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HOUSE BILL NO. 1141

Offered January 10, 2018

Prefiled January 10, 2018

A BILL to amend and reenact §§ 62.1-44.15, as it is currently effective and as it shall become effective, and 62.1-44.15:20 of the Code of Virginia, relating to Virginia Water Protection Permit; interstate natural gas pipelines.

Patrons—Rasoul, Hurst and Kory; Senator: Deeds

Referred to Committee on Rules

Be it enacted by the General Assembly of Virginia:

1. That §§ 62.1-44.15, as it is currently effective and as it shall become effective, and 62.1-44.15:20 of the Code of Virginia are amended and reenacted as follows:

§ 62.1-44.15. (For expiration date, see Acts 2016, cc. 68 and 758, as amended by Acts 2017, c. 345) Powers and duties; civil penalties.

It shall be the duty of the Board and it shall have the authority:

(1) [Repealed.]

(2) To study and investigate all problems concerned with the quality of state waters and to make reports and recommendations.

(2a) To study and investigate methods, procedures, devices, appliances, and technologies that could assist in water conservation or water consumption reduction.

(2b) To coordinate its efforts toward water conservation with other persons or groups, within or without the Commonwealth.

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

(3a) To establish such standards of quality and policies for any state waters consistent with the general policy set forth in this chapter, and to modify, amend or cancel any such standards or policies established and to take all appropriate steps to prevent quality alteration contrary to the public interest or to standards or policies thus established, except that a description of provisions of any proposed standard or policy adopted by regulation which are more restrictive than applicable federal requirements, together with the reason why the more restrictive provisions are needed, shall be provided to the standing committee of each house of the General Assembly to which matters relating to the content of the standard or policy are most properly referable. The Board shall, from time to time, but at least once every three years, hold public hearings pursuant to § 2.2-4007.01 but, upon the request of an affected person or upon its own motion, hold hearings pursuant to § 2.2-4009, for the purpose of reviewing the standards of quality, and, as appropriate, adopting, modifying, or canceling such standards. Whenever the Board considers the adoption, modification, amendment or cancellation of any standard, it shall give due consideration to, among other factors, the economic and social costs and benefits which can reasonably be expected to obtain as a consequence of the standards as adopted, modified, amended or cancelled. The Board shall also give due consideration to the public health standards issued by the Virginia Department of Health with respect to issues of public health policy and protection. If the Board does not follow the public health standards of the Virginia Department of Health, the Board's reason for any deviation shall be made in writing and published for any and all concerned parties.

(3b) Except as provided in subdivision (3a), such standards and policies are to be adopted or modified, amended or cancelled in the manner provided by the Administrative Process Act (§ 2.2-4000 et seq.).

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

(5) To issue, revoke or amend certificates under prescribed conditions for: (a) the discharge of sewage, industrial wastes and other wastes into or adjacent to state waters; (b) the alteration otherwise of the physical, chemical or biological properties of state waters; (c) excavation in a wetland; or (d) on and after October 1, 2001, the conduct of the following activities in a wetland: (i) new activities to cause

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59 draining that significantly alters or degrades existing wetland acreage or functions, (ii) filling or
60 dumping, (iii) permanent flooding or impounding, or (iv) new activities that cause significant alteration
61 or degradation of existing wetland acreage or functions. However, to the extent allowed by federal law,
62 any person holding a certificate issued by the Board that is intending to upgrade the permitted facility
63 by installing technology, control equipment, or other apparatus that the permittee demonstrates to the
64 satisfaction of the Director will result in improved energy efficiency, reduction in the amount of
65 nutrients discharged, and improved water quality shall not be required to obtain a new, modified, or
66 amended permit. The permit holder shall provide the demonstration anticipated by this subdivision to the
67 Department no later than 30 days prior to commencing construction.

68 (5a) All certificates issued by the Board under this chapter shall have fixed terms. The term of a
69 Virginia Pollution Discharge Elimination System permit shall not exceed five years. The term of a
70 Virginia Water Protection Permit shall be based upon the projected duration of the project, the length of
71 any required monitoring, or other project operations or permit conditions; however, the term shall not
72 exceed 15 years. The term of a Virginia Pollution Abatement permit shall not exceed 10 years, except
73 that the term of a Virginia Pollution Abatement permit for confined animal feeding operations shall be
74 10 years. The Department of Environmental Quality shall inspect all facilities for which a Virginia
75 Pollution Abatement permit has been issued to ensure compliance with statutory, regulatory, and permit
76 requirements. Department personnel performing inspections of confined animal feeding operations shall
77 be certified under the voluntary nutrient management training and certification program established in
78 § 10.1-104.2. The term of a certificate issued by the Board shall not be extended by modification
79 beyond the maximum duration and the certificate shall expire at the end of the term unless an
80 application for a new permit has been timely filed as required by the regulations of the Board and the
81 Board is unable, through no fault of the permittee, to issue a new permit before the expiration date of
82 the previous permit.

83 (5b) Any certificate issued by the Board under this chapter may, after notice and opportunity for a
84 hearing, be amended or revoked on any of the following grounds or for good cause as may be provided
85 by the regulations of the Board:

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

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

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

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

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

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

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

(8a) Except as otherwise provided in Articles 2.4 (§ 62.1-44.15:51 et seq.) and 2.5 (§ 62.1-44.15:67 et seq.) issue special orders to owners (i) who are permitting or causing the pollution, as defined by § 62.1-44.3, of state waters to cease and desist from such pollution, (ii) who have failed to construct facilities in accordance with final approved plans and specifications to construct such facilities in accordance with final approved plans and specifications, (iii) who have violated the terms and provisions of a certificate issued by the Board to comply with such terms and provisions, (iv) who have failed to comply with a directive from the Board to comply with such directive, (v) who have contravened duly adopted and promulgated water quality standards and policies to cease and desist from such contravention and to comply with such water quality standards and policies, (vi) who have violated the terms and provisions of a pretreatment permit issued by the Board or by the owner of a publicly owned treatment works to comply with such terms and provisions or (vii) who have contravened any applicable pretreatment standard or requirement to comply with such standard or requirement; and also to issue such orders to require any owner to comply with the provisions of this chapter and any decision of the Board. Except as otherwise provided by a separate article, orders issued pursuant to this subsection may include civil penalties of up to \$32,500 per violation, not to exceed \$100,000 per order. The Board may assess penalties under this subsection if (a) the person has been issued at least two written notices of alleged violation by the Department for the same or substantially related violations at the same site, (b) such violations have not been resolved by demonstration that there was no violation, by an order issued by the Board or the Director, or by other means, (c) at least 130 days have passed since the issuance of the first notice of alleged violation, and (d) there is a finding that such violations have occurred after a hearing conducted in accordance with subdivision (8b). The actual amount of any penalty assessed shall be based upon the severity of the violations, the extent of any potential or actual environmental harm, the compliance history of the facility or person, any economic benefit realized from the noncompliance, and the ability of the person to pay the penalty. The Board shall provide the person with the calculation for the proposed penalty prior to any hearing conducted for the issuance of an order that assesses penalties pursuant to this subsection. The issuance of a notice of alleged violation by the Department shall not be considered a case decision as defined in § 2.2-4001. Any notice of alleged violation shall include a description of each violation, the specific provision of law violated, and information on the process for obtaining a final decision or fact finding from the Department on whether or not a violation has occurred, and nothing in this section shall preclude an owner from seeking such a determination. Such civil penalties shall be paid into the state treasury and deposited by the State Treasurer into the Virginia Environmental Emergency Response Fund (§ 10.1-2500 et seq.), except that civil penalties assessed for violations of Article 9 (§ 62.1-44.34:8 et seq.) or Article 11 (§ 62.1-44.34:14 et seq.) shall be paid into the Virginia Petroleum Storage Tank Fund in accordance with § 62.1-44.34:11, and except that civil penalties assessed for violations of Article 2.3 (§ 62.1-44.15:24 et seq.) shall be paid in accordance with the provisions of § 62.1-44.15:48.

(8b) Such special orders are to be issued only after a hearing before a hearing officer appointed by the Supreme Court in accordance with § 2.2-4020 or, if requested by the person, before a quorum of the Board with at least 30 days' notice to the affected owners, of the time, place and purpose thereof, and they shall become effective not less than 15 days after service as provided in § 62.1-44.12; provided that if the Board finds that any such owner is grossly affecting or presents an imminent and substantial danger to (i) the public health, safety or welfare, or the health of animals, fish or aquatic life; (ii) a public water supply; or (iii) recreational, commercial, industrial, agricultural or other reasonable uses, it may issue, without advance notice or hearing, an emergency special order directing the owner to cease such pollution or discharge immediately, and shall provide an opportunity for a hearing, after reasonable notice as to the time and place thereof to the owner, to affirm, modify, amend or cancel such emergency special order. If an owner who has been issued such a special order or an emergency special order is not complying with the terms thereof, the Board may proceed in accordance with § 62.1-44.23, and where the order is based on a finding of an imminent and substantial danger, the court shall issue an injunction compelling compliance with the emergency special order pending a hearing by the Board. If an emergency special order requires cessation of a discharge, the Board shall provide an opportunity for a hearing within 48 hours of the issuance of the injunction.

(8c) The provisions of this section notwithstanding, the Board may proceed directly under § 62.1-44.32 for any past violation or violations of any provision of this chapter or any regulation duly promulgated hereunder.

(8d) With the consent of any owner who has violated or failed, neglected or refused to obey any regulation or order of the Board, any condition of a permit or any provision of this chapter, the Board may provide, in an order issued by the Board against such person, for the payment of civil charges for past violations in specific sums not to exceed the limit specified in § 62.1-44.32 (a). Such civil charges shall be instead of any appropriate civil penalty which could be imposed under § 62.1-44.32 (a) and shall not be subject to the provisions of § 2.2-514. Such civil charges shall be paid into the state

182 treasury and deposited by the State Treasurer into the Virginia Environmental Emergency Response
183 Fund (§ 10.1-2500 et seq.), excluding civil charges assessed for violations of Article 9 (§ 62.1-44.34:8 et
184 seq.) or 10 (§ 62.1-44.34:10 et seq.) of Chapter 3.1, or a regulation, administrative or judicial order, or
185 term or condition of approval relating to or issued under those articles, or civil charges assessed for
186 violations of Article 2.3 (§ 62.1-44.15:24 et seq.), or a regulation, administrative or judicial order, or
187 term or condition of approval relating to or issued under that article.

188 The amendments to this section adopted by the 1976 Session of the General Assembly shall not be
189 construed as limiting or expanding any cause of action or any other remedy possessed by the Board
190 prior to the effective date of said amendments.

191 (8e) The Board shall develop and provide an opportunity for public comment on guidelines and
192 procedures that contain specific criteria for calculating the appropriate penalty for each violation based
193 upon the severity of the violations, the extent of any potential or actual environmental harm, the
194 compliance history of the facility or person, any economic benefit realized from the noncompliance, and
195 the ability of the person to pay the penalty.

196 (8f) Before issuing a special order under subdivision (8a) or by consent under (8d), with or without
197 an assessment of a civil penalty, to an owner of a sewerage system requiring corrective action to prevent
198 or minimize overflows of sewage from such system, the Board shall provide public notice of and
199 reasonable opportunity to comment on the proposed order. Any such order under subdivision (8d) may
200 impose civil penalties in amounts up to the maximum amount authorized in § 309(g) of the Clean Water
201 Act. Any person who comments on the proposed order shall be given notice of any hearing to be held
202 on the terms of the order. In any hearing held, such person shall have a reasonable opportunity to be
203 heard and to present evidence. If no hearing is held before issuance of an order under subdivision (8d),
204 any person who commented on the proposed order may file a petition, within 30 days after the issuance
205 of such order, requesting the Board to set aside such order and provide a formal hearing thereon. If the
206 evidence presented by the petitioner in support of the petition is material and was not considered in the
207 issuance of the order, the Board shall immediately set aside the order, provide a formal hearing, and
208 make such petitioner a party. If the Board denies the petition, the Board shall provide notice to the
209 petitioner and make available to the public the reasons for such denial, and the petitioner shall have the
210 right to judicial review of such decision under § 62.1-44.29 if he meets the requirements thereof.

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

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

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

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

231 (b) If the owner is a political subdivision of the Commonwealth, the action may be brought in any
232 circuit court within the territory embraced by such political subdivision. If the owner is an
233 establishment, as defined in this chapter, the action shall be brought in the circuit court of the city or the
234 circuit court of the county in which such establishment is located. If the owner is an individual or group
235 of individuals, the action shall be brought in the circuit court of the city or circuit court of the county in
236 which such person or any of them reside.

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

241 (d) The proceeds of any recovery had under this subsection shall, when received by the Board, be
242 applied, first, to reimburse the Board for any expenses incurred in investigating such killing of fish. The
243 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 Department of Health to state waters in the course of processing or treating such waters for public water supply purposes, except where negligence is shown.

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

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

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

(15) To promote and establish requirements for the reclamation and reuse of wastewater that are protective of state waters and public health as an alternative to directly discharging pollutants into waters of the state. The requirements shall address various potential categories of reuse and may include general permits and provide for greater flexibility and less stringent requirements commensurate with the quality of the reclaimed water and its intended use. The requirements shall be developed in consultation with the Department of Health and other appropriate state agencies. This authority shall not be construed as conferring upon the Board any power or duty duplicative of those of the State Board of Health.

(16) To establish and implement policies and programs to protect and enhance the Commonwealth's wetland resources. Regulatory programs shall be designed to achieve no net loss of existing wetland acreage and functions. Voluntary and incentive-based programs shall be developed to achieve a net resource gain in acreage and functions of wetlands. The Board shall seek and obtain advice and guidance from the Virginia Institute of Marine Science in implementing these policies and programs.

(17) To establish additional procedures for obtaining a Virginia Water Protection Permit pursuant to §§ 62.1-44.15:20 and 62.1-44.15:22 for a proposed water withdrawal involving the transfer of water resources between major river basins within the Commonwealth that may impact water basins in another state. Such additional procedures shall not apply to any water withdrawal in existence as of July 1, 2012, except where the expansion of such withdrawal requires a permit under §§ 62.1-44.15:20 and 62.1-44.15:22, in which event such additional procedures may apply to the extent of the expanded withdrawal only. The applicant shall provide as part of the application (i) an analysis of alternatives to such a transfer, (ii) a comprehensive analysis of the impacts that would occur in the source and receiving basins, (iii) a description of measures to mitigate any adverse impacts that may arise, (iv) a description of how notice shall be provided to interested parties, and (v) any other requirements that the Board may adopt that are consistent with the provisions of this section and §§ 62.1-44.15:20 and 62.1-44.15:22 or regulations adopted thereunder. This subdivision shall not be construed as limiting or expanding the Board's authority under §§ 62.1-44.15:20 and 62.1-44.15:22 to issue permits and impose conditions or limitations on the permitted activity.

(18) To be the lead agency for the Commonwealth's nonpoint source pollution management program, including coordination of the nonpoint source control elements of programs developed pursuant to certain state and federal laws, including § 319 of the federal Clean Water Act and § 6217 of the federal Coastal Zone Management Act. Further responsibilities include the adoption of regulations necessary to implement a nonpoint source pollution management program in the Commonwealth, the distribution of assigned funds, the identification and establishment of priorities to address nonpoint source related water quality problems, the administration of the Statewide Nonpoint Source Advisory Committee, and the development of a program for the prevention and control of soil erosion, sediment deposition, and nonagricultural runoff to conserve Virginia's natural resources.

(19) To adopt regulations requiring, prior to the issuance for an interstate natural gas pipeline of either a Virginia Water Protection Permit or an Individual Water Quality Certification under § 401 of the Clean Water Act, a review of each instance of proposed construction on an upland area, including construction on any steep slope adjacent to a waterway.

§ 62.1-44.15. (For effective date, see Acts 2016, cc. 68 and 758, as amended by Acts 2017, c. 345) Powers and duties; civil penalties.

It shall be the duty of the Board and it shall have the authority:

(1) [Repealed.]

(2) To study and investigate all problems concerned with the quality of state waters and to make reports and recommendations.

(2a) To study and investigate methods, procedures, devices, appliances, and technologies that could assist in water conservation or water consumption reduction.

(2b) To coordinate its efforts toward water conservation with other persons or groups, within or without the Commonwealth.

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

(3a) To establish such standards of quality and policies for any state waters consistent with the general policy set forth in this chapter, and to modify, amend, or cancel any such standards or policies established and to take all appropriate steps to prevent quality alteration contrary to the public interest or to standards or policies thus established, except that a description of provisions of any proposed standard or policy adopted by regulation which are more restrictive than applicable federal requirements, together with the reason why the more restrictive provisions are needed, shall be provided to the standing committee of each house of the General Assembly to which matters relating to the content of the standard or policy are most properly referable. The Board shall, from time to time, but at least once every three years, hold public hearings pursuant to § 2.2-4007.01 but, upon the request of an affected person or upon its own motion, hold hearings pursuant to § 2.2-4009, for the purpose of reviewing the standards of quality, and, as appropriate, adopting, modifying, or canceling such standards. Whenever the Board considers the adoption, modification, amendment, or cancellation of any standard, it shall give due consideration to, among other factors, the economic and social costs and benefits which can reasonably be expected to obtain as a consequence of the standards as adopted, modified, amended, or cancelled. The Board shall also give due consideration to the public health standards issued by the Virginia Department of Health with respect to issues of public health policy and protection. If the Board does not follow the public health standards of the Virginia Department of Health, the Board's reason for any deviation shall be made in writing and published for any and all concerned parties.

(3b) Except as provided in subdivision (3a), such standards and policies are to be adopted or modified, amended, or cancelled in the manner provided by the Administrative Process Act (§ 2.2-4000 et seq.).

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

(5) To issue, revoke, or amend certificates and land-disturbance approvals under prescribed conditions for (a) the discharge of sewage, stormwater, industrial wastes, and other wastes into or adjacent to state waters; (b) the alteration otherwise of the physical, chemical, or biological properties of state waters; (c) excavation in a wetland; or (d) on and after October 1, 2001, the conduct of the following activities in a wetland: (i) new activities to cause draining that significantly alters or degrades existing wetland acreage or functions, (ii) filling or dumping, (iii) permanent flooding or impounding, or (iv) new activities that cause significant alteration or degradation of existing wetland acreage or functions. However, to the extent allowed by federal law, any person holding a certificate issued by the Board that is intending to upgrade the permitted facility by installing technology, control equipment, or other apparatus that the permittee demonstrates to the satisfaction of the Director will result in improved energy efficiency, reduction in the amount of nutrients discharged, and improved water quality shall not be required to obtain a new, modified, or amended permit. The permit holder shall provide the demonstration anticipated by this subdivision to the Department no later than 30 days prior to commencing construction.

(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 Virginia Water Protection Permit shall be based upon the projected duration of the project, the length of any required monitoring, or other project operations or permit conditions; however, the term shall not exceed 15 years. The term of a Virginia Pollution Abatement permit shall not exceed 10 years, except that the term of a Virginia Pollution Abatement permit for confined animal feeding operations shall be 10 years. The Department of Environmental Quality shall inspect all facilities for which a Virginia

Pollution Abatement permit has been issued to ensure compliance with statutory, regulatory, and permit requirements. Department personnel performing inspections of confined animal feeding operations shall be certified under the voluntary nutrient management training and certification program established in § 10.1-104.2. The term of a certificate issued by the Board shall not be extended by modification beyond the maximum duration and the certificate shall expire at the end of the term unless an application for a new permit has been timely filed as required by the regulations of the Board and the Board is unable, through no fault of the permittee, to issue a new permit before the expiration date of the previous permit.

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

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

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

3. The activity for which the certificate or land-disturbance approval was issued endangers human health or the environment or causes unreasonable property degradation and can be regulated to acceptable levels or practices by amendment or revocation of the certificate or land-disturbance approval; or

4. There exists a material change in the basis on which the certificate, land-disturbance approval, or permit was issued that requires either a temporary or a permanent reduction or elimination of any discharge or land-disturbing activity controlled by the certificate, land-disturbance approval, or permit necessary to protect human health or the environment or stop or prevent unreasonable degradation of property.

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

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

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

(8a) Except as otherwise provided in subdivision (19) and Article 2.3 (§ 62.1-44.15:24 et seq.), to issue special orders to owners, including owners as defined in § 62.1-44.15:24, who (i) are permitting or causing the pollution, as defined by § 62.1-44.3, of state waters or the unreasonable degradation of property to cease and desist from such pollution or degradation, (ii) have failed to construct facilities in accordance with final approved plans and specifications to construct such facilities in accordance with final approved plans and specifications, (iii) have violated the terms and provisions of a certificate or land-disturbance approval issued by the Board to comply with such terms and provisions, (iv) have failed to comply with a directive from the Board to comply with such directive, (v) have contravened duly adopted and promulgated water quality standards and policies to cease and desist from such contravention and to comply with such water quality standards and policies, (vi) have violated the terms

and provisions of a pretreatment permit issued by the Board or by the owner of a publicly owned treatment works to comply with such terms and provisions, or (vii) have contravened any applicable pretreatment standard or requirement to comply with such standard or requirement; and also to issue such orders to require any owner to comply with the provisions of this chapter and any decision of the Board. Except as otherwise provided by a separate article, orders issued pursuant to this subdivision may include civil penalties of up to \$ 32,500 per violation, not to exceed \$ 100,000 per order. The Board may assess penalties under this subdivision if (a) the person has been issued at least two written notices of alleged violation by the Department for the same or substantially related violations at the same site, (b) such violations have not been resolved by demonstration that there was no violation, by an order issued by the Board or the Director, or by other means, (c) at least 130 days have passed since the issuance of the first notice of alleged violation, and (d) there is a finding that such violations have occurred after a hearing conducted in accordance with subdivision (8b). The actual amount of any penalty assessed shall be based upon the severity of the violations, the extent of any potential or actual environmental harm, the compliance history of the facility or person, any economic benefit realized from the noncompliance, and the ability of the person to pay the penalty. The Board shall provide the person with the calculation for the proposed penalty prior to any hearing conducted for the issuance of an order that assesses penalties pursuant to this subdivision. The issuance of a notice of alleged violation by the Department shall not be considered a case decision as defined in § 2.2-4001. Any notice of alleged violation shall include a description of each violation, the specific provision of law violated, and information on the process for obtaining a final decision or fact finding from the Department on whether or not a violation has occurred, and nothing in this section shall preclude an owner from seeking such a determination. Such civil penalties shall be paid into the state treasury and deposited by the State Treasurer into the Virginia Environmental Emergency Response Fund (§ 10.1-2500 et seq.), except that civil penalties assessed for violations of Article 9 (§ 62.1-44.34:8 et seq.) or Article 11 (§ 62.1-44.34:14 et seq.) shall be paid into the Virginia Petroleum Storage Tank Fund in accordance with § 62.1-44.34:11, and except that civil penalties assessed for violations of subdivision (19) or Article 2.3 (§ 62.1-44.15:24 et seq.) shall be paid into the Stormwater Local Assistance Fund in accordance with § 62.1-44.15:29.1.

(8b) Such special orders are to be issued only after a hearing before a hearing officer appointed by the Supreme Court in accordance with § 2.2-4020 or, if requested by the person, before a quorum of the Board with at least 30 days' notice to the affected owners, of the time, place, and purpose thereof, and they shall become effective not less than 15 days after service as provided in 62.1-44.12, provided that if the Board finds that any such owner is grossly affecting or presents an imminent and substantial danger to (i) the public health, safety, or welfare, or the health of animals, fish, or aquatic life; (ii) a public water supply; or (iii) recreational, commercial, industrial, agricultural, or other reasonable uses, it may issue, without advance notice or hearing, an emergency special order directing the owner to cease such pollution or discharge immediately, and shall provide an opportunity for a hearing, after reasonable notice as to the time and place thereof to the owner, to affirm, modify, amend, or cancel such emergency special order. If an owner who has been issued such a special order or an emergency special order is not complying with the terms thereof, the Board may proceed in accordance with 62.1-44.23, and where the order is based on a finding of an imminent and substantial danger, the court shall issue an injunction compelling compliance with the emergency special order pending a hearing by the Board. If an emergency special order requires cessation of a discharge, the Board shall provide an opportunity for a hearing within 48 hours of the issuance of the injunction.

(8c) The provisions of this section notwithstanding, the Board may proceed directly under § 62.1-44.32 for any past violation or violations of any provision of this chapter or any regulation duly promulgated hereunder.

(8d) Except as otherwise provided in subdivision (19), subdivision 2 of § 62.1-44.15:25, or § 62.1-44.15:63, 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 certificate, land-disturbance approval, or 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 § 2.2-514. Such civil charges shall be paid into the state treasury and deposited by the State Treasurer into the Virginia Environmental Emergency Response Fund (§ 10.1-2500 et seq.), excluding civil charges assessed for violations of Article 9 (§ 62.1-44.34:8 et seq.) or 10 (§ 62.1-44.34:10 et seq.) of Chapter 3.1, or a regulation, administrative or judicial order, or term or condition of approval relating to or issued under those articles, or civil charges assessed for violations of Article 2.3 (§ 62.1-44.15:24 et seq.) or 2.5 (§ 62.1-44.15:67 et seq.) or a regulation, administrative or judicial order, or term or condition of approval relating to or issued under Article 2.3 or 2.5.

The amendments to this section adopted by the 1976 Session of the General Assembly shall not be

construed as limiting or expanding any cause of action or any other remedy possessed by the Board prior to the effective date of said amendments.

(8e) The Board shall develop and provide an opportunity for public comment on guidelines and procedures that contain specific criteria for calculating the appropriate penalty for each violation based upon the severity of the violations, the extent of any potential or actual environmental harm, the compliance history of the facility or person, any economic benefit realized from the noncompliance, and the ability of the person to pay the penalty.

(8f) Before issuing a special order under subdivision (8a) or by consent under (8d), with or without an assessment of a civil penalty, to an owner of a sewerage system requiring corrective action to prevent or minimize overflows of sewage from such system, the Board shall provide public notice of and reasonable opportunity to comment on the proposed order. Any such order under subdivision (8d) may impose civil penalties in amounts up to the maximum amount authorized in § 309(g) of the Clean Water Act. Any person who comments on the proposed order shall be given notice of any hearing to be held on the terms of the order. In any hearing held, such person shall have a reasonable opportunity to be heard and to present evidence. If no hearing is held before issuance of an order under subdivision (8d), any person who commented on the proposed order may file a petition, within 30 days after the issuance of such order, requesting the Board to set aside such order and provide a formal hearing thereon. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Board shall immediately set aside the order, provide a formal hearing, and make such petitioner a party. If the Board denies the petition, the Board shall provide notice to the petitioner and make available to the public the reasons for such denial, and the petitioner shall have the right to judicial review of such decision under § 62.1-44.29 if he meets the requirements thereof.

(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 soil erosion control and stormwater management program and 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

551 adds or applies any chemicals or other substances that are recommended or approved by the State
552 Department of Health to state waters in the course of processing or treating such waters for public water
553 supply purposes, except where negligence is shown.

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

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

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

567 (15) To promote and establish requirements for the reclamation and reuse of wastewater that are
568 protective of state waters and public health as an alternative to directly discharging pollutants into waters
569 of the state. The requirements shall address various potential categories of reuse and may include
570 general permits and provide for greater flexibility and less stringent requirements commensurate with the
571 quality of the reclaimed water and its intended use. The requirements shall be developed in consultation
572 with the Department of Health and other appropriate state agencies. This authority shall not be construed
573 as conferring upon the Board any power or duty duplicative of those of the State Board of Health.

574 (16) To establish and implement policies and programs to protect and enhance the Commonwealth's
575 wetland resources. Regulatory programs shall be designed to achieve no net loss of existing wetland
576 acreage and functions. Voluntary and incentive-based programs shall be developed to achieve a net
577 resource gain in acreage and functions of wetlands. The Board shall seek and obtain advice and
578 guidance from the Virginia Institute of Marine Science in implementing these policies and programs.

579 (17) To establish additional procedures for obtaining a Virginia Water Protection Permit pursuant to
580 §§ 62.1-44.15:20 and 62.1-44.15:22 for a proposed water withdrawal involving the transfer of water
581 resources between major river basins within the Commonwealth that may impact water basins in another
582 state. Such additional procedures shall not apply to any water withdrawal in existence as of July 1,
583 2012, except where the expansion of such withdrawal requires a permit under §§ 62.1-44.15:20 and
584 62.1-44.15:22, in which event such additional procedures may apply to the extent of the expanded
585 withdrawal only. The applicant shall provide as part of the application (i) an analysis of alternatives to
586 such a transfer, (ii) a comprehensive analysis of the impacts that would occur in the source and
587 receiving basins, (iii) a description of measures to mitigate any adverse impacts that may arise, (iv) a
588 description of how notice shall be provided to interested parties, and (v) any other requirements that the
589 Board may adopt that are consistent with the provisions of this section and §§ 62.1-44.15:20 and
590 62.1-44.15:22 or regulations adopted thereunder. This subdivision shall not be construed as limiting or
591 expanding the Board's authority under §§ 62.1-44.15:20 and 62.1-44.15:22 to issue permits and impose
592 conditions or limitations on the permitted activity.

593 (18) To be the lead agency for the Commonwealth's nonpoint source pollution management program,
594 including coordination of the nonpoint source control elements of programs developed pursuant to
595 certain state and federal laws, including § 319 of the federal Clean Water Act and § 6217 of the federal
596 Coastal Zone Management Act. Further responsibilities include the adoption of regulations necessary to
597 implement a nonpoint source pollution management program in the Commonwealth, the distribution of
598 assigned funds, the identification and establishment of priorities to address nonpoint source related water
599 quality problems, the administration of the Statewide Nonpoint Source Advisory Committee, and the
600 development of a program for the prevention and control of soil erosion, sediment deposition, and
601 nonagricultural runoff to conserve Virginia's natural resources.

602 (19) To review for compliance with the provisions of this chapter the Virginia Erosion and
603 Stormwater Management Programs adopted by localities pursuant to § 62.1-44.15:27, the Virginia
604 Erosion and Sediment Control Programs adopted by localities pursuant to subdivision B 3 of §
605 62.1-44.15:27, and the programs adopted by localities pursuant to the Chesapeake Bay Preservation Act
606 (§ 62.1-44.15:67 et seq.). The Board shall develop and implement a schedule for conducting such
607 program reviews as often as necessary but at least once every five years. Following the completion of a
608 compliance review in which deficiencies are found, the Board shall establish a schedule for the locality
609 to follow in correcting the deficiencies and bringing its program into compliance. If the locality fails to
610 bring its program into compliance in accordance with the compliance schedule, then the Board is
611 authorized to (i) issue a special order to any locality imposing a civil penalty not to exceed \$ 5,000 per
612 violation with the maximum amount not to exceed \$ 50,000 per order for noncompliance with the state

program, to be paid into the state treasury and deposited in the Stormwater Local Assistance Fund established in § 62.1-44.15:29.1 or (ii) with the consent of the locality, provide in an order issued against the locality for the payment of civil charges for violations in lieu of civil penalties, in specific sums not to exceed the limit stated in this subdivision. Such civil charges shall be in lieu of any appropriate civil penalty that could be imposed under subsection (a) of § 62.1-44.32 and shall not be subject to the provisions of § 2.2-514. The Board shall not delegate to the Department its authority to issue special orders pursuant to clause (i). In lieu of issuing an order, the Board is authorized to take legal action against a locality pursuant to § 62.1-44.23 to ensure compliance.

(20) *To adopt regulations requiring, prior to the issuance for an interstate natural gas pipeline of either a Virginia Water Protection Permit or an Individual Water Quality Certification under § 401 of the Clean Water Act, a review of each instance of proposed construction on an upland area, including construction on any steep slope adjacent to a waterway.*

§ 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 in a case involving an interstate natural gas pipeline.*

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 provisions of this subsection.

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

G. *For any interstate natural gas pipeline, the Board shall require both a Virginia Water Protection Permit and an Individual Water Quality Certification under § 401 of the Clean Water Act. Prior to issuing either such permit or certification, the Board shall conduct a review that includes, at a minimum, (i) an individual review of each proposed water body crossing consistent with the requirements of a Virginia Water Protection Permit, (ii) a review of any construction through karst terrain, and (iii) a review and approval of erosion and sediment control plans and stormwater*

674 management plans.

675 *H. For the purposes of any Individual Water Quality Certification of an interstate natural gas*
676 *pipeline, the Board shall not permit any land-disturbing activity to occur pursuant to § 62.1-44.15:24*
677 *prior to issuance of a Water Quality Certification. The Board shall consider tree felling to be a*
678 *land-disturbing activity.*

679 *I. The Board shall require that any portion of an interstate natural gas pipeline that crosses a water*
680 *body that is larger than a size established in regulations adopted by the Board pursuant to the*
681 *provisions of this chapter be constructed using horizontal directional drilling.*

682 *J. The Board shall not voluntarily waive its authority to require an Individual Water Quality*
683 *Certification under § 401 of the Clean Water Act.*

684 **2. That the State Water Control Board shall adopt amendments conforming to the provisions of**
685 **this act the regulations that establish the Virginia Water Protection General Permit for Linear**
686 **Transportation Projects.**

687 **3. That the initial adoption of regulations by the State Water Control Board necessary to**
688 **implement the provisions of this act shall be exempt from the Administrative Process Act**
689 **(§ 2.2-4000 et seq. of the Code of Virginia), except that the State Water Control Board shall**
690 **provide an opportunity for public comment on the regulations prior to adoption.**