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SENATE BILL NO. 654

Offered January 18, 2022

A *BILL to amend and reenact § 62.1-44.15:23 of the Code of Virginia, relating to wetland and stream mitigation banks; location of site.*

Patron—McClellan

Referred to Committee on Agriculture, Conservation and Natural Resources

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:

"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.

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

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59 Environmental Quality to reflect site-specific geographic or hydrologic information provided by the bank
60 sponsor.

61 C. For impacts to a site for which no credits are available to purchase (i) in the primary service area
62 of any mitigation provider or (ii) at a price below 200 percent of the current price of credits applicable
63 to that site from a Board-approved fund dedicated to achieving no net loss of wetland acreage and
64 functions, a permit applicant may be permitted to purchase or use credits from the secondary service
65 area of a mitigation provider *or from the locality in which the site is located* to satisfy all or any part of
66 such applicant's mitigation requirements. *Credits from a locality shall be generated from mitigation (i) in*
67 *the same fourth order subbasin in which the site is located and any adjacent fourth order subbasin*
68 *within the same watershed or (ii) within the same physiographic province in which the site is located*
69 *and any adjacent physiographic province within the same watershed.* For purposes of this subsection,
70 the permit applicant shall provide a determination of credit availability and credit price no later than the
71 time such applicant submits to the Department (a) its proof of credit acquisition or (b) a later change to
72 such proof.

73 If a permit applicant purchases or uses credits ~~from a secondary service area pursuant to this~~
74 ~~subsection~~, the permit applicant shall:

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

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

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

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

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

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

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

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

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

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

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

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

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