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SENATE BILL NO. 648

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the House Committee on Chesapeake and Its Tributaries
on February 28, 2000)

(Patron Prior to Substitute—Senator Whipple)

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. Excavate in a wetland;

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

93 4. On and after October 1, 2001, conduct the following activities in a wetland:

94 a. New activities to cause draining that significantly alters or degrades existing wetland acreage or
95 functions;

96 b. Filling or dumping;

97 c. Permanent flooding or impounding; or

98 d. New activities that cause significant alteration or degradation of existing wetland acreage or
99 functions.

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

109 § 62.1-44.15. Powers and duties.

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

111 (1) [Repealed.]

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

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

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

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

121 (3a) To establish such standards of quality and policies for any state waters consistent with the

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~~; (c) *excavation in a wetland*; or (d) *on and after October 1, 2001, the conduct of the following activities in a wetland: (i) new activities to cause draining that significantly alters or degrades existing wetland acreage or functions, (ii) filling or dumping, (iii) permanent flooding or impounding, or (iv) new activities that 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 Water Protection Permit shall be based upon the projected duration of the project, the length of any required monitoring, or other project operations or permit conditions; however, the term shall not exceed fifteen 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;

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

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

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

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

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

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

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

232 (8c) The provisions of this section notwithstanding, the Board may proceed directly under
233 § 62.1-44.32 for any past violation or violations of any provision of this chapter or any regulation duly
234 promulgated hereunder.

235 (8d) With the consent of any owner who has violated or failed, neglected or refused to obey any
236 regulation or order of the Board, any condition of a permit or any provision of this chapter, the Board
237 may provide, in an order issued by the Board against such person, for the payment of civil charges for
238 past violations in specific sums not to exceed the limit specified in § 62.1-44.32 (a). Such civil charges
239 shall be instead of any appropriate civil penalty which could be imposed under § 62.1-44.32 (a) and
240 shall not be subject to the provisions of § 2.1-127. Such civil charges shall be paid into the state
241 treasury and deposited by the State Treasurer into the Virginia Environmental Emergency Response
242 Fund pursuant to Chapter 25 (§ 10.1-2500 et seq.) of Title 10.1, excluding civil charges assessed for
243 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
244 62.1, or a regulation, administrative or judicial order, or term or condition of approval relating to or

issued under those articles.

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

(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

306 *acreage and functions. Voluntary and incentive-based programs shall be developed to achieve a net*
307 *resource gain in acreage and functions of wetlands. The Board shall seek and obtain advice and*
308 *guidance from the Virginia Institute of Marine Science in implementing these policies and programs.*

309 § 62.1-44.15:5. Virginia Water Protection Permit.

310 A. ~~After the effective date of regulations adopted by the Board pursuant to this section, issuance~~
311 *Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of*
312 *the Clean Water Act.*

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

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

323 D. *Except in compliance with an individual or general Virginia Water Protection Permit issued in*
324 *accordance with this subsection, it shall be unlawful to excavate in a wetland. On and after October 1,*
325 *2001, except in compliance with an individual or general Virginia Water Protection Permit issued in*
326 *accordance with this subsection, it shall also be unlawful to conduct the following activities in a*
327 *wetland: (i) new activities to cause draining that significantly alters or degrades existing wetland*
328 *acreage or functions, (ii) filling or dumping, (iii) permanent flooding or impounding, or (iv) new*
329 *activities that cause significant alteration or degradation of existing wetland acreage or functions.*
330 *Permits shall address avoidance and minimization of wetland impacts to the maximum extent*
331 *practicable. A permit shall be issued only if the Board finds that the effect of the impact, together with*
332 *other existing or proposed impacts to wetlands, will not cause or contribute to a significant impairment*
333 *of state waters or fish and wildlife resources. Permits shall contain requirements for compensating*
334 *impacts on wetlands. Such compensation requirements shall be sufficient to achieve no net loss of*
335 *existing wetland acreage and functions, and may be met through wetland creation or restoration,*
336 *purchase or use of mitigation bank credits pursuant to subsection E, or contributing to a fund that is*
337 *approved by the Board and is dedicated to achieving no net loss of wetland acreage and functions.*
338 *When utilized in conjunction with creation, restoration or mitigation bank credits, compensation may*
339 *incorporate (i) preservation or restoration of upland buffers adjacent to wetlands or other state waters;*
340 *or (ii) preservation of wetlands. The Board shall assess compensation implementation, inventory*
341 *permitted wetland impacts, and work to prevent unpermitted impacts. Within 15 days of receipt of an*
342 *individual permit application, the Board shall review the application for completeness and either accept*
343 *the application or request additional specific information from the applicant. Within 120 days of receipt*
344 *of a complete application, the Board shall issue the permit, issue the permit with conditions, deny the*
345 *permit or decide to conduct a public meeting or hearing. If a public meeting or hearing is held, it must*
346 *be held within 60 days of the decision to conduct such a proceeding and a final decision as to the*
347 *permit shall be made within ninety days of completion of the public meeting or hearing.*

348 *The Board shall develop general permits for such activities in wetlands as it deems appropriate.*
349 *General permits shall include such terms and conditions as the Board deems necessary to protect state*
350 *waters and fish and wildlife resources from significant impairment. The Board shall deny, approve or*
351 *approve with conditions any application for coverage under a general permit within forty-five days of*
352 *receipt of a complete pre-construction application. The application shall be deemed approved if the*
353 *Board fails to act within forty-five days. The Board is authorized to waive the requirement for a general*
354 *permit, or deem an activity in compliance with a general permit, when it determines that an isolated*
355 *wetland is of minimal ecological value.*

356 *The Board shall develop general permits for:*

- 357 1. *Activities causing wetland impacts of less than one-half of an acre;*
- 358 2. *Facilities and activities of utilities and public service companies regulated by the Federal Energy*
359 *Regulatory Commission or State Corporation Commission. No Board action on an individual or general*
360 *permit for such facilities shall alter the siting determination made through Federal Energy Regulatory*
361 *Commission or State Corporation Commission approval. The Board and the State Corporation*
362 *Commission shall develop a memorandum of agreement pursuant to §§ 56-46.1, 56-265.2, 56-265.2:1*
363 *and 56-580 to ensure that consultation on wetland impacts occurs prior to siting determinations;*
- 364 3. *Coal, natural gas, and coal bed methane gas mining activities authorized by the Department of*
365 *Mines, Minerals and Energy;*
- 366 4. *Virginia Department of Transportation or other linear transportation projects; and*
- 367 5. *Activities governed by nationwide or regional permits approved by the Board and issued by the*

U.S. Army Corps of Engineers. Conditions contained in the general permits shall include, but not be limited to, filing with the Board copies of any pre-construction notification, post-construction report and certificate of compliance required by the U.S. Army Corps of Engineers.

The Board shall utilize the U.S. Army Corps of Engineers' "Wetlands Delineation Manual, Technical Report Y-87-1, January 1987, Final Report" as the approved method for delineating wetlands. The Board shall adopt appropriate guidance and regulations to ensure consistency with the U.S. Army Corps of Engineers' implementation of delineation practices. The Board shall also adopt guidance and regulations for review and approval of the geographic area of a delineated wetland. Any such approval of a delineation shall remain effective for a period of five years; however, if the Board issues a permit pursuant to this subsection for an activity in the delineated wetland within the five-year period, the approval shall remain effective for the term of the permit. Any delineation accepted by the U.S. Army Corps of Engineers as sufficient for its exercise of jurisdiction pursuant to § 404 of the Clean Water Act shall be determinative of the geographic area of that delineated wetland.

This subsection shall not apply to activities governed under Chapter 13 (§ 28.2-100 et seq.) of Title 28.2 or normal agricultural activities or normal silvicultural activities.

No locality may impose wetlands permit requirements duplicating state or federal wetlands permit requirements.

E. When a Virginia Water Protection Permit is conditioned upon compensatory mitigation for adverse impacts to wetlands, the applicant may be permitted to satisfy all or part of such mitigation requirements by the purchase or use of credits from any wetlands mitigation bank, including any banks owned by the permit applicant, that has been approved and is operating in accordance with applicable federal and state guidance, laws or regulations for the establishment, use and operation of mitigation banks as long as: (1) the bank is in the same U.S.G.S. cataloging unit, as defined by the Hydrologic Unit Map of the United States (U.S.G.S. 1980), or an adjacent cataloging unit within the same river watershed, as the impacted site, or it meets all the conditions found in clauses (i) through (iv) and either clause (v) or (vi) of this subsection; (2) the bank is ecologically preferable to practicable on-site and off-site individual mitigation options, as defined by federal wetland regulations; and (3) the banking instrument, if approved after July 1, 1996, has been approved by a process that included public review and comment. When the bank is not located in the same cataloging unit or adjacent cataloging unit within the same river watershed as the impacted site, the purchase or use of credits shall not be allowed unless the applicant demonstrates to the satisfaction of the Department of Environmental Quality that (i) the impacts will occur as a result of a Virginia Department of Transportation linear project or as the result of a locality project for a locality whose jurisdiction crosses multiple river watersheds; (ii) there is no practical same river watershed mitigation alternative; (iii) the impacts are less than one acre in a single and complete project within a cataloging unit; (iv) there is no significant harm to water quality or fish and wildlife resources within the river watershed of the impacted site; and either (v) impacts within the Chesapeake Bay watershed are mitigated within the Chesapeake Bay watershed as close as possible to the impacted site or (vi) impacts within U.S.G.S. cataloging units 02080108, 02080208, and 03010205, as defined by the 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. *The Department of Environmental Quality is authorized to serve as a signatory to agreements governing the operation of wetlands mitigation banks. The Commonwealth, its officials, agencies, and employees shall not be liable for any action taken under any agreement developed pursuant to such authority. State agencies are authorized to purchase credits from wetland mitigation banks.*

ƉF. 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.

ƉG. 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

429 before January 1, 1989, with respect to installation of any necessary withdrawal structures to make such
430 withdrawal; however, a permit shall be required before any such withdrawal is increased beyond the
431 amount authorized by the certification.

432 *I. On and after July 1, 2000, and prior to the adoption of regulations promulgated pursuant to*
433 *subsection D, absent the issuance of a permit by the U.S. Army Corps of Engineers pursuant to § 404 of*
434 *the Clean Water Act, no person shall excavate in a wetland without compensating for the impact of the*
435 *loss of the wetland to the satisfaction of the Board in a manner sufficient to achieve no net loss of*
436 *existing wetland acreage and functions.*

437 § 62.1-44.29. Judicial review.

438 Any owner aggrieved by, or any person who has participated, in person or by submittal of written
439 comments, in the public comment process related to, a final decision of the Board under §§ 62.1-44.15
440 (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,
441 whether such decision is affirmative or negative, is entitled to judicial review thereof in accordance with
442 the provisions of the Administrative Process Act (§ 9-6.14:1 et seq.) if such person meets the standard
443 for obtaining judicial review of a case or controversy pursuant to Article III of the United States
444 Constitution. A person shall be deemed to meet such standard if (i) such person has suffered an actual
445 or imminent injury which is an invasion of a legally protected interest and which is concrete and
446 particularized; (ii) such injury is fairly traceable to the decision of the Board and not the result of the
447 independent action of some third party not before the court; and (iii) such injury will likely be redressed
448 by a favorable decision by the court.

449 **2. The State Water Control Board shall promulgate regulations governing excavation activities in**
450 **wetlands to be effective within 280 days of enactment of this act, and shall adopt proposed**
451 **regulations to implement all other provisions of this act by January 1, 2001 to become effective on**
452 **October 1, 2001.**

453 **3. That the State Water Control Board shall promptly, but not later than July 1, 2002, seek from**
454 **the U.S. Army Corps of Engineers the issuance to Virginia of a § 404 Clean Water Act State**
455 **Programmatic General Permit. The Board shall report to the House Committee on Chesapeake**
456 **and Its Tributaries and the Senate Committee on Agriculture, Conservation and Natural**
457 **Resources at least every six months on its progress in obtaining the State Programmatic General**
458 **Permit.**

459 **4. That nothing in this act shall be construed to restrict the State Water Control Board's authority**
460 **to issue Virginia Water Protection Permits for activities requiring certification under § 401 of the**
461 **Clean Water Act.**