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SENATE BILL NO. 1396

Offered January 13, 2021

Prefiled January 13, 2021

A BILL to amend and reenact §§ 32.1-164 and 32.1-164.1:01 of the Code of Virginia and to amend the Code of Virginia by adding in Title 62.1 a chapter numbered 21.1, consisting of sections numbered 62.1-223.1, 62.1-223.2, and 62.1-223.3, relating to sewage; Onsite Sewage Indemnification Fund; Wastewater Infrastructure Policy Working Group; regulations; report.

Patron—Hashmi

Referred to Committee on Agriculture, Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That §§ 32.1-164 and 32.1-164.1:01 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Title 62.1 a chapter numbered 21.1, consisting of sections numbered 62.1-223.1, 62.1-223.2, and 62.1-223.3, as follows:

§ 32.1-164. Powers and duties of Board; regulations; fees; onsite soil evaluators; letters in lieu of permits; inspections; civil penalties.

A. The Board shall have supervision and control over the safe and sanitary collection, conveyance, transportation, treatment, and disposal of sewage by onsite sewage systems and alternative discharging sewage systems, and treatment works as they affect the public health and welfare. The Board shall also have supervision and control over the maintenance, inspection, and reuse of alternative onsite sewage systems as they affect the public health and welfare. In discharging the responsibility to supervise and control the safe and sanitary treatment and disposal of sewage as they affect the public health and welfare, the Board shall exercise due diligence to protect the quality of both surface water and ground water. Upon the final adoption of a general Virginia Pollutant Discharge Elimination permit by the State Water Control Board, the Board of Health shall assume the responsibility for permitting alternative discharging sewage systems as defined in § 32.1-163. All such permits shall comply with the applicable regulations of the State Water Control Board and be registered with the State Water Control Board.

In the exercise of its duty to supervise and control the treatment and disposal of sewage, the Board shall require and the Department shall conduct regular inspections of alternative discharging sewage systems. The Board shall also establish requirements for maintenance contracts for alternative discharging sewage systems. The Board may require, as a condition for issuing a permit to operate an alternative discharging sewage system, that the applicant present an executed maintenance contract. Such contract shall be maintained for the life of any general Virginia Pollutant Discharge Elimination System permit issued by the State Water Control Board.

B. The regulations of the Board shall govern the collection, conveyance, transportation, treatment and disposal of sewage by onsite sewage systems and alternative discharging sewage systems and the maintenance, inspection, and reuse of alternative onsite sewage systems. Such regulations shall be designed to protect the public health and promote the public welfare and may include, without limitation:

1. A requirement that the owner obtain a permit from the Commissioner prior to the construction, installation, modification or operation of a sewerage system or treatment works except in those instances where a permit is required pursuant to Chapter 3.1 (§ 62.1-44.2 et seq.) of Title 62.1.

2. Criteria for the granting or denial of such permits.

3. Standards for the design, construction, installation, modification and operation of sewerage systems and treatment works for permits issued by the Commissioner.

4. Standards governing disposal of sewage on or in soils.

5. Standards specifying the minimum distance between sewerage systems or treatment works and:

~~(a)~~ *a.* Public and private wells supplying water for human consumption,

~~(b)~~ *b.* Lakes and other impounded waters,

~~(c)~~ *c.* Streams and rivers,

~~(d)~~ *d.* Shellfish waters,

~~(e)~~ *e.* Ground waters,

~~(f)~~ *f.* Areas and places of human habitation,

~~(g)~~ *g.* Property lines.

6. Standards as to the adequacy of an approved water supply.

7. Standards governing the transportation of sewage.

8. A prohibition against the discharge of untreated sewage onto land or into waters of the

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Commonwealth.

9. A requirement that such residences, buildings, structures and other places designed for human occupancy as the Board may prescribe be provided with a sewerage system or treatment works.

10. Criteria for determining the demonstrated ability of alternative onsite systems, which are not permitted through the then current sewage handling and disposal regulations, to treat and dispose of sewage as effectively as approved methods.

11. Standards for inspections of and requirements for maintenance contracts for alternative discharging sewage systems.

12. Notwithstanding the provisions of subdivision 1 above and Chapter 3.1 of Title 62.1, a requirement that the owner obtain a permit from the Commissioner prior to the construction, installation, modification, or operation of an alternative discharging sewage system as defined in § 32.1-163.

13. Criteria for granting, denying, and revoking of permits for alternative discharging sewage systems.

14. Procedures for issuing letters recognizing onsite sewage sites in lieu of issuing onsite sewage system permits.

15. Performance requirements for nitrogen discharged from alternative onsite sewage systems that protect public health and ground and surface water quality.

16. Consideration of the impacts of climate change on proposed treatment works based on research and analysis from the Center for Coastal Resources Management at the Virginia Institute of Marine Science at The College of William and Mary in Virginia.

C. A fee of $75 shall be charged for filing an application for an onsite sewage system or an alternative discharging sewage system permit with the Department. Funds received in payment of such charges shall be transmitted to the Comptroller for deposit. The funds from the fees shall be credited to a special fund to be appropriated by the General Assembly, as it deems necessary, to the Department for the purpose of carrying out the provisions of this title. However, $10 of each fee shall be credited to the Onsite Sewage Indemnification Fund established pursuant to § 32.1-164.1:01.

The Board, in its regulations, shall establish a procedure for the waiver of fees for persons whose incomes are below the federal poverty guidelines established by the United States Department of Health and Human Services or when the application is for a pit privy or the repair of a failing onsite sewage system. If the Department denies the permit for land on which the applicant seeks to construct his principal place of residence, then such fee shall be refunded to the applicant.

From such funds as are appropriated to the Department from the special fund, the Board shall apportion a share to local or district health departments to be allocated in the same ratios as provided for the operation of such health departments pursuant to § 32.1-31. Such funds shall be transmitted to the local or district health departments on a quarterly basis.

D. In addition to factors related to the Board's responsibilities for the safe and sanitary treatment and disposal of sewage as they affect the public health and welfare, the Board shall, in establishing standards, give due consideration to economic costs of such standards in accordance with the applicable provisions of the Administrative Process Act (§ 2.2-4000 et seq.).

E. Further a fee of $75 shall be charged for such installation and monitoring inspections of alternative discharging sewage systems as may be required by the Board. The funds received in payment of such fees shall be credited to a special fund to be appropriated by the General Assembly, as it deems necessary, to the Department for the purpose of carrying out the provisions of this section. However, $10 of each fee shall be credited to the Onsite Sewage Indemnification Fund established pursuant to § 32.1-164.1:01.

The Board, in its regulations, shall establish a procedure for the waiver of fees for persons whose incomes are below the federal poverty guidelines established by the United States Department of Health and Human Services.

F. Any owner who violates any provision of this section or any regulation of the Board of Health or the State Water Control Board relating to alternative discharging sewage systems or who fails to comply with any order of the Board of Health or any special final order of the State Water Control Board shall be subject to the penalties provided in §§ 32.1-27 and 62.1-44.32.

In the event that a county, city, or town, or its agent, is the owner, the county, city, or town, or its agent may initiate a civil action against any user or users of an alternative discharging sewage system to recover that portion of any civil penalty imposed against the owner which directly resulted from violations by the user or users of any applicable federal, state, or local laws, regulations, or ordinances.

G. The Board shall establish and implement procedures for issuance of letters recognizing the appropriateness of onsite sewage site conditions in lieu of issuing onsite sewage system permits. The Board may require that a survey plat be included with an application for such letter. Such letters shall state, in language determined by the Office of the Attorney General and approved by the Board, the appropriateness of the soil for an onsite sewage system; no system design shall be required for issuance of such letter. The letter may be recorded in the land records of the clerk of the circuit court in the

jurisdiction where all or part of the site or proposed site of the onsite sewage system is to be located so as to be a binding notice to the public, including subsequent purchases of the land in question. Upon the sale or transfer of the land which is the subject of any letter, the letter shall be transferred with the title to the property. A permit shall be issued on the basis of such letter unless, from the date of the letter's issuance, there has been a substantial, intervening change in the soil or site conditions where the onsite sewage system is to be located. The Board, Commissioner, and the Department shall accept evaluations from licensed onsite soil evaluators for the issuance of such letters, if they are produced in accordance with the Board's established procedures for issuance of letters. The Department shall issue such letters within 20 working days of the application filing date when evaluations produced by licensed onsite soil evaluators are submitted as supporting documentation. The Department shall not be required to do a field check of the evaluation prior to issuing such a letter or a permit based on such letter; however, the Department may conduct such field analyses as deemed necessary to protect the integrity of the Commonwealth's environment. Applicants for such letters in lieu of onsite sewage system permits shall pay the fee established by the Board for the letters' issuance and, upon application for an onsite sewage system permit, shall pay the permit application fee.

H. The Board shall establish a program for the operation and maintenance of alternative onsite systems. The program shall require:

1. The owner of an alternative onsite sewage system, as defined in § 32.1-163, to have that system operated by a licensed operator, as defined in § 32.1-163, and visited by the operator as specified in the operation permit;

2. The licensed operator to provide a report on the results of the site visit utilizing the web-based system required by this subsection. A fee of $1 shall be paid by the licensed operator at the time the report is filed. Such fees shall be credited to the Onsite Operation and Maintenance Fund established pursuant to § 32.1-164.8;

3. A statewide web-based reporting system to track the operation, monitoring, and maintenance requirements of each system, including its components. The system shall have the capability for pre-notification of operation, maintenance, or monitoring to the operator or owner. Licensed operators shall be required to enter their reports onto the system. The Department of Health shall utilize the system to provide for compliance monitoring of operation and maintenance requirements throughout the state. The Commissioner shall consider readily available commercial systems currently utilized within the Commonwealth; and

4. Any additional requirements deemed necessary by the Board.

I. The Board shall promulgate regulations governing the requirements for maintaining alternative onsite sewage systems.

J. The Board shall establish a uniform schedule of civil penalties for violations of regulations promulgated pursuant to subsection B that are not remedied within 30 days after service of notice from the Department. Civil penalties collected pursuant to this chapter shall be credited to the Environmental Health Education and Training Fund established pursuant to § 32.1-248.3.

This schedule of civil penalties shall be uniform for each type of specified violation, and the penalty for any one violation shall be not more than $100 for the initial violation and not more than $150 for each additional violation. Each day during which the violation is found to have existed shall constitute a separate offense. However, specified violations arising from the same operative set of facts shall not be charged more than once in any 10-day period, and a series of specified violations arising from the same operative set of facts shall not result in civil penalties exceeding a total of $3,000. Penalties shall not apply to unoccupied structures which do not contribute to the pollution of public or private water supplies or the contraction or spread of infectious, contagious, or dangerous diseases. The Department may pursue other remedies as provided by law; however, designation of a particular violation for a civil penalty pursuant to this section shall be in lieu of criminal penalties, except for any violation that contributes to or is likely to contribute to the pollution of public or private water supplies or the contraction or spread of infectious, contagious, or dangerous diseases.

The Department may issue a civil summons ticket as provided by law for a scheduled violation. Any person summoned or issued a ticket for a scheduled violation may make an appearance in person or in writing by mail to the Department prior to the date fixed for trial in court. Any person so appearing may enter a waiver of trial, admit liability, and pay the civil penalty established for the offense charged.

If a person charged with a scheduled violation does not elect to enter a waiver of trial and admit liability, the violation shall be tried in the general district court with jurisdiction in the same manner and with the same right of appeal as provided for by law. In any trial for a scheduled violation, the Department shall have the burden of proving by a preponderance of the evidence the liability of the alleged violator. An admission of liability or finding of liability under this section shall not be deemed an admission at a criminal proceeding.

This section shall not be interpreted to allow the imposition of civil penalties for activities related to

land development.

K. The Department shall establish procedures for requiring a survey plat as part of an application for a permit or letter for any onsite sewage or alternative discharging sewage system, and for granting waivers for such requirements. In all cases, it shall be the landowner's responsibility to ensure that the system is properly located as permitted.

§ 32.1-164.1:01. Onsite Sewage Indemnification Fund.

A. There is hereby created the Onsite Sewage Indemnification ~~fund~~ *Fund, hereafter referred to as "the Fund,"* whose purpose is to receive moneys generated by a portion of the fees collected by the Department of Health pursuant to subsections C and E of § 32.1-164 and appropriated by the Commonwealth for the purpose of assisting any Virginia real property owner holding a valid permit to operate an onsite sewage system when such system or components thereof fail within three years of construction and such failure results from the negligence of the Department of Health. The ~~fund~~ *Fund* may also be used, in the discretion of the Board, to support the program for training and recognition of licensed onsite soil evaluators *and to provide grants and loans to property owners with income at or below 200 percent of the federal poverty guidelines to repair failing onsite sewage systems or install onsite sewage systems on properties that lack adequate sewage disposal. No expenses shall be paid from the Fund to support the program for training and recognition of onsite soil evaluators, or to provide any grant or loan to repair a failing onsite sewage system or install an onsite sewage system on any property that lacks adequate sewage disposal, in lieu of payment to any owner or owners qualified to receive payment from the Fund pursuant to this chapter*.

B. Ten dollars of each fee collected by the Department of Health pursuant to subsections C and E of § 32.1-164 shall be deposited by the Comptroller ~~to this fund~~ *in the Fund* to be appropriated for the purposes of this section to the Department of Health by the General Assembly as it deems necessary.

C. The owner of an onsite sewage system that has been permitted by the Department of Health may cause, by filing a request for payment from the ~~fund~~ *Fund* within one year from the date the system or components thereof failed, the Commissioner to review the circumstances of the onsite sewage system failure, if the onsite sewage system has failed within three years of construction. Upon the Commissioner's finding that the onsite sewage system was permitted by the Department and (i) the system or components thereof failed within three years of construction; (ii) that specific actions of the Department were negligent and that those actions caused the failure; and (iii) that the owner filed a request for payment from the ~~fund~~ *Fund* within one year from the date the system or components thereof failed, the Commissioner shall, subject to the limitations stated herein, reimburse the owner for the reasonable cost of following the Board's regulations to repair or replace the failed onsite sewage system or components thereof.

D. Prior to receiving payment from the ~~fund~~ *Fund*, the owner shall follow the requirements in the Board's regulations to repair or replace the failed onsite sewage system or components thereof.

E. The total amount an owner may receive in payment from the ~~fund~~ *Fund* shall not exceed $30,000. Only the costs of the system that failed or the costs of labor and equipment required to repair or replace the failed onsite sewage system or components thereof are reimbursable by the ~~fund~~ *Fund*.

F. If the Commissioner finds that the system was permitted by the Department and has failed within three years of construction and that the failure resulted from faulty construction or other private party error, the Commissioner may assist the owner of the failed system in seeking redress from the system's builder or other private party.

G. Every request for payment from the ~~fund~~ *Fund* shall be forever barred unless the owner has filed a complete application as required by the Department. The request shall be filed with the Commissioner within one year from the date that the onsite sewage system or components thereof first failed. However, if the owner was under a disability at the time the cause of action accrued, the tolling provisions of § 8.01-229 shall apply. The owner shall mail the request for payment from the ~~fund~~ *Fund* via the United States Postal Service by certified mail, return receipt requested, addressed to the Commissioner.

In any action contesting the filing of the request for payment from the ~~fund~~ *Fund*, the burden of proof shall be on the owner to establish mailing and receipt of the notice in conformity with this section. The signed receipt indicating delivery to the Commissioner, when admitted into evidence, shall be prima facie evidence of filing of the request for payment from the ~~fund~~ *Fund* under this section. The request for payment from the ~~fund~~ *Fund* shall be deemed to be timely filed if it is sent by certified mail, return receipt requested, and if the official receipt shows that the mailing was within the prescribed time limits.

Notwithstanding any provision of this article, the liability for any payment from the ~~fund~~ *Fund* shall be conditioned upon the execution by the owner of a release approved by the Attorney General of all claims against the Commonwealth, its political subdivisions, agencies, and instrumentalities and against any officer or employee of the Commonwealth in connection with or arising out of the occurrence complained of.

H. The Commissioner and the Attorney General shall cooperatively develop an actuarially sound program and policy for identifying, evaluating, and processing requests for payment from the ~~fund~~ *Fund*.

I. If the Commissioner refuses the request for payment from the ~~fund~~ *Fund*, the owner may appeal the refusal to the State Health Department Sewage Handling and Disposal Appeal Review Board.

The Board may promulgate regulations pursuant to the Administrative Process Act (§ 2.2-4000 et seq.) for the administration of the ~~fund~~ *Fund* consistent with this chapter.

In the event the ~~fund~~ *Fund* is insufficient to meet requests for payment from the ~~fund~~ *Fund*, this section and the creation of the ~~fund~~ *Fund* shall not be construed to provide liability on the part of the Department or any of its personnel where no such liability existed prior to July 1, 1994.

CHAPTER 21.1.

WASTEWATER INFRASTRUCTURE POLICY.

§ 62.1-223.1. State policy as to community and onsite wastewater treatment.

It is the policy of the Commonwealth to prioritize universal access to wastewater treatment that protects public health and the environment and supports local economic growth and stability. To further this policy, the Commonwealth endorses (i) public education about the importance of adequate wastewater treatment; (ii) collaboration among local, state, and federal government entities, including consistent collaboration and coordination of grant requirements and timelines; (iii) the prioritized, focused, and innovative use of state and federal funding to address needs determined pursuant to § 62.1-223.3; (iv) a preference for community-based and regional projects as opposed to cumulative and repetitive site-by-site individual solutions; (v) the use of integrated solutions across sewer and onsite wastewater treatment systems; and (vi) the incorporation of the effects of climate change into wastewater treatment regulatory and funding programs.

§ 62.1-223.2. Wastewater Infrastructure Policy Working Group.

A. The Wastewater Infrastructure Policy Working Group (the Working Group) is established as an advisory board within the meaning of § 2.2-2100 in the executive branch of state government. The purpose of the Working Group is to continually assess wastewater infrastructure needs in the Commonwealth and develop policy recommendations.

B. The Working Group shall have a total membership of four ex officio members. The Director of the Department of Environmental Quality, the State Health Commissioner, the Director of the Department of Housing and Community Development, and the Executive Director of the Virginia Resources Authority, or their designees, shall serve ex officio with voting privileges. Members of the Working Group shall serve terms coincident with their terms of office. A majority of the members shall constitute a quorum.

C. The Working Group shall invite participation in its meetings by the Virginia Association of Counties, the Virginia Association of Planning District Commissions, the U.S. Department of Agriculture Rural Development, the Virginia Onsite Wastewater Recycling Association, the Virginia Association of Municipal Wastewater Agencies, the Virginia Rural Water Association, and SERCAP, Inc.

D. The Working Group shall have the following powers and duties:

1. Assess wastewater infrastructure needs in the Commonwealth and develop policy recommendations.

2. Promote public education about the importance of adequate wastewater treatment.

3. Encourage collaboration among local, state, and federal government entities, including consistent collaboration and coordination of grant requirements and timelines.

4. Endorse community-based and regional projects as opposed to cumulative and repetitive site-by-site individual solutions and integrated solutions across sewer and onsite wastewater treatment systems.

5. Support prioritized, focused, and innovative use of state and federal funding to address needs determined pursuant to § 62.1-223.3.

6. Prioritize universal access to wastewater treatment that protects public health and the environment and supports local economic growth and stability.

7. Support the incorporation of the effects of climate change into wastewater treatment regulatory and funding programs.

8. Submit an annual report to the Governor and the General Assembly for publication as a report document as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports. The Secretary of Natural Resources shall submit to the Governor and the General Assembly an annual executive summary of the interim activity and work of the Working Group no later than the first day of each regular session of the General Assembly. The executive summary shall be submitted as a report document as provided in the procedures of the Division of Legislative Automated Systems for the processing of legislative documents and reports and shall be posted on the General Assembly's website.

E. The Secretaries of Natural Resources, Commerce and Trade, and Health and Human Resources shall provide staff support to the Working Group. The Center for Coastal Resources Management at the

Virginia Institute of Marine Science and the Virginia Coastal Policy Center at William and Mary Law School shall advise the Working Group. All agencies of the Commonwealth shall provide assistance to the Working Group upon request.

F. Notwithstanding the provisions of § 30-19.1:9, the provisions of this section shall expire on July 1, 2030.

§ 62.1-223.3. Wastewater infrastructure needs assessment.

The Department of Environmental Quality (the Department), in partnership with the Virginia Department of Health and in consultation with stakeholders, including representatives of the Department of Housing and Community Development, the Virginia Resources Authority, the U.S. Department of Agriculture Rural Development, the Virginia Onsite Wastewater Recycling Association, the Center for Coastal Resources Management at the Virginia Institute of Marine Science, the Virginia Association of Municipal Wastewater Agencies, the Virginia Rural Water Association, SERCAP, Inc., local governments, and conservation organizations, shall determine every four years an estimate of the amount of wastewater infrastructure funding that is (i) necessary to implement the policy of the Commonwealth articulated in § 62.1-223.1 and (ii) not eligible to be covered by grant funding pursuant to the Virginia Water Quality Improvement Act of 1997 (§ 10.1-2117 et seq.). The Department shall report such estimate to the Governor and the General Assembly no later than July 1, 2023, and no later than July 1 every four years thereafter.

2. That the State Board of Health (the Board) shall adopt regulations to implement the requirements of § 32.1-164 of the Code of Virginia, as amended by this act. If requested by the Board, technical assistance during the regulatory development process shall be provided by the Department of Conservation and Recreation and the Department of Environmental Quality.