

003872652

HOUSE BILL NO. 1170

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on the Chesapeake and Its Tributaries
on February 7, 2000)

(Patron Prior to Substitute—Delegate Bryant)

A BILL to amend and reenact §§ 62.1-44.3, 62.1-44.5, 62.1-44.15, 62.1-44.15:5, and 62.1-44.29 of the Code of Virginia, relating to wetlands.

Be it enacted by the General Assembly of Virginia:

1. That §§ 62.1-44.3, 62.1-44.5, 62.1-44.15, 62.1-44.15:5, and 62.1-44.29 of the Code of Virginia are amended and reenacted as follows:

§ 62.1-44.3. Definitions.

Unless a different meaning is required by the context the following terms as used in this chapter shall have the meanings hereinafter respectively ascribed to them:

"Board" means the State Water Control Board;

"Member" means a member of the Board;

"Certificate" means any certificate issued by the Board;

"State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, *including wetlands*;

"Owner" means the Commonwealth or any of its political subdivisions, including, but not limited to, sanitation district commissions and authorities, and any public or private institution, corporation, association, firm or company organized or existing under the laws of this or any other state or country, or any officer or agency of the United States, or any person or group of persons acting individually or as a group that owns, operates, charters, rents, or otherwise exercises control over or is responsible for any actual or potential discharge of sewage, industrial wastes, or other wastes to state waters, or any facility or operation that has the capability to alter the physical, chemical, or biological properties of state waters in contravention of § 62.1-44.5;

"Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters (a) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (b) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (c) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (i) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (ii) the discharge of untreated sewage by any owner into state waters; and (iii) contributing to the contravention of standards of water quality duly established by the Board, are "pollution" for the terms and purposes of this chapter;

"Sewage" means the water-carried human wastes from residences, buildings, industrial establishments or other places together with such industrial wastes and underground, surface, storm, or other water as may be present;

"Industrial wastes" means liquid or other wastes resulting from any process of industry, manufacture, trade or business, or from the development of any natural resources;

"Other wastes" means decayed wood, sawdust, shavings, bark, lime, garbage, refuse, ashes, offal, tar, oil, chemicals, and all other substances, except industrial wastes and sewage, which may cause pollution in any state waters;

"Establishment" means any industrial establishment, mill, factory, tannery, paper or pulp mill, mine, coal mine, colliery, breaker or coal-processing operations, quarry, oil refinery, boat, vessel, and every other industry or plant or works the operation of which produces industrial wastes or other wastes or which may otherwise alter the physical, chemical or biological properties of any state waters;

"Sewerage system" means pipelines or conduits, pumping stations, and force mains, and all other construction, devices, and appliances appurtenant thereto, used for conducting sewage or industrial wastes or other wastes to a point of ultimate disposal;

"The law" or "this law" means the law contained in this chapter as now existing or hereafter amended;

"Rule" means a rule adopted by the Board to regulate the procedure of the Board pursuant to § 62.1-44.15 (7);

"Special order" means a special order issued under subdivisions (8a), (8b), and (8c) of § 62.1-44.15;

"Ruling" means a ruling issued under § 62.1-44.15 (9);

"Regulation" means a regulation issued under § 62.1-44.15 (10);

60 "Standards" means standards established under subdivisions (3a) and (3b) of § 62.1-44.15;

61 "Policies" means policies established under subdivisions (3a) and (3b) of § 62.1-44.15;

62 "Person" means an individual, corporation, partnership, association, a governmental body, a municipal
63 corporation or any other legal entity;

64 "Pretreatment requirements" means any requirements arising under the Board's pretreatment
65 regulations including the duty to allow or carry out inspections, entry or monitoring activities; any rules,
66 regulations, or orders issued by the owner of a publicly owned treatment works; or any reporting
67 requirements imposed by the owner of a publicly owned treatment works or by the regulations of the
68 Board; and

69 "Pretreatment standards" means any standards of performance or other requirements imposed by
70 regulation of the Board upon an industrial user of a publicly owned treatment works.

71 *"Normal agricultural activities" means those activities defined as an agricultural operation in*
72 *§ 3.1-22.29, and any activity that is conducted as part of or in furtherance of such agricultural*
73 *operation, but shall not include any activity for which a permit would have been required as of January*
74 *1, 1997, under 33 U.S.C. § 1344 or any regulations promulgated pursuant thereto.*

75 *"Normal silvicultural activities" means any silvicultural activity, as defined in § 10.1-1181.1, and any*
76 *activity that is conducted as part of or in furtherance of such silvicultural activity, but shall not include*
77 *any activity for which a permit would have been required as of January 1, 1997, under 33 U.S.C.*
78 *§ 1344 or any regulations promulgated pursuant thereto.*

79 *"Wetlands" means those areas that are inundated or saturated by surface or ground water at a*
80 *frequency and duration sufficient to support, and that under normal circumstances do support, a*
81 *prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally*
82 *include swamps, marshes, bogs and similar areas.*

83 § 62.1-44.5. Prohibition of waste discharges or other quality alterations of state waters except as
84 authorized by permit; notification required.

85 A. Except in compliance with a certificate issued by the Board, it shall be unlawful for any person to
86 (i) discharge :

87 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious
88 substances; ~~or (ii) otherwise;~~

89 2. Conduct the following activities in a wetland:

90 a. Excavation, ditching or dredging;

91 b. Draining which significantly alters or degrades existing wetland acreage or functions;

92 c. Filling or dumping;

93 d. Permanent flooding or impounding; or

94 e. Activities which cause significant alteration or degradation of existing wetland acreage or
95 functions; or

96 3. Otherwise alter the physical, chemical or biological properties of such state waters and make them
97 detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for domestic
98 or industrial consumption, or for recreation, or for other uses.

99 B. Any person required to obtain a permit or certificate pursuant to this chapter, who discharges or
100 causes or allows (i) a discharge of sewage, industrial waste, other wastes or any noxious or deleterious
101 substance into or upon state waters or (ii) a discharge that may reasonably be expected to enter state
102 waters, in violation of the provisions of subsection A shall, upon learning of the discharge, promptly
103 notify, but in no case later than 24 hours the Board, the Director of the Department of Environmental
104 Quality, or the coordinator of emergency services appointed pursuant to § 44-146.19 for the political
105 subdivision reasonably expected to be affected by the discharge. Written notice to the Director of the
106 Department of Environmental Quality shall follow initial notice within the time frame specified by the
107 federal Clean Water Act.

108 § 62.1-44.15. Powers and duties.

109 It shall be the duty of the Board and it shall have the authority:

110 (1) [Repealed.]

111 (2) To study and investigate all problems concerned with the quality of state waters and to make
112 reports and recommendations.

113 (2a) To study and investigate methods, procedures, devices, appliances, and technologies which could
114 assist in water conservation or water consumption reduction.

115 (2b) To coordinate its efforts toward water conservation with other persons or groups, within or
116 without the Commonwealth.

117 (2c) To make reports concerning, and formulate recommendations based upon, any such water
118 conservation studies to ensure that present and future water needs of the citizens of the Commonwealth
119 are met.

120 (3a) To establish such standards of quality and policies for any state waters consistent with the
121 general policy set forth in this chapter, and to modify, amend or cancel any such standards or policies

established and to take all appropriate steps to prevent quality alteration contrary to the public interest or to standards or policies thus established, except that a description of provisions of any proposed standard or policy adopted by regulation which are more restrictive than applicable federal requirements, together with the reason why the more restrictive provisions are needed, shall be provided to the standing committee of each house of the General Assembly to which matters relating to the content of the standard or policy are most properly referable. The Board shall, from time to time, but at least once every three years, hold public hearings pursuant to subsection B of § 9-6.14:7.1 but, upon the request of an affected person or upon its own motion, hold hearings pursuant to § 9-6.14:8, for the purpose of reviewing the standards of quality, and, as appropriate, adopting, modifying, or cancelling such standards. Whenever the Board considers the adoption, modification, amendment or cancellation of any standard, it shall give due consideration to, among other factors, the economic and social costs and benefits which can reasonably be expected to obtain as a consequence of the standards as adopted, modified, amended or cancelled. The Board shall also give due consideration to the public health standards issued by the Virginia Department of Health with respect to issues of public health policy and protection. If the Board does not follow the public health standards of the Virginia Department of Health, the Board's reason for any deviation shall be made in writing and published for any and all concerned parties.

(3b) Except as provided in subdivision (3a), such standards and policies are to be adopted or modified, amended or cancelled in the manner provided by the Administrative Process Act (§ 9-6.14:1 et seq.).

(4) To conduct or have conducted scientific experiments, investigations, studies, and research to discover methods for maintaining water quality consistent with the purposes of this chapter. To this end the Board may cooperate with any public or private agency in the conduct of such experiments, investigations and research and may receive in behalf of the Commonwealth any moneys which any such agency may contribute as its share of the cost under any such cooperative agreement. Such moneys shall be used only for the purposes for which they are contributed and any balance remaining after the conclusion of the experiments, investigations, studies, and research, shall be returned to the contributors.

(5) To issue, *revoke or amend* certificates *under prescribed conditions* for: (a) the discharge of sewage, industrial wastes and other wastes into or adjacent to ~~or state waters~~; (b) the alteration otherwise of the physical, chemical or biological properties of state waters ~~under prescribed conditions and to revoke or amend such certificates~~; or (c) *the conduct of the following activities in a wetland: (i) excavation, ditching or dredging, (ii) draining which significantly alters or degrades existing wetland acreage or functions, (iii) filling or dumping, (iv) permanent flooding or impounding, or (v) activities which cause significant alteration or degradation of existing wetland acreage or functions.*

(5a) All certificates issued by the Board under this chapter shall have fixed terms. The term of a Virginia Pollution Discharge Elimination System permit shall not exceed five years. The term of a Virginia Pollution Abatement permit shall not exceed ten years, except that the term of a Virginia Pollution Abatement permit for confined animal feeding operations shall be ten years. The Department of Environmental Quality shall inspect all facilities for which a Virginia Pollution Abatement permit has been issued at least once every five years, except that the Department shall inspect all facilities covered by the Virginia Pollution Abatement permit for confined animal feeding operations annually. Department personnel performing inspections of confined animal feeding operations shall be certified under the voluntary nutrient management training and certification program established in § 10.1-104.2. The term of a certificate issued by the Board shall not be extended by modification beyond the maximum duration and the certificate shall expire at the end of the term unless an application for a new permit has been timely filed as required by the regulations of the Board and the Board is unable, through no fault of the permittee, to issue a new permit before the expiration date of the previous permit.

(5b) Any certificate issued by the Board under this chapter may, after notice and opportunity for a hearing, be amended or revoked on any of the following grounds or for good cause as may be provided by the regulations of the Board:

1. The owner has violated any regulation or order of the Board, any condition of a certificate, any provision of this chapter, or any order of a court, where such violation results in a release of harmful substances into the environment or poses a substantial threat of release of harmful substances into the environment or presents a hazard to human health or the violation is representative of a pattern of serious or repeated violations which, in the opinion of the Board, demonstrates the owner's disregard for or inability to comply with applicable laws, regulations, or requirements;

2. The owner has failed to disclose fully all relevant material facts or has misrepresented a material fact in applying for a certificate, or in any other report or document required under this law or under the regulations of the Board;

3. The activity for which the certificate was issued endangers human health or the environment and can be regulated to acceptable levels by amendment or revocation of the certificate; or

183 4. There exists a material change in the basis on which the permit was issued that requires either a
184 temporary or a permanent reduction or elimination of any discharge controlled by the certificate
185 necessary to protect human health or the environment.

186 (6) To make investigations and inspections, to ensure compliance with any certificates, standards,
187 policies, rules, regulations, rulings and special orders which it may adopt, issue or establish and to
188 furnish advice, recommendations, or instructions for the purpose of obtaining such compliance. In
189 recognition of §§ 32.1-164 and 62.1-44.18, the Board and the State Department of Health shall enter into
190 a memorandum of understanding establishing a common format to consolidate and simplify inspections
191 of sewage treatment plants and coordinate the scheduling of the inspections. The new format shall
192 ensure that all sewage treatment plants are inspected at appropriate intervals in order to protect water
193 quality and public health and at the same time avoid any unnecessary administrative burden on those
194 being inspected.

195 (7) To adopt rules governing the procedure of the Board with respect to: (a) hearings; (b) the filing
196 of reports; (c) the issuance of certificates and special orders; and (d) all other matters relating to
197 procedure; and to amend or cancel any rule adopted. Public notice of every rule adopted under this
198 section shall be by such means as the Board may prescribe.

199 (8a) To issue special orders to owners (i) who are permitting or causing the pollution, as defined by
200 § 62.1-44.3, of state waters to cease and desist from such pollution, (ii) who have failed to construct
201 facilities in accordance with final approved plans and specifications to construct such facilities in
202 accordance with final approved plans and specifications, (iii) who have violated the terms and provisions
203 of a certificate issued by the Board to comply with such terms and provisions, (iv) who have failed to
204 comply with a directive from the Board to comply with such directive, (v) who have contravened duly
205 adopted and promulgated water quality standards and policies to cease and desist from such
206 contravention and to comply with such water quality standards and policies, (vi) who have violated the
207 terms and provisions of a pretreatment permit issued by the Board or by the owner of a publicly owned
208 treatment works to comply with such terms and provisions or (vii) who have contravened any applicable
209 pretreatment standard or requirement to comply with such standard or requirement; and also to issue
210 such orders to require any owner to comply with the provisions of this chapter and any decision of the
211 Board.

212 (8b) Such special orders are to be issued only after a hearing with at least thirty days' notice to the
213 affected owners, of the time, place and purpose thereof, and they shall become effective not less than
214 fifteen days after service as provided in § 62.1-44.12; provided that if the Board finds that any such
215 owner is grossly affecting or presents an imminent and substantial danger to (i) the public health, safety
216 or welfare, or the health of animals, fish or aquatic life; (ii) a public water supply; or (iii) recreational,
217 commercial, industrial, agricultural or other reasonable uses, it may issue, without advance notice or
218 hearing, an emergency special order directing the owner to cease such pollution or discharge
219 immediately, and shall provide an opportunity for a hearing, after reasonable notice as to the time and
220 place thereof to the owner, to affirm, modify, amend or cancel such emergency special order. If an
221 owner who has been issued such a special order or an emergency special order is not complying with
222 the terms thereof, the Board may proceed in accordance with § 62.1-44.23, and where the order is based
223 on a finding of an imminent and substantial danger, the court shall issue an injunction compelling
224 compliance with the emergency special order pending a hearing by the Board. If an emergency special
225 order requires cessation of a discharge, the Board shall provide an opportunity for a hearing within
226 forty-eight hours of the issuance of the injunction.

227 (8c) The provisions of this section notwithstanding, the Board may proceed directly under
228 § 62.1-44.32 for any past violation or violations of any provision of this chapter or any regulation duly
229 promulgated hereunder.

230 (8d) With the consent of any owner who has violated or failed, neglected or refused to obey any
231 regulation or order of the Board, any condition of a permit or any provision of this chapter, the Board
232 may provide, in an order issued by the Board against such person, for the payment of civil charges for
233 past violations in specific sums not to exceed the limit specified in § 62.1-44.32 (a). Such civil charges
234 shall be instead of any appropriate civil penalty which could be imposed under § 62.1-44.32 (a) and
235 shall not be subject to the provisions of § 2.1-127. Such civil charges shall be paid into the state
236 treasury and deposited by the State Treasurer into the Virginia Environmental Emergency Response
237 Fund pursuant to Chapter 25 (§ 10.1-2500 et seq.) of Title 10.1, excluding civil charges assessed for
238 violations of Article 9 (§ 62.1-44.34:8 et seq.) or 10 (§ 62.1-44.34:10 et seq.) of Chapter 3.1 of Title
239 62.1, or a regulation, administrative or judicial order, or term or condition of approval relating to or
240 issued under those articles.

241 The amendments to this section adopted by the 1976 Session of the General Assembly shall not be
242 construed as limiting or expanding any cause of action or any other remedy possessed by the Board
243 prior to the effective date of said amendments.

244 (9) To make such rulings under §§ 62.1-44.16, 62.1-44.17 and 62.1-44.19 as may be required upon

requests or applications to the Board, the owner or owners affected to be notified by certified mail as soon as practicable after the Board makes them and such rulings to become effective upon such notification.

(10) To adopt such regulations as it deems necessary to enforce the general water quality management program of the Board in all or part of the Commonwealth, except that a description of provisions of any proposed regulation which are more restrictive than applicable federal requirements, together with the reason why the more restrictive provisions are needed, shall be provided to the standing committee of each house of the General Assembly to which matters relating to the content of the regulation are most properly referable.

(11) To investigate any large-scale killing of fish.

(a) Whenever the Board shall determine that any owner, whether or not he shall have been issued a certificate for discharge of waste, has discharged sewage, industrial waste, or other waste into state waters in such quantity, concentration or manner that fish are killed as a result thereof, it may effect such settlement with the owner as will cover the costs incurred by the Board and by the Department of Game and Inland Fisheries in investigating such killing of fish, plus the replacement value of the fish destroyed, or as it deems proper, and if no such settlement is reached within a reasonable time, the Board shall authorize its executive secretary to bring a civil action in the name of the Board to recover from the owner such costs and value, plus any court or other legal costs incurred in connection with such action.

(b) If the owner is a political subdivision of the Commonwealth, the action may be brought in any circuit court within the territory embraced by such political subdivision. If the owner is an establishment, as defined in this chapter, the action shall be brought in the circuit court of the city or the circuit court of the county in which such establishment is located. If the owner is an individual or group of individuals, the action shall be brought in the circuit court of the city or circuit court of the county in which such person or any of them reside.

(c) For the purposes of this subsection the State Water Control Board shall be deemed the owner of the fish killed and the proceedings shall be as though the State Water Control Board were the owner of the fish. The fact that the owner has or held a certificate issued under this chapter shall not be raised as a defense in bar to any such action.

(d) The proceeds of any recovery had under this subsection shall, when received by the Board, be applied, first, to reimburse the Board for any expenses incurred in investigating such killing of fish. The balance shall be paid to the Board of Game and Inland Fisheries to be used for the fisheries' management practices as in its judgment will best restore or replace the fisheries' values lost as a result of such discharge of waste, including, where appropriate, replacement of the fish killed with game fish or other appropriate species. Any such funds received are hereby appropriated for that purpose.

(e) Nothing in this subsection shall be construed in any way to limit or prevent any other action which is now authorized by law by the Board against any owner.

(f) Notwithstanding the foregoing, the provisions of this subsection shall not apply to any owner who adds or applies any chemicals or other substances that are recommended or approved by the State Department of Health to state waters in the course of processing or treating such waters for public water supply purposes, except where negligence is shown.

(12) To administer programs of financial assistance for planning, construction, operation, and maintenance of water quality control facilities for political subdivisions in this Commonwealth.

(13) To establish policies and programs for effective area-wide or basin-wide water quality control and management. The Board may develop comprehensive pollution abatement and water quality control plans on an area-wide or basin-wide basis. In conjunction with this, the Board, when considering proposals for waste treatment facilities, is to consider the feasibility of combined or joint treatment facilities and is to ensure that the approval of waste treatment facilities is in accordance with the water quality management and pollution control plan in the watershed or basin as a whole. In making such determinations, the Board is to seek the advice of local, regional, or state planning authorities.

(14) To establish requirements for the treatment of sewage, industrial wastes and other wastes that are consistent with the purposes of this chapter; however, no treatment shall be less than secondary or its equivalent, unless the owner can demonstrate that a lesser degree of treatment is consistent with the purposes of this chapter.

(15) *To establish and implement policies and programs to protect and enhance the Commonwealth's wetland resources. Regulatory programs shall be designed to achieve no net loss of existing wetland acreage and functions. Voluntary and incentive-based programs shall be developed to achieve a net resource gain in acreage and functions of wetlands. The Board shall seek and obtain advice and guidance from the Virginia Institute of Marine Science in implementing these policies and programs.*

§ 62.1-44.15:5. Virginia Water Protection Permit.

A. After the effective date of regulations adopted by the Board pursuant to this section, issuance

306 Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of
307 the Clean Water Act.

308 B. The Board shall, *after providing an opportunity for public comment*, issue a Virginia Water
309 Protection Permit ~~for an activity requiring § 401 certification~~ if it has determined that the proposed
310 activity is consistent with the provisions of the Clean Water Act *and the State Water Control Law* and
311 will protect instream beneficial uses.

312 C. The preservation of instream flows for purposes of the protection of navigation, maintenance of
313 waste assimilation capacity, the protection of fish and wildlife resources and habitat, recreation, cultural,
314 and aesthetic values is a beneficial use of Virginia's waters. Conditions contained in a Virginia Water
315 Protection Permit may include, but are not limited to, the volume of water which may be withdrawn as
316 a part of the permitted activity. Domestic and other existing beneficial uses shall be considered the
317 highest priority uses.

318 D. *Except in compliance with either an individual or general Virginia Water Protection Permit*
319 *issued in accordance with this subsection, it shall be unlawful to conduct the following activities in a*
320 *wetland: (i) excavation, ditching or dredging; (ii) draining which significantly alters or degrades*
321 *existing wetland acreage or functions; (iii) filling or dumping; (iv) permanent flooding or impounding;*
322 *or (v) activities which cause significant alteration or degradation of existing wetland acreage or*
323 *functions. A Virginia Water Protection Permit for an activity impacting a wetland shall be issued in*
324 *compliance with a regulatory program developed by the Board. The program shall include, but not be*
325 *limited to, standards and requirements governing (1) avoidance and minimization of wetland impacts,*
326 *(2) evaluations of practical alternatives to proposed impacts, and (3) the effects of cumulative impacts of*
327 *proposed and permitted activities on state waters and fish and wildlife resources. Permits shall be*
328 *conditioned upon compensatory mitigation for adverse impacts to wetlands. Such mitigation shall be*
329 *sufficient to maintain existing wetland acreage and functions. As part of the program, the Board shall*
330 *inventory permitted wetland impacts, assess implementation of compensatory mitigation requirements,*
331 *and work to prevent unpermitted impacts.*

332 *The Board may issue general permits for activities that are similar in nature and will cause minimal*
333 *adverse environmental impacts when performed separately and minimal cumulative adverse*
334 *environmental impacts. The Board shall develop general permits for linear utility activities such as*
335 *water, sewer, gas and electric lines, and for wetland impacts of less than one-half of an acre. Each*
336 *general permit shall require a pre-construction application and the Board shall deny, approve or issue*
337 *with conditions any application for coverage under a general permit within forty-five days of receipt of*
338 *a completed application. The application shall be deemed approved if the Board fails to act within*
339 *forty-five days.*

340 *The Board shall incorporate in the program delineation approaches and methods consistent with*
341 *those established by the United States Army Corps of Engineers' "Wetlands Delineation Manual,*
342 *Technical Report Y-87-1, January 1987, Final Report" and the associated March 1992 "Clarification*
343 *and Interpretation of the 1987 Manual."*

344 *This subsection shall not apply to activities governed under Chapter 13 (§ 28.2-1300 et seq.) of Title*
345 *28.2 or normal agricultural activities or normal silvicultural activities.*

346 E. When a Virginia Water Protection Permit is conditioned upon compensatory mitigation for adverse
347 impacts to wetlands, the applicant may be permitted to satisfy all or part of such mitigation requirements
348 by the purchase or use of credits from any wetlands mitigation bank, including any banks owned by the
349 permit applicant, that has been approved and is operating in accordance with applicable federal and state
350 guidance, laws or regulations for the establishment, use and operation of mitigation banks as long as: (1)
351 the bank is in the same U.S.G.S. cataloging unit, as defined by the Hydrologic Unit Map of the United
352 States (U.S.G.S. 1980), or an adjacent cataloging unit within the same river watershed, as the impacted
353 site, or it meets all the conditions found in clauses (i) through (iv) and either clause (v) or (vi) of this
354 subsection; (2) the bank is ecologically preferable to practicable on-site and off-site individual mitigation
355 options, as defined by federal wetland regulations; and (3) the banking instrument, if approved after July
356 1, 1996, has been approved by a process that included public review and comment. When the bank is
357 not located in the same cataloging unit or adjacent cataloging unit within the same river watershed as
358 the impacted site, the purchase or use of credits shall not be allowed unless the applicant demonstrates
359 to the satisfaction of the Department of Environmental Quality that (i) the impacts will occur as a result
360 of a Virginia Department of Transportation linear project or as the result of a locality project for a
361 locality whose jurisdiction crosses multiple river watersheds; (ii) there is no practical same river
362 watershed mitigation alternative; (iii) the impacts are less than one acre in a single and complete project
363 within a cataloging unit; (iv) there is no significant harm to water quality or fish and wildlife resources
364 within the river watershed of the impacted site; and either (v) impacts within the Chesapeake Bay
365 watershed are mitigated within the Chesapeake Bay watershed as close as possible to the impacted site
366 or (vi) impacts within U.S.G.S. cataloging units 02080108, 02080208, and 03010205, as defined by the
367 Hydrologic Unit Map of the United States (U.S.G.S. 1980), are mitigated in-kind within those

hydrologic cataloging units, as close as possible to the impacted site. After July 1, 2002, the provisions of clause (vi) shall apply only to impacts within subdivisions of the listed cataloging units where overlapping watersheds exist, as determined by the Department of Environmental Quality, provided the Department has made such a determination by that date.

CF. Prior to the issuance of a Virginia Water Protection Permit, the Board shall consult with, and give full consideration to the written recommendations of, the following agencies: the Department of Game and Inland Fisheries, the Department of Conservation and Recreation, the Virginia Marine Resources Commission, the Department of Health, the Department of Agriculture and Consumer Services and any other interested and affected agencies. Such consultation shall include the need for balancing instream uses with offstream uses. Agencies may submit written comments on proposed permits within forty-five days after notification by the Board. The Board shall assume that if written comments are not submitted by an agency within this time period, the agency has no comments on the proposed permit.

DG. No Virginia Water Protection Permit shall be required for any water withdrawal in existence on July 1, 1989; however, a permit shall be required if a new § 401 certification is required to increase a withdrawal.

H. No Virginia Water Protection Permit shall be required for any water withdrawal not in existence on July 1, 1989, if the person proposing to make the withdrawal has received a § 401 certification before January 1, 1989, with respect to installation of any necessary withdrawal structures to make such withdrawal; however, a permit shall be required before any such withdrawal is increased beyond the amount authorized by the certification.

I. After July 1, 2000, and prior to the adoption of regulations promulgated pursuant to subsection D, no person shall drain, excavate or ditch a wetland without compensating the impact on the wetland to the satisfaction of the Board. Compensation shall be sufficient to maintain existing wetland acreage and functions.

§ 62.1-44.29. Judicial review.

Any owner aggrieved by, or any person who has participated, in person or by submittal of written comments, in the public comment process related to, a final decision of the Board under §§ 62.1-44.15 (5), 62.1-44.15 (8a), (8b), and (8c), 62.1-44.15:5, 62.1-44.16, 62.1-44.17, 62.1-44.19 or § 62.1-44.25, whether such decision is affirmative or negative, is entitled to judicial review thereof in accordance with the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.) if such person meets the standard for obtaining judicial review of a case or controversy pursuant to Article III of the United States Constitution. A person shall be deemed to meet such standard if (i) such person has suffered an actual or imminent injury which is an invasion of a legally protected interest and which is concrete and particularized; (ii) such injury is fairly traceable to the decision of the Board and not the result of the independent action of some third party not before the court; and (iii) such injury will likely be redressed by a favorable decision by the court.

2. That the State Water Control Board shall adopt final regulations to implement the provisions of this act no later than April 1, 2001.

3. That the State Water Control Board shall, by July 1, 2001, seek from the U.S. Army Corps of Engineers the issuance to Virginia of a Section 404 Clean Water Act State Programmatic General Permit.

#