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SENATE BILL NO. 187

Offered January 12, 2022

Prefiled January 10, 2022

A BILL to amend and reenact § 62.1-44.19:20 of the Code of Virginia, relating to accelerated stream nutrient credit release.

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 of the Code of Virginia is amended and reenacted as follows:****§ 62.1-44.19:20. 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

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

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

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

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

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

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

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

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

85 4. Establish requirements to reasonably assure the generation of the credit depending on the nature of
86 the credit-generating activity and use, such as legal instruments for perpetual credits, operation and
87 maintenance requirements, and associated financial assurance requirements. Financial assurance
88 requirements may include letters of credit, escrows, surety bonds, insurance, and where the credits are
89 used or generated by a locality, authority, utility, sanitation district, or permittee operating an MS4 or a
90 point source permitted under this article, its existing tax or rate authority. *The release of credits
91 generated from a stream restoration project may be accelerated by the Department beyond any release
92 schedule set out in Board regulations when a qualified applicant provides a bond the Department finds
93 sufficient to (i) provide a high degree of confidence that required performance standards will be
94 achieved and (ii) cover the cost of correcting a failure to achieve the performance standards. Financial
95 assurance in the form of a bond equal to the cost of replacing accelerated credits based on the market
96 rate, as demonstrated to the Department's satisfaction by the applicant, for stream nutrient credits in the
97 same river watershed shall be deemed sufficient for the Department to accelerate the release schedule.
98 Upon demonstration that a sufficient bond for accelerated stream nutrient credit release has been
99 provided, the Department shall release 75 percent of the project's calculated stream nutrient credits
100 following completion of construction and Department verification of completion of the conditions of the
101 nutrient credit certification. The remaining 25 percent shall be released in accordance with the Board's
102 regulations. The bond for accelerated credits shall be fully released by the time of final credit release.
103 For purposes of this subdivision, "qualified applicant" means an applicant engaged in more than one
104 locality in the creation and operation of stream restoration projects approved and operating in
105 accordance with Board regulations and involving a cumulative total of at least 25,000 linear feet;*

106 5. Establish appropriate reporting requirements;

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

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

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

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

116 C. Prior to the adoption of such regulations, the Board shall certify (i) credits that may be generated
117 from effective nutrient controls or removal practices, including activities associated with the types of
118 facilities or practices historically regulated by the Board, such as water withdrawal and treatment and
119 wastewater collection, treatment, and beneficial reuse, on a case-by-case basis using the best available
120 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. "

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.