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HOUSE BILL NO. 643

Offered January 8, 2020

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A *BILL to amend and reenact §§ 62.1-44.15:20, 62.1-44.15:21, 62.1-44.15:37.1, 62.1-44.15:58.1, 62.1-44.15:80, and 62.1-44.15:81 of the Code of Virginia, relating to State Water Control Board; pipeline construction; permit requirement; minimum diameter.*

Patrons—Hurst, Hudson, Jenkins, Keam, Rasoul and Samirah

Referred to Committee on Agriculture, Chesapeake and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That §§ 62.1-44.15:20, 62.1-44.15:21, 62.1-44.15:37.1, 62.1-44.15:58.1, 62.1-44.15:80, and 62.1-44.15:81 of the Code of Virginia are amended and reenacted as follows:

§ 62.1-44.15:20. Virginia Water Protection Permit.

A. Except in compliance with an individual or general Virginia Water Protection Permit issued in accordance with this article, it shall be unlawful to:

1. Excavate in a wetland;
2. On or after October 1, 2001, conduct the following in a wetland:
 - a. New activities to cause draining that significantly alters or degrades existing wetland acreage or functions;
 - b. Filling or dumping;
 - c. Permanent flooding or impounding; or
 - d. New activities that cause significant alteration or degradation of existing wetland acreage or functions; or

3. Alter the physical, chemical, or biological properties of state waters and make them detrimental to the public health, animal or aquatic life, or to the uses of such waters for domestic or industrial consumption, or for recreation, or for other uses unless authorized by a certificate issued by the Board.

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

C. Prior to the issuance of a Virginia Water Protection Permit, the Board shall consult with and give full consideration to any relevant information contained in the state water supply plan described in subsection A of § 62.1-44.38:1 as well as 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. When considering the state water supply plan, nothing shall be construed to limit the operation or expansion of an electric generation facility located on a man-made lake or impoundment built for the purpose of providing cooling water to such facility. Such consultation shall include the need for balancing instream uses with offstream uses. Agencies may submit written comments on proposed permits within 45 days after notification by the Board. If written comments are not submitted by an agency within this time period, the Board shall assume that the agency has no comments on the proposed permit and deem that the agency has waived its right to comment. After the expiration of the 45-day period, any such agency shall have no further opportunity to comment.

D. Issuance of a Virginia Water Protection Permit shall constitute the certification required under § 401 of the Clean Water Act, except for any applicant to the Federal Energy Regulatory Commission for a certificate of public convenience and necessity pursuant to § 7c of the federal Natural Gas Act (15 U.S.C. § 717f(c)) to construct any natural gas transmission pipeline ~~greater than 36~~ 24 inches or greater in inside diameter, in which case issuance of a Virginia Water Protection Permit pursuant to this article and a certification issued pursuant to Article 2.6 (§ 62.1-44.15:80 et seq.) shall together constitute the certification required under § 401 of the federal Clean Water Act.

E. No locality may impose wetlands permit requirements duplicating state or federal wetlands permit requirements. In addition, no locality shall impose or establish by ordinance, policy, plan, or any other means provisions related to the location of wetlands or stream mitigation in satisfaction of aquatic resource impacts regulated under a Virginia Water Protection Permit or under a permit issued by the U.S. Army Corps of Engineers pursuant to § 404 of the Clean Water Act. However, a locality's determination of allowed uses within zoning classifications or its approval of the siting or construction of wetlands or stream mitigation banks or other mitigation projects shall not be affected by the

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59 provisions of this subsection.

60 F. The Board shall assess compensation implementation, inventory permitted wetland impacts, and
61 work to prevent unpermitted impacts to wetlands.

62 **§ 62.1-44.15:21. Impacts to wetlands.**

63 A. Permits shall address avoidance and minimization of wetland impacts to the maximum extent
64 practicable. A permit shall be issued only if the Board finds that the effect of the impact, together with
65 other existing or proposed impacts to wetlands, will not cause or contribute to a significant impairment
66 of state waters or fish and wildlife resources.

67 B. Permits shall contain requirements for compensating impacts on wetlands. Such compensation
68 requirements shall be sufficient to achieve no net loss of existing wetland acreage and functions and
69 may be met through (i) wetland creation or restoration, (ii) purchase or use of mitigation bank credits
70 pursuant to § 62.1-44.15:23, (iii) contribution to the Wetland and Stream Replacement Fund established
71 pursuant to § 62.1-44.15:23.1 to provide compensation for impacts to wetlands, streams, or other state
72 waters that occur in areas where neither mitigation bank credits nor credits from a Board-approved fund
73 that have met the success criteria are available at the time of permit application, or (iv) contribution to a
74 Board-approved fund dedicated to achieving no net loss of wetland acreage and functions. The Board
75 shall evaluate the appropriate compensatory mitigation option on a case-by-case basis with consideration
76 for which option is practicable and ecologically and environmentally preferable, including, in terms of
77 replacement of acreage and functions, which option offers the greatest likelihood of success and
78 avoidance of temporal loss of acreage and function. This evaluation shall be consistent with the U.S.
79 Army Corps of Engineers Compensatory Mitigation for Losses of Aquatic Resources (33 C.F.R. Part
80 332). When utilized in conjunction with creation, restoration, or mitigation bank credits, compensation
81 may incorporate (a) preservation or restoration of upland buffers adjacent to wetlands or other state
82 waters or (b) preservation of wetlands.

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

93 D. The Board shall develop general permits for such activities in wetlands as it deems appropriate.
94 General permits shall include such terms and conditions as the Board deems necessary to protect state
95 waters and fish and wildlife resources from significant impairment. The Board is authorized to waive the
96 requirement for a general permit or deem an activity in compliance with a general permit when it
97 determines that an isolated wetland is of minimal ecological value. The Board shall develop general
98 permits for:

99 1. Activities causing wetland impacts of less than one-half of an acre;

100 2. Facilities and activities of utilities and public service companies regulated by the Federal Energy
101 Regulatory Commission or State Corporation Commission, except for construction of any natural gas
102 transmission pipeline that is ~~greater than 36~~ 24 inches ~~or greater in~~ inside diameter pursuant to a
103 certificate of public convenience and necessity under § 7c of the federal Natural Gas Act (15 U.S.C.
104 § 717f(c)). No Board action on an individual or general permit for such facilities shall alter the siting
105 determination made through Federal Energy Regulatory Commission or State Corporation Commission
106 approval. The Board and the State Corporation Commission shall develop a memorandum of agreement
107 pursuant to §§ 56-46.1, 56-265.2, 56-265.2:1, and 56-580 to ensure that consultation on wetland impacts
108 occurs prior to siting determinations;

109 3. Coal, natural gas, and coalbed methane gas mining activities authorized by the Department of
110 Mines, Minerals and Energy, and sand mining;

111 4. Virginia Department of Transportation or other linear transportation projects; and

112 5. Activities governed by nationwide or regional permits approved by the Board and issued by the
113 U.S. Army Corps of Engineers. Conditions contained in the general permits shall include, but not be
114 limited to, filing with the Board any copies of preconstruction notification, postconstruction report, and
115 certificate of compliance required by the U.S. Army Corps of Engineers.

116 E. Within 15 days of receipt of an individual permit application, the Board shall review the
117 application for completeness and either accept the application or request additional specific information
118 from the applicant. Within 120 days of receipt of a complete application, the Board shall issue the
119 permit, issue the permit with conditions, deny the permit, or decide to conduct a public meeting or
120 hearing. If a public meeting or hearing is held, it shall be held within 60 days of the decision to conduct

such a proceeding, and a final decision as to the permit shall be made within 90 days of completion of the public meeting or hearing. In addition, for an individual permit application related to an application to the Federal Energy Regulatory Commission for a certificate of public convenience and necessity pursuant to § 7c of the federal Natural Gas Act (15 U.S.C. § 717f(c)) for construction of any natural gas transmission pipeline ~~greater than 36 24 inches~~ *or greater in* inside diameter, the Board shall complete its consideration within the one-year period established under 33 U.S.C. § 1341(a).

F. Within 15 days of receipt of a general permit application, the Board shall review the application for completeness and either accept the application or request additional specific information from the applicant. A determination that an application is complete shall not mean the Board will issue the permit but means only that the applicant has submitted sufficient information to process the application. The Board shall deny, approve, or approve with conditions any application for coverage under a general permit within 45 days of receipt of a complete preconstruction application. The application shall be deemed approved if the Board fails to act within 45 days.

G. No Virginia Water Protection Permit shall be required for impacts to wetlands caused by activities governed under Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 or normal agricultural activities or normal silvicultural activities. This section shall also not apply to normal residential gardening, lawn and landscape maintenance, or other similar activities that are incidental to an occupant's ongoing residential use of property and of minimal ecological impact. The Board shall develop criteria governing this exemption and shall specifically identify the activities meeting these criteria in its regulations.

H. No Virginia Water Protection Permit shall be required for impacts caused by the construction or maintenance of farm or stock ponds, but other permits may be required pursuant to state and federal law. For purposes of this exclusion, farm or stock ponds shall include all ponds and impoundments that do not fall under the authority of the Virginia Soil and Water Conservation Board pursuant to Article 2 (§ 10.1-604 et seq.) of Chapter 6 pursuant to normal agricultural or silvicultural activities.

I. No Virginia Water Protection Permit shall be required for wetland and open water impacts to a stormwater management facility that was created on dry land for the purpose of conveying, treating, or storing stormwater, but other permits may be required pursuant to local, state, or federal law. The Department shall adopt guidance to ensure that projects claiming this exemption create no more than minimal ecological impact.

J. An individual Virginia Water Protection Permit shall be required for impacts to state waters for the construction of any natural gas transmission pipeline ~~greater than 36 24 inches~~ *or greater in* inside diameter pursuant to a certificate of public convenience and necessity under § 7c of the federal Natural Gas Act (15 U.S.C. § 717f(c)). For purposes of this subsection:

1. Each wetland and stream crossing shall be considered as a single and complete project; however, only one individual Virginia Water Protection Permit addressing all such crossings shall be required for any such pipeline. Notwithstanding the requirement for only one such individual permit addressing all such crossings, individual review of each proposed water body crossing with an upstream drainage area of five square miles or greater shall be performed.

2. All pipelines shall be constructed in a manner that minimizes temporary and permanent impacts to state waters and protects water quality to the maximum extent practicable, including by the use of applicable best management practices that the Board determines to be necessary to protect water quality.

3. The Department shall assess an administrative charge to any applicant for such project to cover the direct costs of services rendered associated with its responsibilities pursuant to this subsection. This administrative charge shall be in addition to any fee assessed pursuant to § 62.1-44.15:6.

§ 62.1-44.15:37.1. Inspections; land-disturbing activities of natural gas pipelines; stop work instructions.

A. The Department is authorized to conduct inspections of the land-disturbing activities of interstate and intrastate natural gas pipeline companies that have approved annual standards and specifications pursuant to § 62.1-44.15:31 as such land-disturbing activities relate to construction of any natural gas transmission pipeline *equal to or greater than 36 24 inches in* inside diameter to determine (i) compliance with such annual standards and specifications, (ii) compliance with any site-specific plans, and (iii) if there have been or are likely to be adverse impacts to water quality as a result of such land-disturbing activities. When the *Board or the* Department determines that there has been a substantial adverse impact to water quality or that an imminent and substantial adverse impact to water quality is likely to occur as a result of such land-disturbing activities, the *Board or the* Department may issue a stop work instruction, without advance notice or hearing, requiring that all ~~or part of~~ such land-disturbing activities ~~on the part of the site~~ that caused the substantial adverse impacts to water quality or are likely to cause imminent and substantial adverse impacts to water quality be stopped ~~until~~ corrective measures specified in the stop work instruction have been completed and approved by the Department.

Such stop work instruction shall become effective upon service on the company by email or other

182 technology agreed to in writing by the Department and the company, by mailing with confirmation of
183 delivery to the address specified in the annual standards and specifications, if available, or by delivery at
184 the site to a person previously identified to the Department by the company. ~~Upon request by the~~
185 ~~company, the Director or his designee shall review such stop work instruction within 48 hours of~~
186 ~~issuance.~~

187 *B. Within five business days of the issuance of a stop work instruction, the Department shall notify*
188 *the company of specific corrective measures that shall be completed before any land-disturbing activity*
189 *shall be resumed. Such corrective measures shall be inspected and approved by the Department before*
190 *any land-disturbing activity shall be resumed.* Within 10 business days of issuance of a stop work
191 instruction, the Department shall promptly provide to such company an opportunity for an informal
192 fact-finding proceeding concerning the stop work instruction and any review by the Director or his
193 designee. Reasonable notice as to the time and place of the informal fact-finding proceeding shall be
194 provided to such company. ~~Within 10 business days of the informal fact-finding proceeding, the~~
195 ~~Department shall affirm, modify, amend, or cancel such stop work instruction.~~ Upon written
196 ~~documentation from the company of the completion and approval by the Department in writing of the~~
197 ~~corrective measures specified in following the issuance of the stop work instruction, the instruction shall~~
198 ~~be immediately lifted.~~

199 C. The company may appeal such stop work instruction or preliminary decision rendered by the
200 Director or his designee to the circuit court of the jurisdiction wherein the land-disturbing activities
201 subject to the stop work instruction occurred, or to another appropriate court, in accordance with the
202 requirements of the Administrative Process Act (§ 2.2-4000 et seq.). Any person violating or failing,
203 neglecting, or refusing to obey a stop work instruction issued by the Department may be compelled in a
204 proceeding instituted in the circuit court of the jurisdiction wherein the violation was alleged to have
205 occurred or other appropriate court to obey same and to comply therewith by injunction, mandamus, or
206 other appropriate remedy. Nothing in this section shall prevent the Board or the Department from taking
207 any other action authorized by this chapter.

208 **§ 62.1-44.15:58.1. Inspections; land-disturbing activities of natural gas pipelines; stop work**
209 **instructions.**

210 A. The Department is authorized to conduct inspections of the land-disturbing activities of interstate
211 and intrastate natural gas pipeline companies that have approved annual standards and specifications
212 pursuant to § 62.1-44.15:55 as such land-disturbing activities relate to construction of any natural gas
213 transmission pipeline *equal to or greater than 36 24 inches in* inside diameter to determine (i)
214 compliance with such annual standards and specifications, (ii) compliance with any site-specific plans,
215 and (iii) if there have been or are likely to be adverse impacts to water quality as a result of such
216 land-disturbing activities. When the *Board or the* Department determines that there has been a
217 substantial adverse impact to water quality or that an imminent and substantial adverse impact to water
218 quality is likely to occur as a result of such land-disturbing activities, the *Board or the* Department may
219 issue a stop work instruction, without advance notice or hearing, requiring that all ~~or part of~~ such
220 land-disturbing activities ~~on the part of the site~~ that caused the substantial adverse impacts to water
221 quality or are likely to cause imminent and substantial adverse impacts to water quality be stopped until
222 corrective measures specified in the stop work instruction have been completed and approved by the
223 Department.

224 Such stop work instruction shall become effective upon service on the company by email or other
225 technology agreed to in writing by the Department and the company, by mailing with confirmation of
226 delivery to the address specified in the annual standards and specifications, if available, or by delivery at
227 the site to a person previously identified to the Department by the company. ~~Upon request by the~~
228 ~~company, the Director or his designee shall review such stop work instruction within 48 hours of~~
229 ~~issuance.~~

230 *B. Within five business days of the issuance of a stop work instruction, the Department shall notify*
231 *the company of specific corrective measures to be completed before land-disturbing activities shall be*
232 *resumed. Such corrective measures shall be inspected and approved by the Department before*
233 *land-disturbing activities shall be resumed.* Within 10 business days of issuance of a stop work
234 instruction, the Department shall promptly provide to such company an opportunity for an informal
235 fact-finding proceeding concerning the stop work instruction and any review by the Director or his
236 designee. Reasonable notice as to the time and place of the informal fact-finding proceeding shall be
237 provided to such company. ~~Within 10 business days of the informal fact-finding proceeding, the~~
238 ~~Department shall affirm, modify, amend, or cancel such stop work instruction.~~ Upon written
239 ~~documentation from the company of the completion and approval by the Department in writing of the~~
240 ~~corrective measures specified in following the stop work instruction, the instruction shall be immediately~~
241 ~~lifted.~~

242 C. The company may appeal such stop work instruction or preliminary decision rendered by the
243 Director or his designee to the circuit court of the jurisdiction wherein the land-disturbing activities

subject to the stop work instruction occurred, or to another appropriate court, in accordance with the requirements of the Administrative Process Act (§ 2.2-4000 et seq.). Any person violating or failing, neglecting, or refusing to obey a stop work instruction issued by the Department may be compelled in a proceeding instituted in the circuit court of the jurisdiction wherein the violation was alleged to have occurred or other appropriate court to obey same and to comply therewith by injunction, mandamus, or other appropriate remedy. Nothing in this section shall prevent the Board or the Department from taking any other action authorized by this chapter.

§ 62.1-44.15:80. Findings and purpose.

The General Assembly determines and finds that to comply with § 401 of the federal Clean Water Act (33 U.S.C. § 1341), any applicant for a federal license or permit to conduct any activity that may result in any discharge into navigable waters shall provide the federal licensing or permitting authority with a certification from the state in which the discharge originates or will originate certifying that any such discharge will comply with applicable provisions of the Clean Water Act. The General Assembly determines and finds that the Virginia Water Protection Permit program has proven to be sufficient to evaluate and, when necessary, mitigate potential water quality impacts for most federally permitted projects. Virginia Water Protection Permit coverage addresses the impacts caused to wetlands and streams by excavating in a wetland, draining or significantly altering wetland acreage or function, filling or dumping in a stream or wetland, or permanently flooding or impounding a wetland area or stream. However, the conditions and requirements of a Virginia Water Protection Permit do not cover activities in upland areas, outside of wetlands and streams, that may result in a discharge to state waters. The General Assembly determines and finds that for construction of natural gas transmission pipelines ~~greater than 36 24 inches or greater in~~ inside diameter that are subject to a certificate of public convenience and necessity under § 7c of the federal Natural Gas Act (15 U.S.C. § 717f(c)), there may be activities in upland areas that may have the potential to affect water quality but that do not fall within the scope of the Virginia Water Protection Permit program. Information related to such impacts would not be contained in the Joint Permit Application utilized to determine permit conditions for a Virginia Water Protection Permit. The General Assembly determines and finds that issuance of a Virginia Water Protection Permit and a certification issued pursuant to this article shall together constitute the certification required under § 401 of the Clean Water Act for natural gas transmission pipelines ~~greater than 36 24 inches or greater in~~ inside diameter subject to § 7c of the Natural Gas Act.

§ 62.1-44.15:81. Application and preparation of draft certification conditions.

A. Any applicant for a federal license or permit for a natural gas transmission pipeline ~~greater than 36 24 inches or greater in~~ inside diameter subject to § 7c of the federal Natural Gas Act (15 U.S.C. § 717f(c)) shall submit a separate application, at the same time the Joint Permit Application is submitted, to the Department containing a description of all activities that will occur in upland areas, including activities in or related to (i) slopes with a grade greater than 15 percent; (ii) karst geology features, including sinkholes and underground springs; (iii) proximity to sensitive streams and wetlands identified by the Department of Conservation and Recreation or the Department of Game and Inland Fisheries; (iv) seasonally high water tables; (v) water impoundment structures and reservoirs; and (vi) areas with highly erodible soils, low pH, and acid sulfate soils.

B. At any time during the review of the application, but prior to issuing a certification pursuant to this article, the Department may issue an information request to the applicant for any relevant additional information necessary to determine (i) if any activities related to the applicant's project in upland areas are likely to result in a discharge to state waters and (ii) how the applicant proposes to minimize water quality impacts to the maximum extent practicable to protect water quality. The information request shall provide a reasonable amount of time for the applicant to respond.

C. The Department shall review the information contained in the application and any additional information obtained through any information requests issued pursuant to subsection B to determine if any activities described in the application or in any additional information requests (i) are likely to result in a discharge to state waters with the potential to adversely impact water quality and (ii) will not be addressed by the Virginia Water Protection Permit issued for the activity pursuant to Article 2.2 (§ 62.1-44.15:20 et seq.). The Department of Game and Inland Fisheries, the Department of Conservation and Recreation, the Department of Health, and the Department of Agriculture and Consumer Services shall consult with the Department during the review of the application and any additional information obtained through any information requests issued pursuant to subsection B. Following the conclusion of its review, the Department shall develop a draft certification for public comment and potential issuance by the Department or the Board pursuant to § 62.1-44.15:02 that contains any additional conditions for activities in upland areas necessary to protect water quality. The Department shall make the information contained in the application and any additional information obtained through any information requests issued pursuant to subsection B available to the public.

D. Notwithstanding any applicable annual standards and specifications for erosion and sediment

305 control or stormwater management pursuant to Article 2.3 (§ 62.1-44.15:24 et seq.) or 2.4
306 (§ 62.1-44.15:51 et seq.), the applicant shall not commence land-disturbing activity prior to approval by
307 the Department of an erosion and sediment control plan and stormwater management plan in accordance
308 with applicable regulations. The Department shall act on any plan submittal within 60 days after initial
309 submittal of a completed plan to the Department. The Department may issue either approval or
310 disapproval and shall provide written rationale for any disapproval. The Department shall act on any
311 plan that has been previously disapproved within 30 days after the plan has been revised and
312 resubmitted for approval.

313 E. No action by either the Department or the Board on a certification pursuant to this article shall
314 alter the siting determination made through Federal Energy Regulatory Commission or State Corporation
315 Commission approval.

316 F. The Department shall assess an administrative charge to the applicant to cover the direct costs of
317 services rendered associated with its responsibilities pursuant to this section.