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SENATE BILL NO. 695

Offered January 24, 2000

A BILL to amend and reenact §§ 62.1-44.3, 62.1-44.5 and 62.1-44.15 of the Code of Virginia and to amend the Code of Virginia by adding in Article 2 of Chapter 3.1 of Title 62.1 a section numbered 62.1-44.15:5.3, relating to certificates for alterations of state waters.

Patrons—Stolle, Hanger, Howell, Lucas, Miller, K.G., Quayle, Rerras, Reynolds, Saslaw, Schrock and Stosch; Delegates: Albo, Day, Diamonstein, Drake, Hamilton, Harris, Joannou, Louderback, McDonnell, Phillips, Wardrup and Weatherholtz

Referred to Committee on Agriculture, Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That §§ 62.1-44.3, 62.1-44.5 and 62.1-44.15 of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding in Article 2 of Chapter 3.1 of Title 62.1 a section numbered 62.1-44.15:5.3 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, *including wetlands*, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction;

"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

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60 amended;

61 "Rule" means a rule adopted by the Board to regulate the procedure of the Board pursuant to
62 § 62.1-44.15 (7);

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

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

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

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

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

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

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

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

77 "*Wetlands*" means swamps, marshes, bogs and similar areas that satisfy the criteria of the United
78 States Army Corps of Engineers' *Wetlands Delineation Manual* (January 1987), that are subject to
79 federal jurisdiction under the federal Clean Water Act (33 U.S.C. § 1251 et seq.), and that have
80 standing water at the ground surface for at least twenty-one consecutive days during the growing season
81 in most years.

82 § 62.1-44.5. Prohibition of waste discharges or other quality alterations of state waters except as
83 authorized by permit; notification required.

84 A. Except in compliance with a certificate issued by the Board, it shall be unlawful for any person to
85 (i) discharge into state waters sewage, industrial wastes, other wastes, or any noxious or deleterious
86 substances; ~~or~~; (ii) *excavate in wetlands*; or (iii) otherwise alter the physical, chemical or biological
87 properties of such state waters and make them detrimental to the public health, or to animal or aquatic
88 life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other
89 uses.

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

99 § 62.1-44.15. Powers and duties.

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

101 (1) [Repealed.]

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

104 (2a) To study and investigate methods, procedures, devices, appliances, and technologies which could
105 assist in water conservation or water consumption reduction.

106 (2b) To coordinate its efforts toward water conservation with other persons or groups, within or
107 without the Commonwealth.

108 (2c) To make reports concerning, and formulate recommendations based upon, any such water
109 conservation studies to ensure that present and future water needs of the citizens of the Commonwealth
110 are met.

111 (3a) To establish such standards of quality and policies for any state waters consistent with the
112 general policy set forth in this chapter, and to modify, amend or cancel any such standards or policies
113 established and to take all appropriate steps to prevent quality alteration contrary to the public interest or
114 to standards or policies thus established, except that a description of provisions of any proposed standard
115 or policy adopted by regulation which are more restrictive than applicable federal requirements, together
116 with the reason why the more restrictive provisions are needed, shall be provided to the standing
117 committee of each house of the General Assembly to which matters relating to the content of the
118 standard or policy are most properly referable. The Board shall, from time to time, but at least once
119 every three years, hold public hearings pursuant to subsection B of § 9-6.14:7.1 but, upon the request of
120 an affected person or upon its own motion, hold hearings pursuant to § 9-6.14:8, for the purpose of
121 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 certificates for (i) the discharge of sewage, industrial wastes and other wastes into or adjacent to *state waters*; (ii) *excavation in wetlands*; or (iii) the alteration otherwise of the physical, chemical or biological properties of state waters under prescribed conditions and to revoke or amend such certificates.

(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 *or a certificate to excavate in wetlands* 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

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

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

183 being inspected.

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

188 (8a) To issue special orders to owners (i) who are permitting or causing the pollution, as defined by
189 § 62.1-44.3, of state waters to cease and desist from such pollution, (ii) who have failed to construct
190 facilities in accordance with final approved plans and specifications to construct such facilities in
191 accordance with final approved plans and specifications, (iii) who have violated the terms and provisions
192 of a certificate issued by the Board to comply with such terms and provisions, (iv) who have failed to
193 comply with a directive from the Board to comply with such directive, (v) who have contravened duly
194 adopted and promulgated water quality standards and policies to cease and desist from such
195 contravention and to comply with such water quality standards and policies, (vi) who have violated the
196 terms and provisions of a pretreatment permit issued by the Board or by the owner of a publicly owned
197 treatment works to comply with such terms and provisions or (vii) who have contravened any applicable
198 pretreatment standard or requirement to comply with such standard or requirement; and also to issue
199 such orders to require any owner to comply with the provisions of this chapter and any decision of the
200 Board.

201 (8b) Such special orders are to be issued only after a hearing with at least thirty days' notice to the
202 affected owners, of the time, place and purpose thereof, and they shall become effective not less than
203 fifteen days after service as provided in § 62.1-44.12; provided that if the Board finds that any such
204 owner is grossly affecting or presents an imminent and substantial danger to (i) the public health, safety
205 or welfare, or the health of animals, fish or aquatic life; (ii) a public water supply; or (iii) recreational,
206 commercial, industrial, agricultural or other reasonable uses, it may issue, without advance notice or
207 hearing, an emergency special order directing the owner to cease such pollution or discharge
208 immediately, and shall provide an opportunity for a hearing, after reasonable notice as to the time and
209 place thereof to the owner, to affirm, modify, amend or cancel such emergency special order. If an
210 owner who has been issued such a special order or an emergency special order is not complying with
211 the terms thereof, the Board may proceed in accordance with § 62.1-44.23, and where the order is based
212 on a finding of an imminent and substantial danger, the court shall issue an injunction compelling
213 compliance with the emergency special order pending a hearing by the Board. If an emergency special
214 order requires cessation of a discharge, the Board shall provide an opportunity for a hearing within
215 forty-eight hours of the issuance of the injunction.

216 (8c) The provisions of this section notwithstanding, the Board may proceed directly under
217 § 62.1-44.32 for any past violation or violations of any provision of this chapter or any regulation duly
218 promulgated hereunder.

219 (8d) With the consent of any owner who has violated or failed, neglected or refused to obey any
220 regulation or order of the Board, any condition of a permit or any provision of this chapter, the Board
221 may provide, in an order issued by the Board against such person, for the payment of civil charges for
222 past violations in specific sums not to exceed the limit specified in § 62.1-44.32 (a). Such civil charges
223 shall be instead of any appropriate civil penalty which could be imposed under § 62.1-44.32 (a) and
224 shall not be subject to the provisions of § 2.1-127. Such civil charges shall be paid into the state
225 treasury and deposited by the State Treasurer into the Virginia Environmental Emergency Response
226 Fund pursuant to Chapter 25 (§ 10.1-2500 et seq.) of Title 10.1, excluding civil charges assessed for
227 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
228 62.1, or a regulation, administrative or judicial order, or term or condition of approval relating to or
229 issued under those articles.

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

233 (9) To make such rulings under §§ 62.1-44.16, 62.1-44.17 and 62.1-44.19 as may be required upon
234 requests or applications to the Board, the owner or owners affected to be notified by certified mail as
235 soon as practicable after the Board makes them and such rulings to become effective upon such
236 notification.

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

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

244 (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.

§ 62.1-44.15:5.3. *Certificates to excavate soils in wetlands; exemptions.*

Notwithstanding clause (ii) of subsection A of § 62.1-44.5, no certificate from the Board shall be required for:

1. *Excavations in wetlands associated with normal agricultural, ranching or silvicultural activities;*
2. *Excavations in wetlands associated with a project involving the discharge of dredged or fill material that has been authorized by the United States Army Corps of Engineers and for which a Virginia Water Protection Permit has been issued; or*
3. *Excavations in wetlands involving only de minimis movement of soil and that are neither intended to cause nor in fact cause the destruction, drainage or degradation of wetlands.*