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HOUSE BILL NO. 222

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Agriculture, Conservation and Natural Resources

on March 7, 1994)

(Patron Prior to Substitute—Delegate Bennett)

A BILL to amend and reenact § 62.1-44.15 of the Code of Virginia and to amend the Code of Virginia by adding in Article 3 of Chapter 3.1 of Title 62.1 a section numbered 62.1-44.17:1, relating to permits for confined animal feeding operations.

Be it enacted by the General Assembly of Virginia:

1. That § 62.1-44.15 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding in Article 3 of Chapter 3.1 of Title 62.1 a section numbered 62.1-44.17:1 as follows:

§ 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(1) [Repealed.]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 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 assure 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 § 9-6.14:7.1 but, upon the request of an affected person or upon its own motion, hold hearings pursuant to § 9-6.14:8, for the purpose of reviewing the standards of quality, and, as appropriate, adopting, modifying, or cancelling such standards. Whenever the Board considers the adoption, modification, amendment or cancellation of any standard, it shall give due consideration to, among other factors, the economic and social costs and benefits which can reasonably be expected to obtain as a consequence of the standards as adopted, modified, amended or cancelled. The Board shall also give due consideration to the public health standards issued by the Virginia Department of Health with respect to issues of public health policy and protection. If the Board does not follow the public health standards of the Virginia Department of Health, the Board's reason for any deviation shall be made in writing and published for any and all concerned parties.

(3b) Except as provided in subdivision (3a), such standards and policies are to be adopted or modified, amended or cancelled in the manner provided by the Administrative Process Act (§ 9-6.14:1 et seq.).

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

(5) To issue certificates for the discharge of sewage, industrial wastes and other wastes into or adjacent to or the alteration otherwise of the physical, chemical or biological properties of state waters under prescribed conditions and to revoke or amend such certificates.

(5a) All certificates issued by the Board under this chapter shall have fixed terms. The term of a Virginia Pollution Discharge Elimination System permit shall not exceed five years. The term of a

59 Virginia Pollution Abatement permit shall not exceed ten years, except that the term of a Virginia
60 Pollution Abatement permit for ~~concentrated animal~~ *confined animal* feeding operations shall ~~not exceed~~
61 ~~five~~ *be ten years. The Department of Environmental Quality shall inspect all facilities for which a*
62 *Virginia Pollution Abatement permit has been issued at least once every five years.* The term of a
63 certificate issued by the Board shall not be extended by modification beyond the maximum duration and
64 the certificate shall expire at the end of the term unless an application for a new permit has been timely
65 filed as required by the regulations of the Board and the Board is unable, through no fault of the
66 permittee, to issue a new permit before the expiration date of the previous permit.

67 (5b) Any certificate issued by the Board under this chapter may, after notice and opportunity for a
68 hearing, be amended or revoked on any of the following grounds or for good cause as may be provided
69 by the regulations of the Board:

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

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

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

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

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

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

97 (8a) To issue special orders to owners (i) who are permitting or causing the pollution, as defined by
98 § 62.1-44.3, of state waters to cease and desist from such pollution, (ii) who have failed to construct
99 facilities in accordance with final approved plans and specifications to construct such facilities in
100 accordance with final approved plans and specifications, (iii) who have violated the terms and provisions
101 of a certificate issued by the Board to comply with such terms and provisions, (iv) who have failed to
102 comply with a directive from the Board to comply with such directive, (v) who have contravened duly
103 adopted and promulgated water quality standards and policies to cease and desist from such
104 contravention and to comply with such water quality standards and policies, (vi) who have violated the
105 terms and provisions of a pretreatment permit issued by the Board or by the owner of a publicly owned
106 treatment works to comply with such terms and provisions or (vii) who have contravened any applicable
107 pretreatment standard or requirement to comply with such standard or requirement; and also to issue
108 such orders to require any owner to comply with the provisions of this chapter and any decision of the
109 Board.

110 (8b) Such special orders are to be issued only after a hearing with at least thirty days' notice to the
111 affected owners, of the time, place and purpose thereof, and they shall become effective not less than
112 fifteen days after service as provided in § 62.1-44.12; provided that if the Board finds that any such
113 owner is grossly affecting or presents an imminent and substantial danger to (i) the public health, safety
114 or welfare, or the health of animals, fish or aquatic life; (ii) a public water supply; or (iii) recreational,
115 commercial, industrial, agricultural or other reasonable uses, it may issue, without advance notice or
116 hearing, an emergency special order directing the owner to cease such pollution or discharge
117 immediately, and shall provide an opportunity for a hearing, after reasonable notice as to the time and
118 place thereof to the owner, to affirm, modify, amend or cancel such emergency special order. If an
119 owner who has been issued such a special order or an emergency special order is not complying with
120 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 subsection (a) of § 62.1-44.32. Such civil charges shall be instead of any appropriate civil penalty which could be imposed under subsection (a) of § 62.1-44.32 and shall not be subject to the provisions of § 2.1-127. 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 Title 62.1, 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

182 Department of Health to state waters in the course of processing or treating such waters for public water
183 supply purposes, except where negligence is shown.

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

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

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

197 § 62.1-44.17:1. *General Permits for confined animal feeding operations.*

198 A. *For the purposes of this chapter, "confined animal feeding operation" means a lot or facility,*
199 *together with any associated treatment works, where both of the following conditions are met:*

200 1. *Animals have been, are, or will be stabled or confined and fed or maintained for a total of*
201 *forty-five days or more in any twelve-month period; and*

202 2. *Crops, vegetation, forage growth or post-harvest residues are not sustained over any portion of*
203 *the operation of the lot or facility.*

204 *Two or more confined animal feeding operations under common ownership are considered to be a*
205 *single confined animal feeding operation if they adjoin each other or if they use a common area or*
206 *system for the disposal of liquid waste.*

207 B. *A confined animal feeding operation with 300 or more animal units utilizing a liquid manure*
208 *collection and storage system, upon fulfillment of the requirements of this section, shall be permitted by*
209 *a General Virginia Pollution Abatement permit (hereafter referred to as the "General Permit"), adopted*
210 *by the Board. In adopting the General Permit the Board shall:*

211 1. *Authorize the General Permit to pertain to confined animal feeding operations having 300 or*
212 *more animal units;*

213 2. *Establish procedures for submitting a registration statement meeting the requirements of*
214 *subsection C. Submitting a registration statement shall be evidence of intention to be covered by the*
215 *General Permit; and*

216 3. *Establish criteria for the design and operation of confined animal feeding operations only as*
217 *described in subsection D.*

218 C. *For coverage under the General Permit, the owner of the confined animal feeding operation shall*
219 *file a registration statement with the Department of Environmental Quality providing the name and*
220 *address of the owner of the operation, the name and address of the operator of the operation (if*
221 *different than the owner), the mailing address and location of the operation, and a list of the types,*
222 *maximum number and average weight of the animals which will be maintained at the facility. The owner*
223 *shall attach to the registration statement: (i) a copy of a letter of approval of the nutrient management*
224 *plan for the operation from the Department of Conservation and Recreation; (ii) a notification from the*
225 *governing body of the locality where the operation is located that the operation is consistent with all*
226 *ordinances adopted pursuant to Chapter 11 (§ 15.1-427 et seq.) of Title 15.1; and (iii) a certification*
227 *that the owner or operator meets all the requirements of the Board for the General Permit.*

228 D. *The criteria for the design and operation of a confined animal feeding operation shall be as*
229 *follows:*

230 1. *The operation shall have a liquid manure collection and storage facility designed and operated to:*
231 *(i) prevent any discharge to state waters, except a discharge resulting from a storm event exceeding a*
232 *twenty-five-year, twenty-four-hour storm and (ii) provide adequate waste storage capacity to*
233 *accommodate periods when the ground is frozen or saturated, periods when land application of*
234 *nutrients should not occur due to limited or nonexistent crop nutrient uptake, and periods when physical*
235 *limitations prohibit the land application of waste;*

236 2. *The operation shall implement, maintain on site, and make available to the Department of*
237 *Environmental Quality, upon request, a nutrient management plan approved pursuant to clause (i) of*
238 *subsection C. The nutrient management plan shall contain at a minimum the following information: (i) a*
239 *site map indicating the location of the waste storage facilities and the fields where waste will be*
240 *applied; (ii) site evaluation and assessment of soil types and potential productivities; (iii) nutrient*
241 *management sampling including soil and waste monitoring; (iv) storage and land area requirements; (v)*
242 *calculation of waste application rates; and (vi) waste application schedules;*

243 3. *Adequate buffer zones, where waste shall not be applied, shall be maintained between areas where*

waste may be applied and (i) water supply wells or springs, (ii) surface water courses, (iii) rock outcroppings, (iv) sinkholes, and (v) occupied dwellings unless a waiver is signed by the occupants of the dwellings;

4. The operation shall be monitored as follows: (i) waste shall be monitored at least once per year; (ii) soil shall be monitored at least once every three years; (iii) ground water shall be monitored at new earthen waste storage facilities constructed to an elevation below the seasonal high water table or within one foot thereof; and (iv) all facilities previously covered by a Virginia Pollution Abatement permit that required ground water monitoring shall continue such monitoring. In such facilities constructed below the water table, the top surface of the waste must be maintained at a level of at least two feet above the water table. Records shall be maintained to demonstrate where and at what rate waste has been applied, that the application schedule has been followed, and what crops have been planted. Records shall be maintained for a period of two years after recorded application is made;

5. New earthen waste storage facilities shall include a properly designed and installed liner. Such liner shall be either a synthetic liner of at least twenty mils thickness or a compacted soil liner of at least one foot thickness with a maximum permeability rating of 0.0014 inches per hour. Proper installation shall be certified in writing by a liner manufacturer, a professional engineer, an employee of the Soil Conservation Service of the United States Department of Agriculture with appropriate engineering approval authority, an employee of a soil and water conservation district with appropriate engineering approval authority, or other qualified individual;

6. New waste storage facilities shall not be located on a 100-year flood plain unless protected from inundation by a 100-year frequency flood event;

7. All facilities must maintain one foot of freeboard at all times, up to and including a twenty-five year, twenty-four-hour storm; and

8. All requirements needed for the proper operation of the permitted facilities shall be maintained in good working order. Manufacturer's operating and maintenance manuals shall be retained for references to allow for timely maintenance and prompt repair of equipment when appropriate.

E. Operations having an individual Virginia Pollution Abatement permit or a No Discharge Certificate may submit a registration statement for operation under the General Permit pursuant to this section.

F. The Director of the Department of Environmental Quality may require the owner of a confined animal feeding operation to obtain an individual permit for an operation subject to this section upon determining that the operation is in violation of the provisions of this section.