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SENATE BILL NO. 77

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Agriculture, Chesapeake and Natural Resources
on February 22, 2012)

(Patron Prior to Substitute—Senator Watkins)

A BILL to amend and reenact §§ 10.1-603.4:1, 10.1-603.8:1, 62.1-44.19:13, 62.1-44.19:15, and 62.1-44.19:18 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 6 of Title 10.1 an article numbered 1.1:1, consisting of sections numbered 10.1-603.15:1 through 10.1-603.15:5, and by adding in Article 4.02 of Chapter 3.1 of Title 62.1 a section numbered 62.1-44.19:20, relating to the expansion of the nutrient credit exchange program and the development of a credit registry.

Be it enacted by the General Assembly of Virginia:

1. That §§ 10.1-603.4:1, 10.1-603.8:1, 62.1-44.19:13, 62.1-44.19:15, and 62.1-44.19:18 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 6 of Title 10.1 an article numbered 1.1:1, consisting of sections numbered 10.1-603.15:1 through 10.1-603.15:5, and by adding in Article 4.02 of Chapter 3.1 of Title 62.1 a section numbered 62.1-44.19:20 as follows:

§ 10.1-603.4:1. Virginia Stormwater Management Fund established.

There is hereby created in the state treasury a special nonreverting fund to be known as the Virginia Stormwater Management Fund, hereafter referred to as "the Fund." The Fund shall be established on the books of the Comptroller. All moneys collected pursuant to § 10.1-603.4 and all civil penalties collected pursuant to § 10.1-603.15:4 shall be paid into the state treasury and credited to the Fund. Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund. Moneys in the Fund shall be used solely for the purposes of carrying out the Department's responsibilities under this article. Expenditures and disbursements from the Fund shall be made by the State Treasurer on warrants issued by the Comptroller upon written request signed by the Director.

An accounting of moneys received by and distributed from the Fund shall be kept by the State Comptroller.

§ 10.1-603.8:1. Nutrient credit use and additional off-site options for construction activities.

A. As used in this section:

"Nonpoint nutrient offset" means nutrient reductions certified as nonpoint nutrient offsets under the Chesapeake Bay Watershed Nutrient Exchange Program (§ 62.1-44.19:12 et seq.).

"Nutrient credit" or "credit" means a nutrient credit certified pursuant to Article 1.1:1 (§ 10.1-603.15:1 et seq.).

"Permit issuing authority" has the same meaning as in § 10.1-603.2 and includes any locality that has adopted a local stormwater management program.

"Tributary" 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" or "VSMP" has the same meaning as in § 10.1-603.2 and includes, until July 1, 2014, any locality that has adopted a local stormwater management program.

B. Permit issuing authorities are A VSMP authority is authorized to allow compliance with stormwater nonpoint nutrient runoff water quality criteria established pursuant to § 10.1-603.4, in whole or in part, through the use of the permittee's applicant's acquisition of nonpoint nutrient offsets nutrient credits in the same tributary.

C. No permit issuing authority shall allow the use of nonpoint nutrient offsets applicant shall use nutrient credits to address water quantity control requirements. No permit issuing authority shall allow the use of nonpoint nutrient offsets applicant shall use nutrient credits or other off-site options in contravention of local water quality-based limitations: (i) consistent with determinations made determined pursuant to subsection B of § 62.1-44.19:7 § 62.1-44.19:14, (ii) contained in a municipal separate storm sewer system (MS4) program plan approved by the Department, or adopted pursuant to § 10.1-603.7 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, off-site options may be used provided that such options do not preclude or impair compliance with the local limitation.

D. A permit issuing VSMP authority shall allow off-site options in accordance with subsection I

60 when:

61 1. *Less than five acres of land will be disturbed;*

62 2. *The postconstruction phosphorous control requirement is less than 10 pounds per year; or*

63 3. The *state* permit applicant demonstrates to the satisfaction of the ~~permit issuing~~ VSMP authority
64 that (i) alternative site designs have been considered that may accommodate on-site best management
65 practices, (ii) on-site best management practices have been considered in alternative site designs to the
66 maximum extent practicable, (iii) appropriate on-site best management practices will be implemented,
67 and (iv) full compliance with postdevelopment nonpoint nutrient runoff compliance requirements cannot
68 practicably be met on site. For purposes of this subdivision, if an applicant demonstrates on-site control
69 of at least 75 percent of the required phosphorous nutrient reductions, the applicant shall be deemed to
70 have met the requirements of clauses (i) through (iv);

71 2. *Less than five acres of land will be disturbed; or*

72 3. *The postconstruction phosphorous control requirement is less than 10 pounds per year.*

73 E. Documentation of the ~~permittee's applicant's~~ acquisition of ~~nonpoint nutrient offsets~~ *nutrient*
74 *credits* shall be provided to the ~~permit issuing~~ VSMP authority *and the Department* in a certification
75 from an ~~offset broker~~ *the credit provider* documenting the number of phosphorus ~~nonpoint nutrient~~
76 *offsets nutrient credits* acquired and the associated ratio of nitrogen ~~nonpoint nutrient~~ *offsets at the*
77 *offset nutrient credits at the credit-generating facility.* The ~~offset broker~~ shall pay the ~~permit issuing~~
78 *authority* *Until the effective date of regulations establishing application fees in accordance with*
79 *§ 10.1-603.15:2, the credit provider shall pay the Department* a water quality enhancement fee equal to
80 six percent of the amount paid by the permittee for the ~~nonpoint nutrient offsets~~. If a locality is not the
81 ~~permit issuing authority~~, such *credits*. Such fee shall be deposited into the Virginia Stormwater
82 Management Fund established by § 10.1-603.4:1. If the ~~permit issuing authority~~ is a locality, such fees
83 shall be used solely in the locality where the associated stormwater permit applies for inspection and
84 maintenance of stormwater best management practices, stormwater educational programs, or programs
85 designed to protect or improve local water quality.

86 F. ~~Nonpoint nutrient offsets~~ *Nutrient credits* used pursuant to subsection B shall be generated in the
87 same or adjacent ~~eight digit~~ *eight-digit* hydrologic unit code as defined by the United States Geological
88 Survey as the permitted site. ~~Nonpoint nutrient offsets~~ *except as otherwise limited in subsection C.*
89 *Nutrient credits* outside the same or adjacent ~~eight digit~~ *eight-digit* hydrologic unit code may only be
90 used if it is determined by the ~~permit issuing~~ VSMP authority that no ~~nonpoint nutrient offsets~~ *credits*
91 are available within the same or adjacent ~~eight digit~~ *eight-digit* hydrologic unit code when the ~~permit~~
92 ~~issuing~~ VSMP authority accepts the final site design. In such cases, and subject to other limitations
93 imposed in this section, ~~nonpoint nutrient offsets~~ *generated credits available* within the same tributary
94 may be used. In no case shall ~~nonpoint nutrient offsets~~ *credits* from another tributary be used.

95 G. For that portion of a site's compliance with stormwater nonpoint nutrient runoff water quality
96 criteria being obtained through ~~nonpoint nutrient offsets~~, a ~~permit issuing authority~~ shall (i) *use nutrient*
97 *credits, the applicant shall (i) comply with a 1:1 ratio of the nonpoint nutrient offsets nutrient credits to*
98 *the site's remaining postdevelopment nonpoint nutrient runoff compliance requirement and (ii) assure that*
99 *the nonpoint nutrient offsets are secured in perpetuity being met by credit use and (ii) use credits*
100 *certified as perpetual credits pursuant to Article 1.1:1 (§ 10.1-603.15:1 et seq.).*

101 H. No ~~permit issuing~~ VSMP authority may grant an exception to, or waiver of, postdevelopment
102 nonpoint nutrient runoff compliance requirements unless off-site options have been considered and found
103 not available.

104 I. The ~~permit issuing~~ VSMP authority shall require that ~~nonpoint nutrient offsets~~ *nutrient credits* and
105 other off-site options approved by the Department or applicable state board, including locality pollutant
106 loading pro rata share programs established pursuant to § 15.2-2243, achieve the necessary nutrient
107 reductions prior to the commencement of the ~~permittee's applicant's~~ land-disturbing activity. A pollutant
108 loading pro rata share program established by a locality pursuant to § 15.2-2243 and approved by the
109 Department or applicable state board prior to January 1, 2011, including those that may achieve nutrient
110 reductions after the commencement of the land-disturbing activity, may continue to operate in the
111 approved manner for a transition period ending ~~June 30~~ *July 1, 2014.* The ~~permittee~~ *applicant* shall have
112 the right to select between the use of ~~nonpoint nutrient offsets~~ *nutrient credits* or other off-site options,
113 except during the transition period in those localities to which the transition period applies. The locality
114 may use funds collected for nutrient reductions pursuant to a locality pollutant loading pro rata share
115 program under § 15.2-2243 for nutrient reductions in the same tributary within the same locality as the
116 land-disturbing activity or for the acquisition of ~~nonpoint nutrient offsets~~ *nutrient credits*. In the case of
117 a phased project, the ~~permittee~~ *applicant* may acquire or achieve the off-site nutrient reductions prior to
118 the commencement of each phase of the land-disturbing activity in an amount sufficient for each such
119 phase.

120 J. The Board may establish by regulation a stormwater nutrient program for portions of the
121 Commonwealth that do not drain into the Chesapeake Bay.

122 ~~K.~~ Nutrient reductions obtained through ~~nonpoint nutrient offsets~~ *nutrient credits* shall be credited
 123 toward compliance with any nutrient allocation assigned to a municipal separate storm sewer system in a
 124 Virginia Stormwater Management Program Permit or Total Maximum Daily Load applicable to the
 125 location where the activity for which the ~~nonpoint nutrient offsets~~ *nutrient credits* are used takes place.
 126 If the activity for which the ~~nonpoint nutrient offsets~~ *nutrient credits* are used does not discharge to a
 127 municipal separate storm sewer system, the nutrient reductions shall be credited toward compliance with
 128 the applicable nutrient allocation.

129 ~~L.~~ *K.* A permit issuing VSMP authority shall allow the full or partial substitution of ~~nonpoint nutrient~~
 130 ~~offsets perpetual nutrient credits~~ for existing on-site nutrient controls when (i) the ~~nonpoint nutrient~~
 131 ~~offsets nutrient credits~~ will compensate for 10 or fewer pounds of the annual phosphorous requirement
 132 associated with the original land-disturbing activity or (ii) existing on-site controls are not functioning as
 133 anticipated after reasonable attempts to comply with applicable maintenance agreements or requirements
 134 and the use of ~~nonpoint nutrient offsets nutrient credits~~ will account for the deficiency. ~~The~~ *Upon*
 135 *determination by the VSMP authority that the conditions established by clause (i) or (ii) has been met,*
 136 *the party responsible for maintenance shall be released from maintenance obligations related to the*
 137 *on-site phosphorous controls for which the nonpoint nutrient offsets nutrient credits are substituted.*

138 ~~M.~~ *L.* To the extent available, with the consent of the permittee, the permit issuing VSMP authority
 139 *or the Department* may include the use of ~~nonpoint nutrient offsets nutrient credits~~ or other off-site
 140 measures in resolving enforcement actions to compensate for (i) nutrient control deficiencies occurring
 141 during the period of noncompliance and (ii) permanent nutrient control deficiencies.

142 ~~N.~~ *M.* This section shall not be construed as limiting the authority established under § 15.2-2243;
 143 however, under any pollutant loading pro rata share program established thereunder, the subdivider or
 144 developer shall be given appropriate credit for nutrient reductions achieved through ~~nonpoint nutrient~~
 145 ~~offsets nutrient credits~~ or other off-site options.

146 *N.* *In order to properly account for allowed nonpoint nutrient off-site reductions, an applicant shall*
 147 *report to the Department in accordance with Department procedures information regarding all off-site*
 148 *reductions that have been authorized to meet stormwater postdevelopment nonpoint nutrient runoff*
 149 *compliance requirements.*

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

Article 1.1:1.

NUTRIENT TRADING ACT.

§ 10.1-603.15:1. Definitions.

155 *"Best management practice," "practice," or "BMP" means a structural practice, nonstructural*
 156 *practice, or other management practice used to prevent or reduce nutrient loads reaching surface waters*
 157 *or the adverse effects thereof.*

158 *"Board" means the Virginia Soil and Water Conservation Board.*

159 *"Department" means the Department of Conservation and Recreation.*

160 *"MS4" means a municipal separate storm sewer system.*

161 *"Nutrient credit" or "credit" means a nutrient reduction that is certified pursuant to this article and*
 162 *expressed in pounds of phosphorus or nitrogen either (i) delivered to tidal waters when the credit is*
 163 *generated within the Chesapeake Bay Watershed or (ii) as otherwise specified when generated in the*
 164 *Southern Rivers watersheds.*

§ 10.1-603.15:2. Nutrient credit certification.

166 *A.* *The Board shall adopt regulations for the purpose of establishing statewide procedures for the*
 167 *certification by the Board of nutrient credits other than (i) point source nitrogen and point source*
 168 *phosphorus credits generated by point sources covered by the general permit issued pursuant to*
 169 *§ 62.1-44.19:14 and (ii) nutrient credits certified by the State Water Control Board and the Department*
 170 *of Environmental Quality pursuant to § 62.1-44.19:20. During the promulgation of the regulations, the*
 171 *Board shall consult with the Department of Environmental Quality to avoid duplication and promote*
 172 *consistency where appropriate. The regulations shall be designed in a manner that promotes certainty*
 173 *for credit market participants to the extent possible.*

174 *B.* *The regulations adopted pursuant to this section shall:*

175 *1. Establish procedures for the certification and registration of credits including:*

176 *a. Certifying credits that may be generated from agricultural and urban stormwater best management*
 177 *practices, use or management of manures, managed turf, land use conversion, stream or wetlands*
 178 *projects, shellfish aquaculture, algal harvesting, and other established or innovative methods of nutrient*
 179 *control or removal, as appropriate;*

180 *b. Establishing a process and standards for wetland or stream credits to be converted to nutrient*
 181 *credits. Such process and standards shall only apply to wetland or stream credits established after July*
 182 *1, 2005, and have not been transferred or used. Under no circumstances shall such credits be used for*

- 183 *both wetland or stream credit and nutrient credit purposes;*
184 *c. Certifying credits from multiple practices that are bundled as a package by the applicant;*
185 *d. Prohibiting the certification of credits generated from activities funded by federal or state water*
186 *quality grant funds; however, baseline levels may be achieved through the use of such grants;*
187 *e. Establishing a timely and efficient review certification process including application requirements,*
188 *a reasonable application fee schedule not to exceed \$10,000 per application, and review and approval*
189 *procedures; and*
190 *f. Requiring public notification of a proposed nutrient credit-generating facility;*
191 *2. Establish credit calculation procedures for all proposed credit-generating practices, including the*
192 *determination of baselines in accordance with the following:*
193 *a. Baselines established for agricultural practices shall be those actions necessary to achieve a level*
194 *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 *b. Baselines for urban practices from new development and redevelopment shall be in compliance*
197 *with postconstruction nutrient loading requirements of the Virginia Stormwater Management Program*
198 *regulations. Baselines for all other existing development shall be at a level necessary to achieve the*
199 *reductions assigned in the urban sector in the Virginia Chesapeake Bay TMDL Watershed*
200 *Implementation Plan or approved TMDLs.*
201 *c. Baselines for land use conversion shall be based on the pre-conversion land use and the level of*
202 *reductions assigned in the Virginia Chesapeake Bay TMDL Watershed Implementation Plan or approved*
203 *TMDLs applicable to that land use.*
204 *d. Baselines for other credit-generating practices shall be based on the Virginia Chesapeake Bay*
205 *TMDL Watershed Implementation Plan or approved TMDLs using the best available scientific and*
206 *technical information.*
207 *e. Unless otherwise established by the Board, for certification within the Chesapeake Bay Watershed*
208 *a credit-generating practice that involves land use conversion shall represent controls beyond those in*
209 *place as of July 1, 2005. For other waters for which a TMDL has been approved, the practice must*
210 *represent controls beyond those in place at the time of TMDL approval.*
211 *f. Credit quantities shall be established using the best available scientific and technical information*
212 *at the time of certification.*
213 *g. The Board shall establish baseline dates for all credit-generating practices based on the Virginia*
214 *Chesapeake Bay TMDL Watershed Implementation Plan or approved TMDLs;*
215 *3. Provide certification of credits on an appropriate temporal basis, such as annual, term of years,*
216 *or perpetual, depending on the nature of the credit-generating practice. A credit shall be certified for a*
217 *term of at least 12 months;*
218 *4. Establish requirements to reasonably assure the generation of the credit depending on the nature*
219 *of 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 but not be limited to letters of credit, escrows, surety bonds, insurance, and,*
222 *where the credits are used or generated by a locality, authority, utility, sanitation district, or permittee*
223 *operating an MS4 or a point source permitted under Article 4.02 (§ 62.1-44.19:12 et seq.) of Chapter*
224 *3.1 of Title 62.1, its existing tax or rate authority;*
225 *5. Establish appropriate reporting requirements;*
226 *6. Provide for the ability of the Department to inspect or audit for compliance with the requirements*
227 *of such regulations;*
228 *7. Provide that the option to acquire nutrient credits for compliance purposes shall not eliminate any*
229 *requirement to comply with local water quality requirements;*
230 *8. Establish a credit retirement requirement whereby five percent of credits in the Chesapeake Bay*
231 *Watershed are permanently retired at the time of certification pursuant to this section for the purposes*
232 *of offsetting growth in unregulated nutrient loads; and*
233 *9. Establish such other requirements as the Board deems necessary and appropriate.*
234 *C. The Department shall establish and maintain an online Virginia Nutrient Credit Registry of*
235 *credits as follows:*
236 *1. The registry shall include all credits certified pursuant to this article and may include point*
237 *source nitrogen and point source phosphorus credits generated from point sources covered by the*
238 *general permit issued pursuant to § 62.1-44.19:14 or nutrient credits certified by the State Water*
239 *Control Board and the Department of Environmental Quality pursuant to § 62.1-44.19:20 at the option*
240 *of the owner. No other credits shall be valid for compliance purposes.*
241 *2. Registration of credits on the registry shall not preclude or restrict the right of the owner of such*
242 *credits from transferring the credits on such commercial terms as may be established by and between*
243 *the owner and the regulated or unregulated party acquiring the credits.*
244 *3. The Department shall establish procedures for the listing and tracking of credits on the registry,*

245 including but not limited to (i) notification of the availability of new nutrient credits to the locality
246 where the credit-generating practice is implemented at least five business days prior to listing on the
247 registry to provide the locality an opportunity to acquire such credits at fair market value for
248 compliance purposes and (ii) notification that the listing of credits on the registry does not constitute a
249 representation by the Board or the owner that the credits will satisfy the specific regulatory
250 requirements applicable to the prospective user's intended use and that the prospective user is
251 encouraged to contact the Board for technical assistance to identify limitations, if any, applicable to the
252 intended use.

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

254 D. The owner or operator of a credit-generating facility that fails to comply with the provisions of
255 this section shall be subject to the enforcement and penalty provisions of § 10.1-603.15:4.

256 § 10.1-603.15:3. Nutrient credit use by regulated entities.

257 A. An MS4 permittee may acquire, use, and transfer nutrient credits for purposes of compliance with
258 any waste load allocations established as effluent limitations in an MS4 permit issued pursuant to
259 § 10.1-603.2:1. Such method of compliance may be approved by the Department following review of a
260 compliance plan submitted by the permittee that includes the use of nutrient credits. The permittee may
261 use such credits for compliance purposes only if (i) the credits, whether annual, term, or perpetual, are
262 generated and applied for purposes of compliance for the same calendar year; (ii) the credits are
263 acquired no later than a date following the calendar year in which the credits are applied as specified
264 by the Department consistent with the permittee's Virginia Stormwater Management Program (VSMP)
265 permit annual report deadline under such permit; (iii) the credits are generated in the same locality or
266 tributary, except that permittees in the Eastern Coastal Basin may also acquire credits from the
267 Potomac and Rappahannock tributaries; and (iv) the credits either are point source nitrogen or point
268 source phosphorus credits generated by point sources covered by the general permit issued pursuant to
269 § 62.1-44.19:14, or are certified pursuant to § 10.1-603.15:1 or 62.1-44.19:20. An MS4 permittee may
270 enter into an agreement with one or more other MS4 permittees within the same locality or within the
271 same or adjacent eight-digit hydrologic unit code to collectively meet the sum of any waste load
272 allocations in their permits. Such permittees shall submit to the Department for approval a compliance
273 plan to achieve their aggregate permit waste load allocations.

274 B. Those applicants required to comply with water quality requirements for land disturbing activities
275 operating under a General VSMP Permit for Discharges of Stormwater from Construction Activities or
276 a Construction Individual Permit may acquire and use perpetual nutrient credits certified and registered
277 on the Virginia Nutrient Credit Registry in accordance with § 10.1-603.8:1.

278 C. Confined animal feeding operations issued permits pursuant to the State Water Control Law
279 (§ 62.1-44.2 et seq.) may acquire, use and transfer credits for compliance with any waste load
280 allocations contained in the provisions of a Virginia Pollutant Discharge Elimination System (VPDES)
281 permit. Such method of compliance may be approved by the State Water Control Board following review
282 of a compliance plan submitted by the permittee that includes the use of nutrient credits.

283 D. Facilities registered under the Industrial Stormwater General Permit issued pursuant to the State
284 Water Control Law (§ 62.1-44.2 et seq.), may acquire, use, and transfer credits for compliance with any
285 waste load allocations established as effluent limitations in a VPDES permit. Such method of
286 compliance may be approved by the State Water Control Board following review of a compliance plan
287 submitted by the permittee that includes the use of nutrient credits.

288 E. Public notice of each compliance plan submitted for approval pursuant to this section shall be
289 given by the Department or by the State Water Control Board, as applicable.

290 F. This section shall not be construed to limit or otherwise affect the authority of the Soil and Water
291 Conservation Board or the State Water Control Board, as applicable, to establish and enforce more
292 stringent water quality-based effluent limitations for total nitrogen or total phosphorus in permits where
293 those limitations are necessary to protect local water quality. The exchange or acquisition of credits
294 pursuant to this article shall not affect any requirement to comply with such local water quality-based
295 limitations.

296 § 10.1-603.15:4. Enforcement and penalties.

297 A. Transfer of nutrient credits by an operator of a nutrient credit-generating facility may be
298 suspended by the Department until such time as the operator comes into compliance with this article
299 and attendant regulations.

300 B. Any operator of a nutrient credit-generating facility who violates any provision of this article, or
301 of any regulations adopted hereunder, shall be subject to a civil penalty not to exceed \$10,000 within
302 the discretion of the court. The Department may issue a summons for collection of the civil penalty and
303 the action may be prosecuted in the appropriate circuit court. When the penalties are assessed by the
304 court as a result of a summons issued by the Department, the court shall direct the penalty to be paid
305 into the state treasury and deposited by the State Treasurer into the Virginia Stormwater Management

306 *Fund established pursuant to § 10.1-603.4:1.*

307 *§ 10.1-603.15:5. Appeals.*

308 *Any person applying to establish a nutrient credit-generating facility or an operator of a nutrient*
309 *credit-generating facility aggrieved by any action of the Department taken in accordance with this*
310 *section, or by inaction of the Department, shall have the right to review in accordance with the*
311 *provisions of the Administrative Process Act (§ 2.2-4000 et seq.).*

312 *§ 62.1-44.19:13. Definitions.*

313 *As used in this article, unless the context requires a different meaning:*

314 *"Annual mass load of total nitrogen" (expressed in pounds per year) means the daily total nitrogen*
315 *concentration (expressed as mg/L to the nearest 0.01 mg/L) multiplied by the flow volume of effluent*
316 *discharged during the 24-hour period (expressed as MGD to the nearest 0.01 MGD), multiplied by 8.34*
317 *and rounded to the nearest whole number to convert to pounds per day (lbs/day) units, then totaled for*
318 *the calendar month to convert to pounds per month (lbs/mo) units, and then totaled for the calendar year*
319 *to convert to pounds per year (lbs/yr) units.*

320 *"Annual mass load of total phosphorus" (expressed in pounds per year) means the daily total*
321 *phosphorus concentration (expressed as mg/L to the nearest 0.01mg/L) multiplied by the flow volume of*
322 *effluent discharged during the 24-hour period (expressed as MGD to the nearest 0.01 MGD) multiplied*
323 *by 8.34 and rounded to the nearest whole number to convert to pounds per day (lbs/day) units, then*
324 *totaled for the calendar month to convert to pounds per month (lbs/mo) units, and then totaled for the*
325 *calendar year to convert to pounds per year (lbs/yr) units.*

326 *"Association" means the Virginia Nutrient Credit Exchange Association authorized by this article.*

327 *"Attenuation" means the rate at which nutrients are reduced through natural processes during*
328 *transport in water.*

329 *"Biological nutrient removal technology" means (i) technology that will achieve an annual average*
330 *total nitrogen effluent concentration of eight milligrams per liter and an annual average total phosphorus*
331 *effluent concentration of one milligram per liter, or (ii) equivalent reductions in loads of total nitrogen*
332 *and total phosphorus through the recycle or reuse of wastewater as determined by the Department.*

333 *"Delivered total nitrogen load" means the discharged mass load of total nitrogen from a point source*
334 *that is adjusted by the delivery factor for that point source.*

335 *"Delivered total phosphorus load" means the discharged mass load of total phosphorus from a point*
336 *source that is adjusted by the delivery factor for that point source.*

337 *"Delivery factor" means an estimate of the number of pounds of total nitrogen or total phosphorus*
338 *delivered to tidal waters for every pound discharged from a permitted facility, as determined by the*
339 *specific geographic location of the permitted facility, to account for attenuation that occurs during*
340 *riverine transport between the permitted facility and tidal waters. Delivery factors shall be calculated*
341 *using the Chesapeake Bay Program watershed model.*

342 *"Department" means the Department of Environmental Quality.*

343 *"Equivalent load" means 2,300 pounds per year of total nitrogen and 300 pounds per year of total*
344 *phosphorus at a flow volume of 40,000 gallons per day; 5,700 pounds per year of total nitrogen and 760*
345 *pounds per year of total phosphorus at a flow volume of 100,000 gallons per day; and 28,500 pounds*
346 *per year of total nitrogen and 3,800 pounds per year of total phosphorus at a flow volume of 500,000*
347 *gallons per day.*

348 *"Facility" means a point source discharging or proposing to discharge total nitrogen or total*
349 *phosphorus to the Chesapeake Bay or its tributaries. This term does not include confined animal feeding*
350 *operations, discharges of stormwater, return flows from irrigated agriculture, or vessels.*

351 *"General permit" means the general permit authorized by this article.*

352 *"Permitted facility" means a facility authorized by the general permit to discharge total nitrogen or*
353 *total phosphorus. For the sole purpose of generating point source nitrogen credits or point source*
354 *phosphorus credits, "permitted facility" shall also mean the Blue Plains wastewater treatment facility*
355 *operated by the District of Columbia Water and Sewer Authority.*

356 *"Permittee" means a person authorized by the general permit to discharge total nitrogen or total*
357 *phosphorus.*

358 *"Point source nitrogen credit" means the difference between (i) the waste load allocation for a*
359 *permitted facility specified as an annual mass load of total nitrogen, and (ii) the monitored annual mass*
360 *load of total nitrogen discharged by that facility, where clause (ii) is less than clause (i), and where the*
361 *difference is adjusted by the applicable delivery factor and expressed as pounds per year of delivered*
362 *total nitrogen load.*

363 *"Point source phosphorus credit" means the difference between (i) the waste load allocation for a*
364 *permitted facility specified as an annual mass load of total phosphorus, and (ii) the monitored annual*
365 *mass load of total phosphorus discharged by that facility, where clause (ii) is less than clause (i), and*
366 *where the difference is adjusted by the applicable delivery factor and expressed as pounds per year of*
367 *delivered total phosphorus load.*

368 "State-of-the-art nutrient removal technology" means (i) technology that will achieve an annual
 369 average total nitrogen effluent concentration of three milligrams per liter and an annual average total
 370 phosphorus effluent concentration of 0.3 milligrams per liter, or (ii) equivalent load reductions in total
 371 nitrogen and total phosphorus through recycle or reuse of wastewater as determined by the Department.

372 "Tributaries" means those river basins for which separate tributary strategies were prepared pursuant
 373 to § 2.2-218 and includes the Potomac, Rappahannock, York, and James River Basins, and the Eastern
 374 Coastal Basin, which encompasses the creeks and rivers of the Eastern Shore of Virginia that are west
 375 of Route 13 and drain into the Chesapeake Bay.

376 "Waste load allocation" means (i) the water quality-based annual mass load of total nitrogen or
 377 annual mass load of total phosphorus allocated to individual facilities pursuant to the Water Quality
 378 Management Planning Regulation (9 VAC 25-720) or its successor, *or permitted capacity in the case of*
 379 *nonsignificant dischargers*; (ii) the water quality-based annual mass load of total nitrogen or annual
 380 mass load of total phosphorus acquired pursuant to § 62.1-44.19:15 for new or expanded facilities; or
 381 (iii) applicable total nitrogen or total phosphorus *waste load allocations under the Chesapeake Bay* total
 382 maximum daily loads (*TMDLs*) to restore or protect the water quality and beneficial uses of the
 383 Chesapeake Bay or its tidal tributaries.

384 § 62.1-44.19:15. New or expanded facilities.

385 A. An owner or operator of a new or expanded facility shall comply with the applicable requirements
 386 of this section as a condition of the facility's coverage under the general permit.

387 1. An owner or operator of a facility authorized by a Virginia Pollutant Discharge Elimination
 388 System permit first issued before July 1, 2005, that expands his facility to discharge 100,000 gallons or
 389 more per day, or an equivalent load directly into tidal waters, or 500,000 gallons or more per day, or an
 390 equivalent load, directly into nontidal waters shall demonstrate to the Department that he has acquired
 391 waste load allocations sufficient to offset any increase in his delivered total nitrogen and delivered total
 392 phosphorus loads resulting from any expansion beyond his waste load allocations or permitted design
 393 capacity as of July 1, 2005, and will install state-of-the-art nutrient removal technology at the time of
 394 the expansion.

395 2. An owner or operator of a facility authorized by a Virginia Pollutant Discharge Elimination
 396 System permit first issued before July 1, 2005, that expands his facility to discharge 100,000 gallons or
 397 more per day up to and including 499,999 gallons per day, or an equivalent load, directly into nontidal
 398 waters, shall demonstrate to the Department that he has acquired waste load allocations sufficient to
 399 offset any increase in his delivered total nitrogen and delivered total phosphorus loads resulting from
 400 any expansion beyond his permitted capacity as of July 1, 2005, and will install, at a minimum,
 401 biological nutrient removal technology at the time of the expansion.

402 3. An owner or operator of a facility authorized by a Virginia Pollutant Discharge Elimination
 403 System permit first issued before July 1, 2005, that expands his facility to discharge 40,000 gallons or
 404 more per day up to and including 99,999 gallons per day, or an equivalent load, directly into tidal or
 405 nontidal waters, shall demonstrate to the Department that he has acquired waste load allocations
 406 sufficient to offset any increase in his delivered total nitrogen and delivered total phosphorus loads
 407 resulting from any expansion beyond his permitted capacity as of July 1, 2005.

408 4. An owner or operator of a facility authorized by a Virginia Pollutant Discharge Elimination
 409 System permit first issued on or after July 1, 2005, to discharge 40,000 gallons or more per day, or an
 410 equivalent load, shall demonstrate to the Department that he has acquired waste load allocations
 411 sufficient to offset his delivered total nitrogen and delivered total phosphorus loads, and will install (i) at
 412 a minimum, biological nutrient removal technology at any facility authorized to discharge up to and
 413 including 99,999 gallons per day, or an equivalent load, directly into tidal and nontidal waters, or up to
 414 and including 499,999 gallons per day, or an equivalent load, to nontidal waters; and (ii) state-of-the-art
 415 nutrient removal technology at any facility authorized to discharge 100,000 gallons or more per day, or
 416 an equivalent load, directly into tidal waters, or 500,000 gallons or more per day, or an equivalent load,
 417 directly into nontidal waters.

418 5. An owner or operator of a facility treating domestic sewage authorized by a Virginia Pollutant
 419 Discharge Elimination System permit with a discharge greater than 1,000 gallons per day up to and
 420 including 39,999 gallons per day that has not commenced the discharge of pollutants prior to January 1,
 421 2011, shall demonstrate to the Department that he has acquired waste load allocations sufficient to offset
 422 his delivered total nitrogen and delivered total phosphorus loads prior to commencing the discharge,
 423 except when the facility is for short-term temporary use only or when treatment of domestic sewage is
 424 not the primary purpose of the facility.

425 B. Waste load allocations required by this section to offset new or increased delivered total nitrogen
 426 and delivered total phosphorus loads shall be acquired in accordance with this subsection.

427 1. Such allocations may be acquired from one or a combination of the following:

428 a. Acquisition of all or a portion of the waste load allocations *or point source nitrogen or point*

429 *source phosphorus credits* from one or more permitted facilities in the same tributary;

430 b. Acquisition of ~~nonpoint source load allocations through the use of best management practices~~
431 ~~acquired through a public or private entity acting on behalf of the land owner~~ *credits certified by the*
432 *Board pursuant to § 62.1-44.19:20 or certified by the Soil and Water Conservation Board pursuant to*
433 *§ 10.1-603.15:2. Such best management practices shall achieve reductions beyond those already required*
434 *by or funded under federal or state law, or the Virginia tributaries strategies plans Chesapeake Bay*
435 *TMDL Watershed Implementation Plan, and shall be installed in the same tributary in which the new or*
436 *expanded facility is located and included as conditions of the facility's individual Virginia Pollutant*
437 *Discharge Elimination System permit;*

438 c. Acquisition of allocations purchased through the Nutrient Offset Fund established pursuant to
439 § 10.1-2128.2; or

440 d. Acquisition of allocations through such other means as may be approved by the Department on a
441 case-by-case basis.

442 2. *Such allocations or credits shall be provided for a minimum period of five years with each*
443 *registration under the general permit. This subdivision shall not preclude the Board from adopting*
444 *longer-term or permanent allocation requirements by regulation.*

445 3. The Board shall give priority to allocations *or credits* acquired in accordance with subdivisions 1
446 a, 1 b, and 1 d. The Board shall approve allocations acquired in accordance with subdivision 1 d only
447 after the owner or operator has demonstrated that he has made a good faith effort to acquire sufficient
448 allocations in accordance with subdivisions 1 a, 1 b, and 1 d and that such allocations are not
449 reasonably available taking into account timing, cost, and other relevant factors.

450 ~~3-~~ 4. Notwithstanding the priority provisions in subdivision 2, the Board may grant a waste load
451 allocation in accordance with subdivision 1 d to an owner or operator of a facility authorized by a
452 Virginia Pollution Abatement permit to land apply domestic sewage if (i) the Virginia Pollution
453 Abatement permit was issued before July 1, 2005; (ii) the waste load allocation does not exceed such
454 facility's permitted design capacity as of July 1, 2005; (iii) the waste treated by the existing facility is
455 going to be treated and discharged pursuant to a Virginia Pollutant Discharge Elimination System permit
456 for a new discharge; and (iv) the owner or operator installs state-of-the-art nutrient removal technology
457 at such facility. Such facilities cannot generate credits or waste load allocations, based upon the removal
458 of land application sites, that can be acquired by other permitted facilities to meet the requirements of
459 this article.

460 C. Until such time as the Director finds that no allocations are reasonably available in an individual
461 tributary, the general permit shall provide for the acquisition of allocations through payments into the
462 Nutrient Offset Fund established in § 10.1-2128.2. Such payments shall be promptly applied by the
463 Department to achieve equivalent point or nonpoint source reductions in the same tributary beyond those
464 reductions already required by or funded under federal or state law or the Virginia ~~tributaries strategies~~
465 ~~plans~~ *Chesapeake Bay TMDL Watershed Implementation Plan*. The general permit shall base the cost of
466 each pound of allocation on (i) the estimated cost of achieving a reduction of one pound of nitrogen or
467 phosphorus at the facility that is securing the allocation, or comparable facility, for each pound of
468 allocation acquired; or (ii) the average cost of reducing two pounds of nitrogen or phosphorus from
469 nonpoint sources in the same tributary for each pound of allocation acquired, whichever is higher. Upon
470 each reissuance of the general permit, the Board may adjust the cost of each pound of allocation based
471 on current costs and cost estimates.

472 D. The acquisition of nutrient allocations; *or credits; or offsets* from animal waste-to-energy or
473 animal waste reduction facilities, or the acquisition of such nutrient allocations; *or credits; or offsets*
474 from entities acting on behalf of such facilities ~~pursuant to subdivision B 4~~, shall be considered point
475 source allocations; *or credits; or offsets* for all nutrient trading purposes and shall not be subject to a
476 ~~two-for-one~~ *any otherwise applicable nonpoint source* trading ratio if the best management practice
477 being used to generate such nutrient allocations; *or credits; or offsets* is a point source nutrient removal
478 technology. Point source nutrient removal technology shall include animal waste gasification in which
479 lab analysis of the animal waste reveals the concentration of nutrients in the animal waste being fed into
480 the gasifier, and the fate of the nutrients during the animal waste gasification process, is known and
481 documented using studies such as air emissions tests and ash analyses.

482 § 62.1-44.19:18. Nutrient allocation compliance and reporting.

483 A. Each permitted facility shall be in compliance with its individual waste load allocations if: (i) its
484 annual mass load is less than the applicable waste load allocation assigned to the facility in the general
485 permit; (ii) the permitted facility acquires sufficient point source nitrogen or phosphorus credits in
486 accordance with subdivision A 1; or (iii) in the event it is unable to meet the individual waste load
487 allocation pursuant to clauses (i) or (ii), the permitted facility acquires sufficient nitrogen or phosphorus
488 credits through payments made in accordance with subdivision A 2; provided, however, that the
489 acquisition of nitrogen or phosphorus credits pursuant to this section shall not alter or otherwise affect
490 the individual waste load allocations for each permitted facility.

491 1. A permittee may acquire point source nitrogen or phosphorus credits from one or more permitted
 492 facilities only if (i) the credits are generated and applied to a compliance obligation in the same calendar
 493 year, (ii) the credits are generated by one or more permitted facilities in the same tributary, except that
 494 permitted facilities in the Eastern Shore basin Coastal Basin may also acquire credits from permitted
 495 facilities in the Potomac and Rappahannock tributaries, (iii) the credits are acquired no later than June 1
 496 immediately following the calendar year in which the credits are applied, and (iv) no later than June 1
 497 immediately following the calendar year in which the credits are applied, the permittee certifies on a
 498 form supplied by the Department that he has acquired sufficient credits to satisfy his compliance
 499 obligations.

500 2. A permittee may acquire nitrogen or phosphorus credits through payments made into the Nutrient
 501 Offset Fund established in § 10.1-2128.2 only if, no later than June 1 immediately following the
 502 calendar year in which the credits are applied, the permittee certifies on a form supplied by the
 503 Department that he has diligently sought, but has been unable to acquire, sufficient credits to satisfy his
 504 compliance obligations through the acquisition of point source nitrogen or phosphorus credits with other
 505 permitted facilities in the same tributary, and that he has acquired sufficient credits to satisfy his
 506 compliance obligations through one or more payments made in accordance with the terms of the general
 507 permit.

508 B. Until such time as the Director finds that no credits are reasonably available in an individual
 509 tributary, the general permit shall provide for the acquisition of nitrogen and phosphorus credits through
 510 payments into the Nutrient Offset Fund in accordance with subdivision A 2. Such payments shall be
 511 promptly applied to achieve equivalent point or nonpoint source reductions in the same tributary beyond
 512 those reductions already required by or funded under federal or state law, or the Virginia tributaries
 513 strategies plans Chesapeake Bay TMDL Watershed Implementation Plan. The general permit shall base
 514 the cost of each nitrogen or phosphorus credit on the average cost of reducing one pound of nitrogen or
 515 phosphorus from Virginia publicly owned wastewater treatment facilities for each credit acquired. Upon
 516 each reissuance of the general permit, the Board may adjust the cost of each nitrogen and phosphorus
 517 credit based on (i) the current average cost of reducing a pound of nitrogen or phosphorus from Virginia
 518 publicly owned wastewater treatment facilities for each credit acquired and (ii) any additional incentives
 519 reasonably necessary to ensure that there is timely and continuing progress toward attaining and
 520 maintaining each tributary's combined waste load allocation.

521 C. On or before February 1, annually, each permittee shall either individually or through the
 522 Association file a discharge monitoring report with the Department. The report shall identify (i)
 523 identifying the annual mass load of total nitrogen and the annual mass load of total phosphorus
 524 discharged by each permitted facility during the previous calendar year; (ii) the delivered total nitrogen
 525 load and delivered total phosphorus load discharged by each permitted facility during the previous year,
 526 and (iii) the number of total nitrogen and total phosphorus credits for the previous calendar year to be
 527 purchased or sold by the permittee. The report shall contain the certification required by federal and
 528 state law and be signed by each permittee for each of the permittee's facilities covered by the general
 529 permit.

530 D. On or before April 1, annually, the Department shall prepare a report containing the annual mass
 531 load of total nitrogen and annual mass load of total phosphorus discharged by each permitted facility,
 532 the number of point source nitrogen and phosphorus credits for the previous calendar year for sale or
 533 purchase generated or required by each such facility, and to the extent there are insufficient point
 534 source credits available for exchange to provide for full compliance by every permittee, the number of
 535 credits to be purchased pursuant to this section. Upon completion of the report, the Department shall
 536 promptly publish notice of the report and make the report available to any person requesting it.

537 E. On or before July 1, annually, the Department shall publish notice of all nitrogen and phosphorus
 538 credit exchanges and purchases for the previous calendar year and make all documents relating to the
 539 exchanges and purchases available to any person requesting them.

540 § 62.1-44.19:20. Nutrient credit certification.

541 A. The Board may adopt regulations for the purpose of establishing procedures for the certification
 542 of nutrient credits other than (i) point source nitrogen or point source phosphorus credits generated by
 543 point sources covered by the general permit issued pursuant to § 62.1-44.19:14 and (ii) nutrient credits
 544 certified by the Soil and Water Conservation Board and the Department of Conservation and Recreation
 545 pursuant to Article 1.1:1 (§ 10.1-603.15:1 et seq.) of Chapter 6 of Title 10.1. During the promulgation
 546 of the regulations, the Board shall consult with the Department of Conservation and Recreation to avoid
 547 duplication and to promote consistency where appropriate.

548 B. Regulations adopted pursuant to this section shall:

549 1. Establish procedures for the certification and registration of credits, including:

550 a. Certifying credits that may be generated from effective nutrient controls or removal practices,
 551 including activities associated with the types of facilities or practices historically regulated by the

552 *Board, such as water withdrawal and treatment and wastewater collection, treatment, and beneficial*
553 *reuse; and*

554 *b. Establishing a timely and efficient certification process including application requirements, a*
555 *reasonable application fee schedule not to exceed \$10,000 per application, and review and approval*
556 *procedures;*

557 *2. Establish credit calculation procedures for proposed credit-generating practices, including the*
558 *determination of:*

559 *a. Baselines in accordance with any applicable provisions of the Virginia Chesapeake Bay TMDL*
560 *Watershed Implementation Plan or approved TMDLs; and*

561 *b. Credit quantities using the best available scientific and technical information;*

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

565 *4. Establish operation and maintenance requirements and associated financial assurance*
566 *requirements to include alternatives such as letters of credit, escrows, surety bonds, insurance, and*
567 *where the credits are used or generated by a locality, authority, utility, sanitation district, or permittee*
568 *operating an MS4 or a point source permitted under this article, its existing tax or rate authority;*

569 *5. Establish appropriate reporting requirements;*

570 *6. Provide for the ability of the Department to inspect or audit for compliance with the requirements*
571 *of such regulations;*

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

574 *8. Establish such other requirements as the Board deems necessary and appropriate.*

575 *C. Prior to the adoption of such regulations, the Board shall certify credits that may be generated*
576 *from effective nutrient controls or removal practices, including activities associated with the types of*
577 *facilities or practices historically regulated by the Board, such as water withdrawal and treatment and*
578 *wastewater collection, treatment, and beneficial reuse, on a case-by-case basis using the best available*
579 *scientific and technical information.*

580 **2. That nutrient credits from stormwater nonpoint nutrient credit-generating facilities in receipt**
581 **of a Nonpoint Nutrient Offset Authorization for Transfer letter from the Department of**
582 **Environmental Quality prior to July 1, 2012, shall be considered certified nutrient credits and**
583 **shall not be subject to further certification requirements or to the credit retirement requirement**
584 **under subdivision B 8 of § 10.1-603.15:2 as added by this act. However, such facilities shall be**
585 **subject to the other provisions of Article 1.1:1 (§ 10.1-603.15:1 et seq.) as added by this act,**
586 **including registration, inspection, reporting, and enforcement.**

587 **3. That by July 1, 2013, the State Water Control Board shall reevaluate its trading ratio for**
588 **nutrient allocation acquisition pursuant to subdivision B 1 b of § 62.1-44.19:15 of the Code of**
589 **Virginia, giving full consideration to similar trading ratios established by § 10.1-603.8:1 of the**
590 **Code of Virginia, § 10.1-603.15:2 as added by this act, and trading programs in other Chesapeake**
591 **Bay watershed states. The Board shall establish an advisory group of interested stakeholders for**
592 **the purpose of receiving recommendations during the reevaluation regarding an appropriate ratio.**
593 **If warranted based on the outcome of the reevaluation, the Board shall adopt a revised trading**
594 **ratio for purposes of subdivision B 1 b of § 62.1-44.19:15 as soon as practicable following the**
595 **completion of the reevaluation.**

596 **4. That until the effective date of the regulations to be adopted pursuant to § 10.1-603.15:2 as**
597 **added by this act, the State Water Control Board shall continue to certify nutrient credits from**
598 **the use of nonpoint source best management practices pursuant to subdivision B 1 b of**
599 **§ 62.1-44.19:15 of the Code of Virginia.**