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HOUSE BILL NO. 2180

Offered January 10, 2007

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A BILL to amend and reenact § 62.1-44.15 of the Code of Virginia, relating to the certification of stormwater inspectors.

Patron—Saxman

Referred to Committee on Agriculture, Chesapeake and Natural Resources

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

§ 62.1-44.15. Powers and duties; civil penalties.

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(1) [Repealed.]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 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.

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

(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 § 2.2-4007 but, upon the request of an affected person or upon its own motion, hold hearings pursuant to § 2.2-4009, for the purpose of reviewing the standards of quality, and, as appropriate, adopting, modifying, or canceling 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 (§ 2.2-4000 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 that 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 state waters; (b) the alteration otherwise of the physical, chemical or biological properties of state waters; (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.

59 (5a) All certificates issued by the Board under this chapter shall have fixed terms. The term of a
60 Virginia Pollution Discharge Elimination System permit shall not exceed five years. ~~As of December 31,~~
61 ~~2004, any Department personnel conducting inspections for compliance with stormwater management~~
62 ~~permits shall hold a certificate of competence pursuant to § 10.1-561.~~ The term of a Virginia Water
63 Protection Permit shall be based upon the projected duration of the project, the length of any required
64 monitoring, or other project operations or permit conditions; however, the term shall not exceed 15
65 years. The term of a Virginia Pollution Abatement permit shall not exceed 10 years, except that the term
66 of a Virginia Pollution Abatement permit for confined animal feeding operations shall be 10 years. The
67 Department of Environmental Quality shall inspect all facilities for which a Virginia Pollution
68 Abatement permit has been issued at least once every five years, except that the Department shall
69 inspect all facilities covered by the Virginia Pollution Abatement permit for confined animal feeding
70 operations annually. Department personnel performing inspections of confined animal feeding operations
71 shall be certified under the voluntary nutrient management training and certification program established
72 in § 10.1-104.2. The term of a certificate issued by the Board shall not be extended by modification
73 beyond the maximum duration and the certificate shall expire at the end of the term unless an
74 application for a new permit has been timely filed as required by the regulations of the Board and the
75 Board is unable, through no fault of the permittee, to issue a new permit before the expiration date of
76 the previous permit.

77 (5b) Any certificate issued by the Board under this chapter may, after notice and opportunity for a
78 hearing, be amended or revoked on any of the following grounds or for good cause as may be provided
79 by the regulations of the Board:

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

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

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

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

94 (5c) Any certificate issued by the Board under this chapter relating to dredging projects governed
95 under Chapter 12 (§ 28.2-1200 et seq.) or Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 may be
96 conditioned upon a demonstration of financial responsibility for the completion of compensatory
97 mitigation requirements. Financial responsibility may be demonstrated by a letter of credit, a certificate
98 of deposit or a performance bond executed in a form approved by the Board. If the U.S. Army Corps of
99 Engineers requires demonstration of financial responsibility for the completion of compensatory
100 mitigation required for a particular project, then the mechanism and amount approved by the U.S. Army
101 Corps of Engineers shall be used to meet this requirement.

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

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

115 (8a) To issue special orders to owners (i) who are permitting or causing the pollution, as defined by
116 § 62.1-44.3, of state waters to cease and desist from such pollution, (ii) who have failed to construct
117 facilities in accordance with final approved plans and specifications to construct such facilities in
118 accordance with final approved plans and specifications, (iii) who have violated the terms and provisions
119 of a certificate issued by the Board to comply with such terms and provisions, (iv) who have failed to
120 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. Orders issued pursuant to this subsection may include civil penalties of up to \$32,500 per violation, not to exceed \$100,000 per order. The Board may assess penalties under this subsection if (a) the person has been issued at least two written notices of alleged violation by the Department for the same or substantially related violations at the same site, (b) such violations have not been resolved by demonstration that there was no violation, by an order issued by the Board or the Director, or by other means, (c) at least 130 days have passed since the issuance of the first notice of alleged violation, and (d) there is a finding that such violations have occurred after a hearing conducted in accordance with subdivision (8b). The actual amount of any penalty assessed shall be based upon the severity of the violations, the extent of any potential or actual environmental harm, the compliance history of the facility or person, any economic benefit realized from the noncompliance, and the ability of the person to pay the penalty. The Board shall provide the person with the calculation for the proposed penalty prior to any hearing conducted for the issuance of an order that assesses penalties pursuant to this subsection. The issuance of a notice of alleged violation by the Department shall not be considered a case decision as defined in § 2.2-4001. Any notice of alleged violation shall include a description of each violation, the specific provision of law violated, and information on the process for obtaining a final decision or fact finding from the Department on whether or not a violation has occurred, and nothing in this section shall preclude an owner from seeking such a determination. Such civil penalties shall be paid into the state treasury and deposited by the State Treasurer into the Virginia Environmental Emergency Response Fund (§ 10.1-2500 et seq.), except that civil penalties assessed for violations of Article 9 (§ 62.1-44.34:8 et seq.) or Article 11 (§ 62.1-44.34:14 et seq.) of this chapter shall be paid into the Virginia Petroleum Storage Tank Fund in accordance with § 62.1-44.34:11.

(8b) Such special orders are to be issued only after a hearing before a hearing officer appointed by the Supreme Court in accordance with § 2.2-4020 or, if requested by the person, before a quorum of the Board with at least 30 days' notice to the affected owners, of the time, place and purpose thereof, and they shall become effective not less than 15 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 48 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 (§ 10.1-2500 et seq.), 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.

(8e) The Board shall develop and provide an opportunity for public comment on guidelines and procedures that contain specific criteria for calculating the appropriate penalty for each violation based

182 upon the severity of the violations, the extent of any potential or actual environmental harm, the
183 compliance history of the facility or person, any economic benefit realized from the noncompliance, and
184 the ability of the person to pay the penalty.

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

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

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

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

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

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

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

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

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

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

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

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

240 (15) To promote and establish requirements for the reclamation and reuse of wastewater that are
241 protective of state waters and public health as an alternative to directly discharging pollutants into waters
242 of the state. The requirements shall address various potential categories of reuse and may include
243 general permits and provide for greater flexibility and less stringent requirements commensurate with the

244 quality of the reclaimed water and its intended use. The requirements shall be developed in consultation
245 with the Department of Health and other appropriate state agencies. This authority shall not be construed
246 as conferring upon the Board any power or duty duplicative of those of the State Board of Health.
247 (16) To establish and implement policies and programs to protect and enhance the Commonwealth's
248 wetland resources. Regulatory programs shall be designed to achieve no net loss of existing wetland
249 acreage and functions. Voluntary and incentive-based programs shall be developed to achieve a net
250 resource gain in acreage and functions of wetlands. The Board shall seek and obtain advice and
251 guidance from the Virginia Institute of Marine Science in implementing these policies and programs.

INTRODUCED

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