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SENATE BILL NO. 959

Offered January 11, 2023

Prefiled January 6, 2023

A *BILL 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.*

Patron—Hanger

Referred to Committee on Agriculture, Conservation and Natural Resources

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

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59 determination of:

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

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

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

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

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

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

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

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

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

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

98 5. Establish appropriate reporting requirements;

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

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

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

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

108 C. ~~Prior to the adoption of such regulations, the~~ The Board shall certify (i) credits that may be
109 generated from effective nutrient controls or removal practices, including activities associated with the
110 types of facilities or practices historically regulated by the Board, such as water withdrawal and
111 treatment and wastewater collection, treatment, and beneficial reuse, ~~on a case-by-case basis~~ using the
112 best available scientific and technical information and (ii) credits that are located in tributaries outside of
113 the Chesapeake Bay watershed as defined in § 62.1-44.15:35, using an average of the nutrient removal
114 rates for each practice identified in Appendix A of the Department's document "Trading Nutrient
115 Reductions from Nonpoint Source Best Management Practices in the Chesapeake Bay Watershed:
116 Guidance for Agricultural Landowners and Your Potential Trading Partners;" *but, for calculating the*
117 *number of credits generated through stream restoration projects, using a delivery factor of 1.0.*

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

120 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.

182 When the request for credit release is from a previously approved land conversion project, the
183 Department shall schedule a site visit, if warranted, within 30 days of the request and shall deny,
184 approve, or approve with conditions the release within 15 days of the site visit or determination that a
185 site visit is not warranted. The timelines set out in this subdivision shall be implemented prior to
186 adoption of regulations. The Department shall release credits from a land conversion project after it is
187 satisfied that the applicant has met the criteria for release in an approved nutrient reduction
188 implementation plan.

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

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

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

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

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

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

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

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

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

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

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

234 5. Establish appropriate reporting requirements;

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

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

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

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

244 C. ~~Prior to the adoption of such regulations, the~~ The Board shall certify (i) credits that may be
245 generated from effective nutrient controls or removal practices, including activities associated with the
246 types of facilities or practices historically regulated by the Board, such as water withdrawal and
247 treatment and wastewater collection, treatment, and beneficial reuse, ~~on a case-by-case basis~~ using the
248 best available scientific and technical information and (ii) credits that are located in tributaries outside of
249 the Chesapeake Bay watershed as defined in § 62.1-44.15:35, using an average of the nutrient removal
250 rates for each practice identified in Appendix A of the Department's document "Trading Nutrient
251 Reductions from Nonpoint Source Best Management Practices in the Chesapeake Bay Watershed:
252 Guidance for Agricultural Landowners and Your Potential Trading Partners:" *but, for calculating the*
253 *number of credits generated through stream restoration projects, using a delivery factor of 1.0.*

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255 as follows:

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

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

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

272 4. The registry shall be publicly accessible without charge.

273 E. The owner or operator of a nonpoint source nutrient credit-generating entity that fails to comply
274 with the provisions of this section shall be subject to the enforcement and penalty provisions of §
275 62.1-44.19:22.

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277 Nonpoint Nutrient Offset Authorization for Transfer letter from the Department prior to July 1, 2012,
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279 or to the credit retirement requirement under subdivision B 8. However, such facilities shall be subject
280 to the other provisions of this article, including registration, inspection, reporting, and enforcement.