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SENATE BILL NO. 843

Offered January 12, 2011

Prefiled January 7, 2011

A BILL to amend and reenact §§ 62.1-44.34:15.1 and 62.1-44.34:20 of the Code of Virginia, relating to aboveground storage tanks; retrofitting requirements; allocation of proceeds from civil penalties.

Patron—Petersen

Referred to Committee on Agriculture, Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That §§ 62.1-44.34:15.1 and 62.1-44.34:20 of the Code of Virginia are amended and reenacted as follows:

§ 62.1-44.34:15.1. Regulations for aboveground storage tanks.

The Board shall adopt regulations and develop procedures necessary to prevent pollution of state waters, lands, or storm drain systems from the discharge of oil from new and existing aboveground storage tanks. These regulations shall be developed in substantial conformity with the current codes and standards recommended by the National Fire Protection Association. To the extent that they are consistent with the Board's program, the Board shall incorporate accepted industry practices contained in the American Petroleum Institute publications and other accepted industry standards when developing the regulations contemplated by this section. The regulations shall provide the following:

1. For existing aboveground storage tanks at facilities with an aggregate capacity of one million gallons or greater:

a. To prevent leaks from aboveground storage tanks, requirements for inventory control, testing for significant inventory variations (e.g., test procedures in accordance with accepted industry practices, where feasible, and approved by the Board) and formal tank inspections every five years in accordance with accepted industry practices and procedures approved by the Board. Initial testing shall be on a schedule approved by the Board. Aboveground storage tanks totally off ground with all associated piping off ground, aboveground storage tanks with a capacity of 5,000 gallons or less located within a building or structure designed to fully contain a discharge of oil, and aboveground storage tanks containing No. 5 or No. 6 fuel oil for consumption on the premises where stored shall not be subject to inventory control and testing for significant variations. In accordance with subdivision 5 of this section 6, the Board shall promulgate regulations which provide for variances from inventory control and testing for significant variation for (i) aboveground storage tanks with Release Prevention Barriers (RPBs) with all associated piping off ground, (ii) aboveground storage tanks with a de minimis capacity (12,000 gallons or less), and (iii) other categories of aboveground storage tanks, including those located within a building or structure, as deemed appropriate;

b. To prevent overfills, requirements for safe fill and shut down procedures, including an audible staged alarm with immediate and controlled shut down procedures, or equivalent measures established by the Board;

c. To prevent leaks from piping, requirements for cathodic protection, and pressure testing to be conducted at least once every five years, or equivalent measures established by the Board;

d. To prevent and identify leaks from any source, requirements (i) for a visual inspection of the facility each day of normal operations and a weekly inspection of the facility with a checklist approved by the Board, performed by a person certified or trained by the operator in accordance with Board requirements, (ii) for monthly gauging and inspection of all ground water monitoring wells located at the facility, and monitoring of the well head space for the presence of vapors indicating the presence of petroleum, and (iii) for quarterly sampling and laboratory analysis of the fluids present in each such monitoring well to determine the presence of petroleum or petroleum by-product contamination; and

e. To ensure proper training of individuals conducting inspections, requirements for proper certification or training by operators relative to aboveground storage tanks.

2. For existing aboveground storage tanks at facilities with an aggregate capacity of less than one million gallons but more than 25,000 gallons:

a. To prevent leaks from aboveground storage tanks, requirements for inventory control and testing for significant inventory variations (e.g., test procedures in accordance with accepted industry practices, where feasible, and approved by the Board). Initial testing shall be on a schedule approved by the Board. Aboveground storage tanks totally off ground with all associated piping off ground, aboveground storage tanks with a capacity of 5,000 gallons or less located within a building or structure designed to fully contain a discharge of oil, and aboveground storage tanks containing No. 5 or No. 6 fuel oil for

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SB843

59 consumption on the premises where stored shall not be subject to inventory control and testing for
60 significant variations. In accordance with subdivision 5 of this section 6, the Board shall promulgate
61 regulations which provide for variances from inventory control and testing for significant variation for
62 (i) aboveground storage tanks with Release Prevention Barriers (RPBs) with all associated piping off
63 ground, (ii) aboveground storage tanks with a de minimis capacity (12,000 gallons or less), and (iii)
64 other categories of aboveground storage tanks, including those located within a building or structure, as
65 deemed appropriate;

66 b. To prevent overfills, requirements for safe fill and shut down procedures;

67 c. To prevent leaks from piping, requirements for pressure testing to be conducted at least once every
68 five years or equivalent measures established by the Board; and

69 d. To prevent and identify leaks from any source, requirements for a visual inspection of the facility
70 each day of normal operations and a weekly inspection of the facility with a checklist approved by the
71 Board, performed by a person certified or trained by the operator in accordance with Board requirements
72 developed in accordance with subdivision 1 of this section.

73 3. For aboveground storage tanks existing prior to the effective date of the regulations required by
74 this section, when the results of a tank inspection indicate the need for replacement of the tank bottom,
75 the operator of a facility shall install a release prevention barrier (RPB) capable of: (i) preventing the
76 release of the oil and (ii) containing or channeling the oil for leak detection. The decision to replace an
77 existing tank bottom shall be based on the criteria established by regulations pursuant to this section.

78 4. *For aboveground storage tanks at facilities with an aggregate capacity of one million gallons or*
79 *greater existing prior to January 29, 1992, the Board shall establish performance standards for*
80 *operators to bring aboveground storage tanks into substantial conformance with regulations adopted in*
81 *accordance with subdivision 5. Operators shall meet such performance standards no later than July 1,*
82 *2021.*

83 5. The Board shall establish performance standards for aboveground storage tanks installed,
84 retrofitted or brought into use after the effective date of the regulations promulgated pursuant to this
85 subsection that incorporate all technologies designed to prevent oil discharges that have been proven in
86 accordance with accepted industry practices and shown to be cost-effective.

87 §6. The Board shall establish criteria for granting variances from the requirements of the regulations
88 promulgated pursuant to this section (i) on a case-by-case basis and (ii) by regulation for categories of
89 aboveground storage tanks, except that the Board shall not grant a variance that would result in an
90 unreasonable risk to the public health or the environment. Variances by regulation shall be based on
91 relevant factors such as tank size, use, and location. Within thirty days after the grant of a variance for a
92 facility, the Board shall send written notification of the variance to the chief administrative officer of the
93 locality in which the facility is located.

94 § 62.1-44.34:20. Enforcement and penalties.

95 A. Upon a finding of a violation of this article or a regulation or term or condition of approval
96 issued pursuant to this article, the Board is authorized to issue a special order requiring any person to
97 cease and desist from causing or permitting such violation or requiring any person to comply with any
98 such provision, regulation or term or condition of approval. Such special orders shall be issued only
99 after notice and an opportunity for hearing except that, if the Board finds that any discharge in violation
100 of this article poses a serious threat to (i) the public health, safety or welfare or the health of animals,
101 fish, botanic or aquatic life; (ii) a public water supply; or (iii) recreational, commercial, industrial,
102 agricultural or other reasonable uses, the Board may issue, without advance notice or hearing, an
103 emergency special order requiring the operator of any facility, vehicle or vessel to cease such discharge
104 immediately, to implement any applicable contingency plan and to effect containment and cleanup. Such
105 emergency special order may also require the operator of a facility to modify or cease regular operation
106 of the facility, or any portion thereof, until the Board determines that continuing regular operation of the
107 facility, or such portion thereof, will not pose a substantial threat of additional or continued discharges.
108 The Board shall affirm, modify, amend or cancel any such emergency order after providing notice and
109 opportunity for hearing to the operator charged with the violation. The notice of the hearing and the
110 emergency order shall be issued at the same time. If an operator who has been issued such a special
111 order or an emergency special order is not complying with the terms thereof, the Board may proceed in
112 accordance with subsection B of this section, and where the order is based on a finding of an imminent
113 and substantial danger, the court shall issue an injunction compelling compliance with the emergency
114 special order pending a hearing by the Board. If an emergency special order requires modification or
115 cessation of operations, the Board shall provide an opportunity for a hearing within 48 hours of the
116 issuance of the injunction.

117 B. In the event of a violation of this article or a regulation, administrative or judicial order, or term
118 or condition of approval issued under this article, or in the event of failure to comply with a special
119 order issued by the Board pursuant to this section, the Board is authorized to proceed by civil action to
120 obtain an injunction of such violation, to obtain such affirmative equitable relief as is appropriate and to

recover all costs, damages and civil penalties resulting from such violation or failure to comply. The Board shall be entitled to an award of reasonable attorneys' fees and costs in any action in which it is a prevailing party.

C. Any person who violates or causes or permits to be violated a provision of this article, or a regulation, administrative or judicial order, or term or condition of approval issued under this article, shall be subject to a civil penalty for each such violation as follows:

1. For failing to obtain approval of an oil discharge contingency plan as required by § 62.1-44.34:15, not less than \$1,000 nor more than \$50,000 for the initial violation, and \$5,000 per day for each day of violation thereafter;

2. For failing to maintain evidence of financial responsibility as required by § 62.1-44.34:16, not less than \$1,000 nor more than \$100,000 for the initial violation, and \$5,000 per day for each day of violation thereafter;

3. For discharging or causing or permitting a discharge of oil into or upon state waters, or owning or operating any facility, vessel or vehicle from which such discharge originates in violation of § 62.1-44.34:18, up to \$100 per gallon of oil discharged;

4. For failing to cooperate in containment and cleanup of a discharge as required by § 62.1-44.34:18 or for failing to report a discharge as required by § 62.1-44.34:19, not less than \$1,000 nor more than \$50,000 for the initial violation, and \$10,000 for each day of violation thereafter; and

5. For violating or causing or permitting to be violated any other provision of this article, or a regulation, administrative or judicial order, or term or condition of approval issued under this article, up to \$32,500 for each violation. Each day of violation of each requirement shall constitute a separate offense.

D. Civil penalties may be assessed under this article either by a court in an action brought by the Board pursuant to this section, as specified in § 62.1-44.15, or with the consent of the person charged, in a special order issued by the Board. All penalties shall be *first allocated to immediate corrective actions that contain or mitigate the effects of any release of petroleum into the environment due to the violation incurring the penalty. Any remaining funds shall be paid into the state treasury and deposited by the State Treasurer into the Virginia Underground Petroleum Storage Tank Fund as established in § 62.1-44.34:11.* In determining the amount of any penalty, consideration shall be given to the willfulness of the violation, any history of noncompliance, the actions of the person in reporting, containing and cleaning up any discharge or threat of discharge, the damage or injury to state waters or the impairment of their beneficial use, the cost of containment and cleanup, the nature and degree of injury to or interference with general health, welfare and property, and the available technology for preventing, containing, reducing or eliminating the discharge.

E. Any person who knowingly violates, or causes or permits to be violated, a provision of this article, or a regulation, administrative or judicial order, or term or condition of approval issued under this article shall be guilty of a misdemeanor punishable by confinement in jail for not more than 12 months and a fine of not more than \$100,000, either or both. Any person who knowingly or willfully makes any false statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained by this article or by administrative or judicial order issued under this article shall be guilty of a felony punishable by a term of imprisonment of not less than one nor more than three years and a fine of not more than \$100,000, either or both. In the case of a discharge of oil into or upon state waters:

1. Any person who negligently discharges or negligently causes or permits such discharge shall be guilty of a misdemeanor punishable by confinement in jail for not more than 12 months and a fine of not more than \$50,000, either or both.

2. Any person who knowingly and willfully discharges or knowingly and willfully causes or permits such discharge shall be guilty of a felony punishable by a term of imprisonment of not less than one year nor more than 10 years and a fine of not more than \$100,000, either or both.

F. Each day of violation of each requirement shall constitute a separate offense. In the event the violation of this article follows a prior felony conviction under subdivision E 2 of this section, such violation shall constitute a felony and shall be punishable by a term of imprisonment of not less than two years nor more than 10 years and a fine of not more than \$200,000, either or both.

G. Upon conviction for a violation of any provision of this article, or a regulation, administrative or judicial order, or term or condition of approval issued under this article, a defendant who is not an individual shall be sentenced to pay a fine not exceeding the greater of:

1. \$1 million; or

2. An amount that is three times the economic benefit, if any, realized by the defendant as a result of the offense.

H. Any tank vessel entering upon state waters which fails to provide evidence of financial responsibility required by § 62.1-44.34:16, and any vessel from which oil is discharged into or upon

182 state waters, may be detained and held as security for payment to the Commonwealth of any damages or
183 penalties assessed under this section. Such damages and penalties shall constitute a lien on the vessel
184 and the lien shall secure all costs of containment and cleanup, damages, fines and penalties, as the case
185 may be, for which the operator may be liable. The vessel shall be released upon posting of a bond with
186 surety in the maximum amount of such damages or penalties.