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HOUSE BILL NO. 479

Offered January 12, 2022

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A BILL to amend and reenact § 62.1-44.15:23 of the Code of Virginia, relating to wetland and stream mitigation credits; dam removal credits.

Patron—Bulova

Committee Referral Pending

Be it enacted by the General Assembly of Virginia:

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

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

A. For purposes of this section:

"Dam removal credits" means stream credits generated through the removal of a significant obstruction.

"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.

"Significant obstruction" means (i) an obsolete manmade structure, such as a dam or other impediment, in a fourth order as defined by the U.S. Geological Survey National Hydrography GIS dataset, or larger stream inhibiting the migration or distribution of anadromous species and (ii) upon request of a mitigation bank sponsor, such other obsolete structures on lower order streams determined by the Department, in consultation with the Department of Wildlife Resources and the Marine Resources Commission, to be a significant impediment to the migration or distribution of anadromous species.

"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 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); (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 impacted site is not located in the 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

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59 result of a locality project for a locality whose jurisdiction encompasses multiple river watersheds; (b)
60 there is no practical same river watershed mitigation alternative; (c) the impacts are less than one acre in
61 a single and complete project within a subbasin; (d) there is no significant harm to water quality or fish
62 and wildlife resources within the river watershed of the impacted site; and either (e) impacts within the
63 Chesapeake Bay watershed are mitigated within the Chesapeake Bay watershed as close as possible to
64 the impacted site or (f) impacts within subbasins 02080108, 02080208, and 03010205, as defined by the
65 National Watershed Boundary Dataset, are mitigated in-kind within those subbasins, as close as possible
66 to the impacted site. For the purposes of this subsection, the hydrologic unit boundaries of the National
67 Watershed Boundary Dataset or other hydrologic unit system may be adjusted by the Department of
68 Environmental Quality to reflect site-specific geographic or hydrologic information provided by the bank
69 sponsor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

115 G. Notwithstanding any service limitation of this section, an applicant may be permitted to satisfy all
116 or part of its stream impact compensatory mitigation requirements through dam removal credits
117 generated in the same or adjacent river watershed as the impacted site. When using dam removal
118 credits from an adjacent watershed, (i) the impacted site shall be located downstream from the first
119 significant obstruction in the river watershed of impact, as determined by the Department in
120 consultation with the Department of Wildlife Resources and the Marine Resources Commission; (ii) the

121 application shall acquire 1.5 times the number of dam removal credits it would have otherwise had to
122 acquire from a primary service area; and (iii) the applicant may only fulfill a maximum of 75 percent of
123 its stream mitigation requirements with dam removal credits unless primary service area credits are not
124 available to meet the remaining need, in which case all stream credits may be acquired from the
125 adjacent watershed. Mitigation banks generating credits through removal of a significant obstruction
126 shall be assigned a service area consistent with this subsection.