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HOUSE BILL NO. 445

Offered January 14, 2004

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A BILL to amend and reenact §§ 10.1-561 and 62.1-44.15 of the Code of Virginia, relating to erosion and sediment control and stormwater management inspectors.

 Patron—Suit

 Referred to Committee on Agriculture, Chesapeake and Natural Resources

Be it enacted by the General Assembly of Virginia:**1. That §§ 10.1-561 and 62.1-44.15 of the Code of Virginia are amended and reenacted as follows:**

§ 10.1-561. State erosion and sediment control program.

A. The Board shall develop a program and promulgate regulations for the effective control of soil erosion, sediment deposition, and nonagricultural runoff ~~which~~ *that* must be met in any control program to prevent the unreasonable degradation of properties, stream channels, waters and other natural resources in accordance with the Administrative Process Act (§ 2.2-4000 et seq.).

The regulations shall:

1. Be based upon relevant physical and developmental information concerning the watersheds and drainage basins of the Commonwealth, including, but not limited to, data relating to land use, soils, hydrology, geology, size of land area being disturbed, proximate water bodies and their characteristics, transportation, and public facilities and services;

2. Include such survey of lands and waters as may be deemed appropriate by the Board or required by any applicable law to identify areas, including multijurisdictional and watershed areas, with critical erosion and sediment problems; and

3. Contain conservation standards for various types of soils and land uses, which shall include criteria, techniques, and methods for the control of erosion and sediment resulting from land-disturbing activities.

B. The Board shall provide technical assistance and advice to, and conduct and supervise educational programs for, districts and localities ~~which~~ *that* have adopted local control programs.

C. The program and regulations shall be available for public inspection at the Department.

D. The Board shall promulgate regulations establishing minimum standards of effectiveness of erosion and sediment control programs, and criteria and procedures for reviewing and evaluating the effectiveness of erosion and sediment control programs. In developing minimum standards for program effectiveness, the Board shall consider information and standards on which the regulations promulgated pursuant to subsection A of this section are based.

E. The Board shall periodically conduct a comprehensive review and evaluation to ensure that all erosion and sediment control programs operating under the jurisdiction of this article meet minimum standards of effectiveness in controlling soil erosion, sediment deposition and nonagricultural runoff. The Board shall develop a schedule for conducting periodic reviews and evaluations of the effectiveness of erosion and sediment control programs.

F. The Board shall issue certificates of competence concerning the content, application and intent of specified subject areas of this chapter and accompanying regulations, including program administration, plan review, and project inspection, to personnel of program authorities and to any other persons who have completed training programs or in other ways demonstrated adequate knowledge. The Department shall administer education and training programs for specified subject areas of this chapter and accompanying regulations, and is authorized to charge persons attending such programs reasonable fees to cover the costs of administering the programs.

G. As of December 31, 2004, any Department personnel conducting inspections pursuant to this chapter shall hold a certificate of competence as provided in subsection F.

§ 62.1-44.15. Powers and duties.

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

(1) [Repealed.]

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

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

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

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59 (2c) To make reports concerning, and formulate recommendations based upon, any such water
60 conservation studies to ensure that present and future water needs of the citizens of the Commonwealth
61 are met.

62 (3a) To establish such standards of quality and policies for any state waters consistent with the
63 general policy set forth in this chapter, and to modify, amend or cancel any such standards or policies
64 established and to take all appropriate steps to prevent quality alteration contrary to the public interest or
65 to standards or policies thus established, except that a description of provisions of any proposed standard
66 or policy adopted by regulation which are more restrictive than applicable federal requirements, together
67 with the reason why the more restrictive provisions are needed, shall be provided to the standing
68 committee of each house of the General Assembly to which matters relating to the content of the
69 standard or policy are most properly referable. The Board shall, from time to time, but at least once
70 every three years, hold public hearings pursuant to subsection B of § 2.2-4007 but, upon the request of
71 an affected person or upon its own motion, hold hearings pursuant to § 2.2-4009, for the purpose of
72 reviewing the standards of quality, and, as appropriate, adopting, modifying, or canceling such standards.
73 Whenever the Board considers the adoption, modification, amendment or cancellation of any standard, it
74 shall give due consideration to, among other factors, the economic and social costs and benefits which
75 can reasonably be expected to obtain as a consequence of the standards as adopted, modified, amended
76 or cancelled. The Board shall also give due consideration to the public health standards issued by the
77 Virginia Department of Health with respect to issues of public health policy and protection. If the Board
78 does not follow the public health standards of the Virginia Department of Health, the Board's reason for
79 any deviation shall be made in writing and published for any and all concerned parties.

80 (3b) Except as provided in subdivision (3a), such standards and policies are to be adopted or
81 modified, amended or cancelled in the manner provided by the Administrative Process Act (§ 2.2-4000
82 et seq.).

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

90 (5) To issue, revoke or amend certificates under prescribed conditions for: (a) the discharge of
91 sewage, industrial wastes and other wastes into or adjacent to state waters; (b) the alteration otherwise of
92 the physical, chemical or biological properties of state waters; (c) excavation in a wetland; or (d) on and
93 after October 1, 2001, the conduct of the following activities in a wetland: (i) new activities to cause
94 draining that significantly alters or degrades existing wetland acreage or functions, (ii) filling or
95 dumping, (iii) permanent flooding or impounding, or (iv) new activities that cause significant alteration
96 or degradation of existing wetland acreage or functions.

97 (5a) All certificates issued by the Board under this chapter shall have fixed terms. The term of a
98 Virginia Pollution Discharge Elimination System permit shall not exceed five years. *As of December 31,*
99 *2004, any Department personnel conducting inspections for compliance with stormwater management*
100 *permits shall hold a certificate of competence pursuant to § 10.1-561.* The term of a Virginia Water
101 Protection Permit shall be based upon the projected duration of the project, the length of any required
102 monitoring, or other project operations or permit conditions; however, the term shall not exceed fifteen
103 years. The term of a Virginia Pollution Abatement permit shall not exceed ten years, except that the
104 term of a Virginia Pollution Abatement permit for confined animal feeding operations shall be ten years.
105 The Department of Environmental Quality shall inspect all facilities for which a Virginia Pollution
106 Abatement permit has been issued at least once every five years, except that the Department shall
107 inspect all facilities covered by the Virginia Pollution Abatement permit for confined animal feeding
108 operations annually. Department personnel performing inspections of confined animal feeding operations
109 shall be certified under the voluntary nutrient management training and certification program established
110 in § 10.1-104.2. The term of a certificate issued by the Board shall not be extended by modification
111 beyond the maximum duration and the certificate shall expire at the end of the term unless an
112 application for a new permit has been timely filed as required by the regulations of the Board and the
113 Board is unable, through no fault of the permittee, to issue a new permit before the expiration date of
114 the previous permit.

115 (5b) Any certificate issued by the Board under this chapter may, after notice and opportunity for a
116 hearing, be amended or revoked on any of the following grounds or for good cause as may be provided
117 by the regulations of the Board:

118 1. The owner has violated any regulation or order of the Board, any condition of a certificate, any
119 provision of this chapter, or any order of a court, where such violation results in a release of harmful
120 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.

(5c) Any certificate issued by the Board under this chapter relating to dredging projects governed under Chapter 12 (§ 28.2-1200 et seq.) or Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 may be conditioned upon a demonstration of financial responsibility for the completion of compensatory mitigation requirements. Financial responsibility may be demonstrated by a letter of credit, a certificate of deposit or a performance bond executed in a form approved by the Board. If the U.S. Army Corps of Engineers requires demonstration of financial responsibility for the completion of compensatory mitigation required for a particular project, then the mechanism and amount approved by the U.S. Army Corps of Engineers shall be used to meet this requirement.

(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 being inspected.

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

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

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

(8c) The provisions of this section notwithstanding, the Board may proceed directly under

§ 62.1-44.32 for any past violation or violations of any provision of this chapter or any regulation duly promulgated hereunder.

(8d) With the consent of any owner who has violated or failed, neglected or refused to obey any regulation or order of the Board, any condition of a permit or any provision of this chapter, the Board may provide, in an order issued by the Board against such person, for the payment of civil charges for past violations in specific sums not to exceed the limit specified in § 62.1-44.32 (a). Such civil charges shall be instead of any appropriate civil penalty which could be imposed under § 62.1-44.32 (a) and shall not be subject to the provisions of § 2.2-514. Such civil charges shall be paid into the state treasury and deposited by the State Treasurer into the Virginia Environmental Emergency Response Fund pursuant to Chapter 25 (§ 10.1-2500 et seq.) of Title 10.1, excluding civil charges assessed for 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 this title, 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 promote and establish requirements for the reclamation and reuse of wastewater that are protective of state waters and public health as an alternative to directly discharging pollutants into waters of the state. The requirements shall address various potential categories of reuse and may include general permits and provide for greater flexibility and less stringent requirements commensurate with the quality of the reclaimed water and its intended use. The requirements shall be developed in consultation with the Department of Health and other appropriate state agencies. This authority shall not be construed as conferring upon the Board any power or duty duplicative of those of the State Board of Health.

(16) 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.