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HOUSE BILL NO. 792

Offered January 12, 2022

Prefiled January 11, 2022

A BILL to amend and reenact § 62.1-44.15:35, as it is currently effective and as it may become effective, of the Code of Virginia, relating to nutrient credit trading; adjacent hydrologic unit code.

Patron—LaRock

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, as it is currently effective and as it may become effective, of the Code of Virginia is amended and reenacted as follows:

§ 62.1-44.15:35. (Contingent expiration date) 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 be generated in the same or adjacent eight-digit hydrologic unit code as defined by the United States Geological Survey as the permitted site 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

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59 available within the same tributary may be used. In no case shall credits from another tributary be used.
60 *Credits shall not be used in a locality with a population of fewer than 20,000 people and geographic*
61 *area under 200 square miles for an adjacent eight-digit hydrologic unit code.*

62 G. For that portion of a site's compliance with stormwater nonpoint nutrient runoff water quality
63 criteria being obtained through nutrient credits, the applicant shall (i) comply with a 1:1 ratio of the
64 nutrient credits to the site's remaining postdevelopment nonpoint nutrient runoff compliance requirement
65 being met by credit use and (ii) use credits certified as perpetual credits pursuant to Article 4.02
66 (§ 62.1-44.19:12 et seq.).

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

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

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

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

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

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

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

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

112 **§ 62.1-44.15:35. (Contingent effective date) Nutrient credit use and additional offsite options for**
113 **construction activities.**

114 A. As used in this section:

115 "Nutrient credit" or "credit" means a type of offsite option that is a nutrient credit certified pursuant
116 to Article 4.02 (§ 62.1-44.19:12 et seq.).

117 "Offsite option" means an alternative available, away from the real property where land disturbance
118 is occurring, to address water quality or water quantity technical criteria established pursuant to §
119 62.1-44.15:28.

120 "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.

B. No offsite option shall be used 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.

C. Unless prohibited by subsection B, a VESMP authority or a VSMP authority:

1. May allow the use of offsite options for compliance with water quality and water quantity technical criteria established pursuant to § 62.1-44.15:28, in whole or in part; and

2. Shall allow the use of nutrient credits for compliance with the water quality technical criteria when:

a. Less than five acres of land will be disturbed;

b. The phosphorous water quality reduction requirement is less than 10 pounds per year; or

c. It is demonstrated to the satisfaction of the VESMP or 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) compliance with water quality technical criteria cannot practicably be met onsite. The requirements of clauses (i) through (iv) shall be deemed to have been met if it is demonstrated that onsite control of at least 75 percent of the required phosphorous water quality reduction will be achieved.

D. No VSMP or VESMP authority may grant an exception to, or waiver of, post-development nonpoint nutrient runoff compliance requirements unless offsite options have been considered and found not available.

E. The VSMP or VESMP authority shall require that offsite options approved by the Department or applicable state board achieve the necessary phosphorous water quality reductions prior to the commencement of the land-disturbing activity. A pollutant loading pro rata share program established by a locality pursuant to § 15.2-2243 and approved by the Department or applicable state board prior to January 1, 2011, including those that may achieve nutrient reductions after the commencement of the land-disturbing activity, may continue to operate in the approved manner for a transition period ending July 1, 2014. In the case of a phased project, the land disturber may acquire or achieve the offsite nutrient reductions prior to the commencement of each phase of the land-disturbing activity in an amount sufficient for each such phase. The land disturber shall have the right to select between the use of nutrient credits or other offsite options, except during the transition period in those localities to which the transition period applies.

F. With the consent of the land disturber, in resolving enforcement actions, the VESMP authority or the Board may include the use of offsite options to compensate for (i) nutrient control deficiencies occurring during the period of noncompliance and (ii) permanent nutrient control deficiencies.

G. This section shall not be construed as limiting the authority established under § 15.2-2243; however, under any pollutant loading pro rata share program established thereunder, the subdivider or developer shall be given appropriate credit for nutrient reductions achieved through offsite options. The locality may use funds collected for nutrient reductions pursuant to a locality pollutant loading pro rata share program for nutrient reductions in the same tributary within the same locality as the land-disturbing activity, or for the acquisition of nutrient credits.

H. Nutrient credits shall not be used to address water quantity technical criteria. Nutrient credits shall be generated in the same or adjacent fourth order subbasin, as defined by the hydrologic unit boundaries of the National Watershed Boundary Dataset, as the land-disturbing activity. If no credits are available within these subbasins when the VESMP or VSMP authority accepts the final site design, credits available within the same tributary may be used. *Credits shall not be used in a locality with a population of fewer than 20,000 people and geographic area under 200 square miles for an adjacent fourth order subbasin.* The following requirements apply to the use of nutrient credits:

1. Documentation of the acquisition of nutrient credits shall be provided to the VESMP authority and the Department or the VSMP authority 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.

2. 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 for the credits. Such fee shall be deposited into the Virginia Stormwater Management Fund established by § 62.1-44.15:29.

3. For that portion of a site's compliance with water quality technical criteria being obtained through nutrient credits, the land disturber shall (i) comply with a 1:1 ratio of the nutrient credits to the site's remaining post-development nonpoint nutrient runoff compliance requirement being met by credit use and (ii) use credits certified as perpetual credits pursuant to Article 4.02 (§ 62.1-44.19:12 et seq.).

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

1. The use of nutrient credits to meet post-construction nutrient control requirements shall be accounted for in the implementation of total maximum daily loads and MS4 permits as specified in subdivisions 1, 2, and 3. In order to ensure that the nutrient reduction benefits of nutrient credits used to meet post-construction nutrient control requirements are attributed to the location of the land-disturbing activity where the credit is used, the following account method shall be used:

1. Chesapeake Bay TMDL.

a. Where nutrient credits are used to meet nutrient reduction requirements applicable to redevelopment projects, a 1:1 credit shall be applied toward MS4 compliance with the Chesapeake Bay TMDL waste load allocation or related MS4 permit requirement applicable to the MS4 service area, including the site of the land-disturbing activity, such that the nutrient reductions of redevelopment projects are counted as part of the MS4 nutrient reductions to the same extent as when land-disturbing activities use onsite measures to comply.

b. Where nutrient credits are used to meet post-construction requirements applicable to new development projects, the nutrient reduction benefits represented by such credits shall be attributed to the location of the land-disturbing activity where the credit is used to the same extent as when land-disturbing activities use onsite measures to comply.

c. A 1:1 credit shall be applied toward compliance by a locality that operates a regulated MS4 with its Chesapeake Bay TMDL waste load allocation or related MS4 permit requirement to the extent that nutrient credits are obtained by the MS4 jurisdiction from a nutrient credit-generating entity as defined in § 62.1-44.19:13 independent of or in excess of those required to meet the post-construction requirements.

2. Local nutrient-related TMDLs adopted prior to the land-disturbing activity.

a. Where nutrient credits are used to meet nutrient reduction requirements applicable to redevelopment projects, a 1:1 credit shall be applied toward MS4 compliance with any local TMDL waste load allocation or related MS4 permit requirement applicable to the MS4 service area, including the site of the land-disturbing activity, such that the nutrient reductions of redevelopment projects are counted as part of the MS4 nutrient reductions to the same extent as when land-disturbing activities use onsite measures to comply, provided the nutrient credits are generated upstream of where the land-disturbing activity discharges to the water body segment that is subject to the TMDL.

b. Where nutrient credits are used to meet post-construction requirements applicable to new development projects, the nutrient reduction benefits represented by such credits shall be attributed to the location of the land-disturbing activity where the credit is used to the same extent as when land-disturbing activities use onsite measures to comply, provided the nutrient credits are generated upstream of where the land-disturbing activity discharges to the water body segment that is subject to the TMDL.

c. A 1:1 credit shall be applied toward MS4 compliance with any local TMDL waste load allocation or related MS4 permit requirement to the extent that nutrient credits are obtained by the MS4 jurisdiction from a nutrient credit-generating entity as defined in § 62.1-44.19:13 independent of or in excess of those required to meet the post-construction requirements. However, such credits shall be generated upstream of where the land-disturbing activity discharges to the water body segment that is subject to the TMDL.

3. Future local nutrient-related TMDLs.

This subdivision applies only to areas where there has been a documented prior use of nutrient credits to meet nutrient control requirements in an MS4 service area that flows to or is upstream of a water body segment for which a nutrient-related TMDL is being developed. For a TMDL waste load allocation applicable to the MS4, the Board shall develop the TMDL waste load allocation with the nutrient reduction benefits represented by the nutrient credit use being attributed to the MS4, except when the Board determines during the TMDL development process that reasonable assurance of implementation cannot be provided for nonpoint source load allocations due to the nutrient reduction

244 benefits being attributed in this manner. The Board shall have no obligation to account for nutrient
245 reduction benefits in this manner if the MS4 does not provide the Board with adequate documentation of
246 (i) the location of the land-disturbing activities, (ii) the number of nutrient credits, and (iii) the
247 generation of the nutrient credits upstream of the site at which the land-disturbing activity discharges to
248 the water body segment addressed by the TMDL. Such attribution shall not be interpreted as amending
249 the requirement that the TMDL be established at a level necessary to meet the applicable water quality
250 standard.