricultural Landowners and Your Potential Trading Partners-"; *however, in the certification and recertification of credits under this subsection, the Department may substitute a delivery factor that is deemed by the Director to be based on the best available scientific and technical information appropriate for the tributaries located outside of the Chesapeake Bay watershed as an alternative to any delivery factor derived from the application of the Chesapeake Bay Program watershed model.*

D. The Department shall establish and maintain an online Virginia Nutrient Credit Registry of credits as follows:

1. The registry shall include all nonpoint source credits certified pursuant to this article and may include point source nitrogen and point source phosphorus credits generated from point sources covered by the general permit issued pursuant to § 62.1-44.19:14 or point source nutrient credits certified

pursuant to this section at the option of the owner. No other credits shall be valid for compliance purposes.

2. Registration of credits on the registry shall not preclude or restrict the right of the owner of such credits from transferring the credits on such commercial terms as may be established by and between the owner and the regulated or unregulated party acquiring the credits.

3. The Department shall establish procedures for the listing and tracking of credits on the registry, including but not limited to (i) notification of the availability of new nutrient credits to the locality where the credit-generating practice is implemented at least five business days prior to listing on the registry to provide the locality an opportunity to acquire such credits at fair market value for compliance purposes and (ii) notification that the listing of credits on the registry does not constitute a representation by the Board or the owner that the credits will satisfy the specific regulatory requirements applicable to the prospective user's intended use and that the prospective user is encouraged to contact the Board for technical assistance to identify limitations, if any, applicable to the intended use.

4. The registry shall be publicly accessible without charge.

E. The owner or operator of a nonpoint source nutrient credit-generating entity that fails to comply with the provisions of this section shall be subject to the enforcement and penalty provisions of § 62.1-44.19:22.

F. Nutrient credits from stormwater nonpoint nutrient credit-generating facilities in receipt of a Nonpoint Nutrient Offset Authorization for Transfer letter from the Department prior to July 1, 2012, shall be considered certified nutrient credits and shall not be subject to further certification requirements or to the credit retirement requirement under subdivision B 8. However, such facilities shall be subject to the other provisions of this article, including registration, inspection, reporting, and enforcement.

§ 62.1-44.19:20. (Contingent effective date) Nutrient credit certification.

A. The Board may adopt regulations for the purpose of establishing procedures for the certification of point source nutrient credits except that no certification shall be required for point source nitrogen and point source phosphorus credits generated by point sources regulated under the Watershed General Virginia Pollutant Discharge Elimination System Permit issued pursuant to § 62.1-44.19:14. The Board shall adopt regulations for the purpose of establishing procedures for the certification of nonpoint source nutrient credits.

B. Regulations adopted pursuant to this section shall:

1. Establish procedures for the certification and registration of credits, including:

a. Certifying credits that may be generated from effective nutrient controls or removal practices, including activities associated with the types of facilities or practices historically regulated by the Board, such as water withdrawal and treatment and wastewater collection, treatment, and beneficial reuse;

b. Certifying credits that may be generated from agricultural and urban stormwater best management practices, use or management of manures, managed turf, land use conversion, stream or wetlands projects, shellfish aquaculture, algal harvesting, and other established or innovative methods of nutrient control or removal, as appropriate;

c. Establishing a process and standards for wetland or stream credits to be converted to nutrient credits. Such process and standards shall only apply to wetland or stream credits that were established after July 1, 2005, and have not been transferred or used. Under no circumstances shall such credits be used for both wetland or stream credit and nutrient credit purposes;

d. Certifying credits from multiple practices that are bundled as a package by the applicant;

e. Prohibiting the certification of credits generated from activities funded by federal or state water quality grant funds other than controls and practices under subdivision B 1 a; however, baseline levels may be achieved through the use of such grants;

f. Establishing a timely and efficient certification process including application requirements, a reasonable application fee schedule not to exceed \$10,000 per application, and review and approval procedures;

g. Requiring public notification of a proposed nutrient credit-generating entity; and

h. Establishing a timeline for the consideration of certification applications for land conversion projects. The timeline shall provide that within 30 days of receipt of an application the Department shall, if warranted, conduct a site visit and that within 45 days of receipt of an application the Department shall either determine that the application is complete or request additional specific information from the applicant. A determination that an application for a land conversion project is complete shall not require the Department to issue the certification. The Department shall deny, approve, or approve with conditions an application within 15 days of the Department's determination that the application is complete. When the request for credit release is made concurrently with the application for a land conversion project certification, the concurrent release shall be processed on the same timeline. When the request for credit release is from a previously approved land conversion project, the Department shall schedule a site visit, if warranted, within 30 days of the request and shall deny, approve, or approve with conditions the release within 15 days of the site visit or determination that a site visit is not warranted. The timelines set out in this subdivision shall be implemented prior to adoption of regulations. The Department shall release credits from a land conversion project after it is

satisfied that the applicant has met the criteria for release in an approved nutrient reduction implementation plan.

2. Establish credit calculation procedures for proposed credit-generating practices, including the determination of:

a. Baselines for credits certified under subdivision B 1 a in accordance with any applicable provisions of the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs;

b. Baselines established for agricultural practices, which shall be those actions necessary to achieve a level of reduction assigned in the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs as implemented on the tract, field, or other land area under consideration;

c. Baselines for urban practices from new development and redevelopment, which shall be in compliance with postconstruction nutrient loading requirements of the Virginia Stormwater Management Program regulations. Baselines for all other existing development shall be at a level necessary to achieve the reductions assigned in the urban sector in the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs;

d. Baselines for land use conversion, which shall be based on the pre-conversion land use and the level of reductions assigned in the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs applicable to that land use;

e. Baselines for other nonpoint source credit-generating practices, which shall be based on the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs using the best available scientific and technical information;

f. Unless otherwise established by the Board, for certification within the Chesapeake Bay Watershed a credit-generating practice that involves land use conversion, which shall represent controls beyond those in place as of July 1, 2005. For other waters for which a TMDL has been approved, the practice shall represent controls beyond those in place at the time of TMDL approval;

g. Baseline dates for all other credit-generating practices, which shall be based on the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs; and

h. Credit quantities, which shall be established using the best available scientific and technical information at the time of certification;

3. Provide certification of credits on an appropriate temporal basis, such as annual, term of years, or perpetual, depending on the nature of the credit-generating practice. A credit shall be certified for a term of no less than 12 months;

4. Establish requirements to reasonably assure the generation of the credit depending on the nature of the credit-generating activity and use, such as legal instruments for perpetual credits, operation and maintenance requirements, and associated financial assurance requirements. Financial assurance requirements may include letters of credit, escrows, surety bonds, insurance, and where the credits are used or generated by a locality, authority, utility, sanitation district, or permittee operating an MS4 or a point source permitted under this article, its existing tax or rate authority. In lieu of long-term management fund financial assurance mechanisms established or required by regulation for projects generating credits from stream restoration, a third-party long-term steward approved by the Department, such as a public agency, nongovernmental organization or private land manager, may hold long-term management funds in a separate interest-bearing account to be used only for the long-term management of the stream restoration project. Notwithstanding any release schedule set out in regulations of the Board, the Department may accelerate the release of a maximum of 50 percent of nutrient credits from a stream restoration project based on (i) a determination that the level of risk for restoration failure is low, (ii) the provision of additional financial assurance in an amount adequate to cover the cost of project repair or replacement in the event of failure, and (iii) the experience of the applicant or the applicant's agents who will implement the stream restoration project;

5. Establish appropriate reporting requirements;

6. Provide for the ability of the Department to inspect or audit for compliance with the requirements of such regulations;

7. Provide that the option to acquire nutrient credits for compliance purposes shall not eliminate any requirement to comply with local water quality requirements;

8. Establish a credit retirement requirement whereby five percent of nonpoint source credits in the Chesapeake Bay Watershed other than controls and practices under subdivision B 1 a are permanently retired at the time of certification pursuant to this section for the purposes of offsetting growth in unregulated nutrient loads; and

9. Establish such other requirements as the Board deems necessary and appropriate.

C. ~~Prior to the adoption of such regulations, the~~ The Board shall certify (i) credits that may be generated from effective nutrient controls or removal practices, including activities associated with the types of facilities or practices historically regulated by the Board, such as water withdrawal and treatment and wastewater collection, treatment, and beneficial reuse, ~~on a case-by-case basis~~ using the best available scientific and technical information and (ii) credits that are located in tributaries outside of the Chesapeake Bay watershed as defined in § 62.1-44.15:35, using an average of the nutrient removal rates for each practice identified in Appendix A of the Department's document "Trading Nutrient

Reductions from Nonpoint Source Best Management Practices in the Chesapeake Bay Watershed: Guidance for Agricultural Landowners and Your Potential Trading Partners-"; *however, in the certification and recertification of credits under this subsection, the Department may substitute a delivery factor that is deemed by the Director to be based on the best available scientific and technical information appropriate for the tributaries located outside of the Chesapeake Bay watershed as an alternative to any delivery factor derived from the application of the Chesapeake Bay Program watershed model.*

D. The Department shall establish and maintain an online Virginia Nutrient Credit Registry of credits as follows:

1. The registry shall include all nonpoint source credits certified pursuant to this article and may include point source nitrogen and point source phosphorus credits generated from point sources covered by the general permit issued pursuant to § 62.1-44.19:14 or point source nutrient credits certified pursuant to this section at the option of the owner. No other credits shall be valid for compliance purposes.

2. Registration of credits on the registry shall not preclude or restrict the right of the owner of such credits from transferring the credits on such commercial terms as may be established by and between the owner and the regulated or unregulated party acquiring the credits.

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