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HOUSE BILL NO. 2402

Offered January 17, 2011

A *BILL to amend the Code of Virginia by adding in Chapter 3.1 of Title 62.1 an article numbered 13, consisting of sections numbered 62.1-44.34:29 through 62.1-44.34:38, relating to state waters; regulation of interbasin transfers.*

Patron—Wright

Referred to Committee on Agriculture, Chesapeake and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 3.1 of Title 62.1 an article numbered 13, consisting of sections numbered 62.1-44.34:29 through 62.1-44.34:38, as follows:

*Article 13.**Interbasin Water Transfers.**§ 62.1-44.34:29. Definitions.*

As used in this article, unless the context requires a different meaning:

"Basin" means an area of watershed as defined by the Board referencing the United States Geological Survey Hydrologic Unit Code that may also incorporate one or more subbasins.

"Interbasin transfer" means a transfer of water between basins.

§ 62.1-44.34:30. Authority of the Board; registration of certain transfers; regulations.

The Board shall adopt regulations necessary to carry out its powers and duties under this article and may require water users required to register under subsection C of § 62.1-44.38 to indicate whether such withdrawal is in connection with an interbasin transfer. If a withdrawal is related to an interbasin transfer, the Board may require information regarding (i) the location of delivery, (ii) the uses to which the water is put, (iii) the manner of transfer, and (iv) such other information as it may require related to the transfer.

§ 62.1-44.34:31. Authorization required for certain transfers.

No person may initiate a new or expanded interbasin transfer where the proposed transfer is in excess of two million gallons per day or 0.1 percent of the mean daily flow in the case of a withdrawal from a free-flowing body of water, or in excess of two million gallons per day or 0.1 percent of the total acre-feet in the case of withdrawal from a lake or other impounded body of water, without a certificate of transfer by the Board. An application to extend or renew a certificate shall be treated as a new application.

§ 62.1-44.34:32. Notice; public hearings.

A. An applicant shall prepare a notice of intent to file an application that includes a nontechnical description of the applicant's request and an identification of the proposed water source. Within 90 days after the applicant files a notice of intent to file an application, the applicant shall hold at least one public meeting in the source basin upstream from the proposed point of withdrawal, at least one public meeting in the source basin downstream from the proposed point of withdrawal, and at least one public meeting in the receiving basin to provide information to interested parties and the public regarding the nature and extent of the proposed transfer and to receive comment on the scope of the environmental impact statement prepared pursuant to § 62.1-44.34:33. Written notice of the public meetings shall be provided at least 30 days before the public meetings.

B. The applicant shall provide notice of the public meetings and opportunity to comment on the scope of the environmental impact statement as follows:

1. By publishing notice in the Virginia Register of Regulations;

2. By publishing notice in a newspaper of general circulation in:

a. Each county or city in the Commonwealth located in whole or in part within the area of the source basin upstream from the proposed point of withdrawal;

b. Each county or city in the Commonwealth or in an adjacent state located in whole or in part within the area of the source basin downstream from the proposed point of withdrawal;

c. Any area in the Commonwealth in a basin for which the source basin has been identified as a future source of water in a local water supply plan prepared pursuant to § 62.1-44.38:1; and

d. Each county in the Commonwealth located in whole or in part within the receiving basin.

3. By giving notice by first-class mail or electronic mail to each of the following:

a. The governing body of each locality in the Commonwealth and the governing body of any locality in any adjacent state that is located entirely or partially within the source basin of the proposed transfer;

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59 *b. The governing body of each locality in the Commonwealth and the governing body of any locality*
60 *in any adjacent state that is located entirely or partially within the receiving basin of the proposed*
61 *transfer;*

62 *c. The governing body of any public water supply system that withdraws water upstream or*
63 *downstream from the withdrawal point of the proposed transfer;*

64 *d. If any portion of the source or receiving basin is located in an adjacent state, all state water*
65 *management or use agencies, environmental protection agencies, and the office of the governor in each*
66 *adjacent state upstream or downstream from the withdrawal point of the proposed transfer;*

67 *e. All persons who have registered a water withdrawal or transfer from the proposed source basin;*

68 *f. All persons who hold a certificate for a transfer of water from the proposed source basin;*

69 *g. All persons who hold a Virginia Pollutant Discharge Elimination System permit for a discharge of*
70 *100,000 gallons per day or more upstream or downstream from the proposed point of withdrawal; and*

71 *h. Any other person who submits to the applicant a written request to receive all notices relating to*
72 *the application.*

73 *§ 62.1-44.34:33. Environmental impact statement; public hearing.*

74 *A. The applicant shall provide an environmental impact statement for any application for a*
75 *certificate under this article. The applicant who requests from the Board a certificate under this article*
76 *shall pay the cost of the environmental impact statement.*

77 *B. An environmental impact statement prepared pursuant to this section shall include the following:*

78 *1. A description of the proposed interbasin transfer and any facilities required for such transfer;*

79 *2. A description of existing water supply sources, yields, demands, usage, and conservation*
80 *measures;*

81 *3. A comprehensive analysis of the impacts, including cumulative impacts, that would occur in the*
82 *source basin and the receiving basin if the application for a certificate is granted;*

83 *4. An evaluation of alternatives to the proposed interbasin transfer, including water supply sources*
84 *that do not require an interbasin transfer and use of water conservation measures; and*

85 *5. A description of measures to mitigate any adverse impacts that may arise from the proposed*
86 *interbasin transfer.*

87 *C. The Board shall hold a public hearing on the draft environmental impact statement for a*
88 *proposed interbasin transfer after giving at least 30 days' notice of the hearing. The notice shall*
89 *indicate where a copy of the environmental impact statement can be reviewed and the procedure to be*
90 *followed by anyone wishing to submit written comments and questions on the environmental impact*
91 *statement. The Board shall prepare a record of all comments and written responses to questions posed*
92 *in writing. The record shall include complete copies of scientific or technical comments related to the*
93 *potential impact of the interbasin transfer.*

94 *§ 62.1-44.34:34. Application for transfer certificate.*

95 *An applicant for a transfer certificate shall make a request in writing to the Board for such*
96 *certificate. The application shall include the following:*

97 *1. The amount of the proposed transfer;*

98 *2. A description of the facilities to be used to transfer the water, including the location and capacity*
99 *of water intakes, pumps, pipelines, and other facilities;*

100 *3. A description of all the proposed consumptive and nonconsumptive uses of the water to be*
101 *transferred;*

102 *4. A description of the water quality of the source water body and receiving water body, including*
103 *information on aquatic habitat for rare, threatened, and endangered species; in-stream flow data for*
104 *segments of the source and receiving water bodies that may be affected by the transfer; and any waters*
105 *that are impaired pursuant to § 303(d) of the federal Clean Water Act;*

106 *5. A description of the water conservation measures used by the applicant at the time of the*
107 *application and any additional water conservation measures that the applicant will implement if the*
108 *certificate is granted;*

109 *6. A description of all sources of water within the receiving basin, including surface water*
110 *impoundments, groundwater wells, reinjection storage, and purchase of water, that would be a*
111 *practicable alternative to the proposed transfer that would meet the applicant's water supply*
112 *requirements. The description of water sources shall include sources available at the time of the*
113 *application for a certificate and any planned or potential water sources;*

114 *7. A description of existing water transfers and withdrawals from the source basin, including*
115 *transfers and withdrawals at the time of the application for a certificate and any planned or reasonably*
116 *foreseeable transfers or withdrawals by a public water system with service area located within the*
117 *source basin;*

118 *8. A demonstration that the proposed transfer, if added to all other transfers and withdrawals from*
119 *the source basin at the time of the application for a certificate, would not reduce either the amount of*
120 *water available for use in the source basin to a degree that would impair existing and planned*

consumptive and nonconsumptive uses of the water or the water quality in the source basin. If the proposed transfer would impact a reservoir within the source basin, the demonstration must include a finding that the transfer would not result in a water level that is inadequate to support existing uses of the reservoir, including recreational uses and emergency uses in case of drought;

9. Analysis of the applicant's future water supply needs and the present and reasonably foreseeable future water supply needs for public water systems with a service area located within the source basin. The analysis of future water supply needs shall include agricultural, recreational, and industrial uses and electric power generation. Local water supply plans prepared pursuant to § 62.1-44.38:1 for water systems with service area located within the source basin shall be used to evaluate the projected future water needs in the source basin that will be met by public water systems; and

10. Any other information deemed necessary by the Board for review of the proposed water transfer. § 62.1-44.34:35. Draft determination; public hearing.

A. Within 90 days after the Board determines that the environmental impact statement prepared in accordance with § 62.1-44.34:33 is adequate or the applicant submits its application for a certificate, whichever occurs later, the Board shall issue a draft determination on whether to grant the certificate. The draft determination shall be based on the criteria set out in § 62.1-44.34:36 and shall include the conditions and limitations, findings of fact, and conclusions of law that would be required in a final determination.

B. Within 60 days of the issuance of the draft determination, the Board shall hold public hearings on the draft determination. At least one hearing shall be held in the affected area of the source basin, and at least one hearing shall be held in the affected area of the receiving basin. In determining whether more than one public hearing should be held within either the source or receiving basin, the Board shall consider the differing or conflicting interests that may exist within the basin, including the interests of both upstream and downstream parties potentially affected by the proposed transfer. The Board shall accept written comment on the draft determination for a minimum of 30 days following the last public hearing. The Board shall prepare a record of all comments and written responses to questions posed in writing. The record shall include complete copies of scientific or technical comments related to the potential impact of the interbasin transfer.

§ 62.1-44.34:36. Final determination; factors for consideration; available information.

A. To determine whether a certificate may be issued for the transfer, the Board shall specifically consider each of the following items and state in writing its findings of fact and conclusions of law with regard to each item:

1. The necessity and reasonableness of the amount of surface water proposed to be transferred and its proposed uses;

2. The present and reasonably foreseeable future detrimental effects on the source basin, including present and future effects on public, industrial, economic, recreational, and agricultural water supply needs; wastewater assimilation; water quality; fish and wildlife habitat; electric power generation; navigation; and recreation. Local water supply plans for public water systems with service area located within the source basin prepared pursuant to § 62.1-44.38:1 shall be used to evaluate the projected future water needs in the source basin that will be met by public water systems. Information on projected future water needs for public water systems with service area located within the source basin that is more recent than the local water supply plans may be used if the Board finds the information to be reliable. The determination shall include a specific finding as to measures that are necessary or advisable to mitigate or avoid detrimental impacts on the source basin;

3. The cumulative effect on the major source basin of any water transfer or consumptive water use that, at the time the Board considers the application for a certificate, is authorized by the Board or by law or is projected in any local water supply plan for public water systems with service area located within the source basin that has been prepared pursuant to § 62.1-44.38:1;

4. The present and reasonably foreseeable future beneficial and detrimental effects on the receiving basin, including present and future effects on public, industrial, economic, recreational, and agricultural water supply needs; wastewater assimilation; water quality; fish and wildlife habitat; electric power generation; navigation; and recreation. Local water supply plans prepared pursuant to § 62.1-44.38:1 that affect the receiving basin shall be used to evaluate the projected future water needs in the receiving basin that will be met by public water systems. Information on projected future water needs that is more recent than the local water supply plans may be used if the Board finds the information to be reliable. The determination shall include a specific finding as to measures that are necessary or advisable to mitigate or avoid detrimental impacts on the receiving basin;

5. The availability of reasonable alternatives to the proposed transfer, including the potential capacity of alternative sources of water, the potential of each alternative to reduce the amount of or avoid the proposed transfer, probable costs, and environmental impacts. In considering alternatives, the Board is not limited to consideration of alternatives that have been proposed, studied, or considered by

182 the applicant. The determination shall include a specific finding as to why the applicant's need for water
183 cannot be satisfied by alternatives within the receiving basin, including unused capacity under a transfer
184 for which a certificate is in effect or that is otherwise authorized by law at the time the applicant
185 submits the application. The determination shall consider the extent to which access to potential sources
186 of surface water or groundwater within the receiving basin is no longer available due to depletion or
187 contamination. The determination shall consider the feasibility of the applicant's purchase of water from
188 other water suppliers within the basin and of the transfer of water from another basin. Except in
189 circumstances of technical or economic infeasibility or adverse environmental impact, the Board's
190 determination as to reasonable alternatives shall give preference to alternatives that would involve a
191 transfer from one basin to another within the receiving basin;

192 6. If applicable to the proposed interbasin transfer, the applicant's present and proposed use of
193 impoundment storage capacity to store water during high-flow periods for use during low-flow periods
194 and the applicant's right of withdrawal;

195 7. If the water to be withdrawn or transferred is stored in a multipurpose reservoir constructed by
196 the U.S. Army Corps of Engineers, the purposes and water storage allocations established for the
197 reservoir at the time the reservoir was authorized by the Congress of the United States;

198 8. Whether the service area of the applicant is located in both the source basin and the receiving
199 basin; and

200 9. Any other facts and circumstances that are reasonably necessary to carry out the purposes of this
201 section.

202 B. In determining whether a certificate may be issued for the transfer, the Board shall consider all of
203 the following sources of information:

204 1. The application;

205 2. The environmental impact statement prepared pursuant to § 62.1-44.34:33;

206 3. All oral and written comment and all accompanying materials or evidence submitted through
207 public comment or at public hearings;

208 4. Information developed by or available to the Board on the water quality of the source basin and
209 the receiving basin, including waters that are identified as impaired pursuant to § 303(d) of the federal
210 Clean Water Act that are subject to a total maximum daily load limit or whose assimilative capacity
211 would be impaired if the certificate is issued; and

212 5. Any other information that the Board determines to be relevant and useful.

213 § 62.1-44.34:37. Whether certificate shall be granted; conditions and limitations.

214 A. The Board shall grant a certificate for a water transfer if it finds that the applicant has
215 established sufficient evidence of the following:

216 1. The benefits of the proposed transfer outweigh the detriments of the proposed transfer;

217 2. The detriments have been or will be mitigated to the maximum degree practicable;

218 3. The amount of the transfer does not exceed the amount of the projected shortfall under the
219 applicant's water supply plan after first taking into account all other sources of water that are available
220 to the applicant; and

221 4. There are no reasonable alternatives to the proposed transfer.

222 B. The Board may impose any conditions or limitations on a certificate that the Board finds
223 necessary to achieve the purposes of this article including a limit on the period for which the certificate
224 is valid. The conditions and limitations shall include any mitigation measures proposed by the applicant
225 to minimize any detrimental effects within the source and receiving basins. In addition, the certificate
226 shall require all of the following conditions and limitations:

227 1. A water conservation plan that specifies the water conservation measures that will be implemented
228 by the applicant in the receiving basin to ensure the efficient use of the transferred water. Except in
229 circumstances of technical or economic infeasibility or adverse environmental impact, the water
230 conservation plan shall provide for the mandatory implementation of water conservation measures by
231 the applicant that equal or exceed the most stringent water conservation plan implemented by a locality
232 that withdraws water from the source basin;

233 2. A drought management plan that specifies how the transfer shall be managed to protect the source
234 basin during drought conditions or other emergencies that occur within the source basin. Except in
235 circumstances of technical or economic infeasibility or adverse environmental impact, this drought
236 management plan shall include mandatory reductions in the permitted amount of the transfer based on
237 the severity and duration of a drought occurring within the source basin and shall provide for the
238 mandatory implementation of a drought management plan by the applicant that equals or exceeds the
239 most stringent water conservation plan implemented by a public water supply that withdraws water from
240 the source basin;

241 3. The maximum amount of water that may be transferred on a daily basis and methods or devices
242 required to be installed and operated that measure the amount of water that is transferred;

243 4. A provision that the Board may amend a certificate to reduce the maximum amount of water

244 authorized to be transferred whenever it appears that an alternative source of water is available to the
245 certificate holder from within the receiving basin, including the purchase of water or the transfer of
246 water from another basin;

247 5. A provision that the Board may amend or modify any term or condition of the certificate,
248 including a reduction of the maximum amount of water authorized to be transferred, if the Board finds
249 that the applicant's current projected water needs are significantly less than the applicant's projected
250 water needs at the time the certificate was granted;

251 6. A requirement that the certificate holder report the quantity of water transferred during each
252 calendar quarter. The report required by this subdivision shall be submitted to the Board no later than
253 30 days after the end of the quarter; and

254 7. Except as provided in this subdivision, a provision that the applicant will use the water for direct
255 consumptive use and not resell the water that would be transferred pursuant to the certificate or any
256 surplus water derived from the transfer to another public water supply system. This limitation shall not
257 apply in the case of a proposed resale or transfer among public water supply systems within the
258 receiving basin as part of an interlocal agreement or other regional water supply arrangement, provided
259 that each participant in the interlocal agreement or regional water supply arrangement is a coapplicant
260 for the certificate and will be subject to all the terms, conditions, and limitations made applicable to
261 any lead or primary applicant.

262 C. The Board shall deny a certificate if it finds that the transfer conflicts with the public interest and
263 the policy of this article in a manner that cannot be mitigated by the imposition of any condition or
264 limitation on the certificate.

265 § 62.1-44.34:38. Emergency transfers.

266 In the case of water supply problems caused by drought, a pollution incident, temporary failure of a
267 water plant, or any other temporary condition in which the public health, safety, or welfare requires a
268 transfer of water, the Director of the Department of Environmental Quality may grant approval for a
269 temporary transfer. If the Director of the Department of Environmental Quality approves a temporary
270 transfer under this subsection, he shall specify conditions to protect other water users. A temporary
271 transfer shall not exceed six months in duration, but the approval may be renewed for a period of six
272 months based on demonstrated need.
273