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HOUSE BILL NO. 2034

Offered January 13, 1997

A BILL to amend and reenact §§ 10.1-2500, 62.1-44.15 and 62.1-44.32 of the Code of Virginia and to amend the Code of Virginia by adding in Title 62.1 a chapter numbered 22.1, consisting of sections numbered 62.1-232.1 through 62.1-232.6, relating to establishment of the Nutrient Reduction Projects Grant Fund.

Patron—Dillard

Referred to Committee on Conservation and Natural Resources

Be it enacted by the General Assembly of Virginia:

1. That §§ 10.1-2500, 62.1-44.15 and 62.1-44.32 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 22.1, consisting of sections numbered 62.1-232.1 through 62.1-232.6 as follows:

§ 10.1-2500. Virginia Environmental Emergency Response Fund established.

A. There is hereby established the Virginia Environmental Emergency Response Fund, hereafter referred to as the Fund, to be used for the purpose of emergency response to environmental pollution incidents and for the development and implementation of corrective actions for pollution incidents, other than pollution incidents addressed through the Virginia Underground Petroleum Storage Tank Fund, as described in § 62.1-44.34:11 of the State Water Control Law.

B. The Fund shall be a nonlapsing revolving fund consisting of grants, general funds, and other such moneys as appropriated by the General Assembly, and moneys received by the State Treasurer for:

1. Noncompliance penalties assessed pursuant to § 10.1-1311, civil penalties assessed pursuant to subsection B of § 10.1-1316 and civil charges assessed pursuant to subsection C of § 10.1-1316.

2. Civil penalties assessed pursuant to subsection C of § 10.1-1418.1, civil penalties assessed pursuant to subsections A and E of § 10.1-1455 and civil charges assessed pursuant to subsection F of § 10.1-1455.

3. Civil charges assessed pursuant to subdivision 8d of § ~~62.1-44.15~~ and civil penalties assessed pursuant to subsection (a) of § ~~62.1-44.32~~, excluding assessments made for violations of Article 9 (§ ~~62.1-44.34:8~~ et seq.) or 10 (§ ~~62.1-44.34:10~~ et seq.), Chapter 3.1 of Title 62.1, or a regulation, administrative or judicial order, or term or condition of approval relating to or issued under those articles.

4. Civil penalties and civil charges assessed pursuant to § 62.1-270.

5. Civil penalties assessed pursuant to subsection A of § 62.1-252 and civil charges assessed pursuant to subsection B of § 62.1-252.

§ 62.1-44.15. Powers and duties.

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

(1) [Repealed.]

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

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

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

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

(3a) To establish such standards of quality and policies for any state waters consistent with the general policy set forth in this chapter, and to modify, amend or cancel any such standards or policies established and to take all appropriate steps to prevent quality alteration contrary to the public interest or to standards or policies thus established, except that a description of provisions of any proposed standard or policy adopted by regulation which are more restrictive than applicable federal requirements, together with the reason why the more restrictive provisions are needed, shall be provided to the standing committee of each house of the General Assembly to which matters relating to the content of the standard or policy are most properly referable. The Board shall, from time to time, but at least once every three years, hold public hearings pursuant to subsection B of § 9-6.14:7.1 but, upon the request of an affected person or upon its own motion, hold hearings pursuant to § 9-6.14:8, for the purpose of reviewing the standards of quality, and, as appropriate, adopting, modifying, or cancelling such

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standards. Whenever the Board considers the adoption, modification, amendment or cancellation of any standard, it shall give due consideration to, among other factors, the economic and social costs and benefits which can reasonably be expected to obtain as a consequence of the standards as adopted, modified, amended or cancelled. The Board shall also give due consideration to the public health standards issued by the Virginia Department of Health with respect to issues of public health policy and protection. If the Board does not follow the public health standards of the Virginia Department of Health, the Board's reason for any deviation shall be made in writing and published for any and all concerned parties.

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

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

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

(5a) All certificates issued by the Board under this chapter shall have fixed terms. The term of a Virginia Pollution Discharge Elimination System permit shall not exceed five years. The term of a Virginia Pollution Abatement permit shall not exceed ten years, except that the term of a Virginia Pollution Abatement permit for confined animal feeding operations shall be ten years. The Department of Environmental Quality shall inspect all facilities for which a Virginia Pollution Abatement permit has been issued at least once every five years. 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 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, any provision of this chapter, or any order of a court, where such violation results in a release of harmful substances into the environment or poses a substantial threat of release of harmful substances into the environment 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 in any other report or document required under this law or under the regulations of the Board;

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

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

(6) To make investigations and inspections, to ensure compliance with any certificates, standards, policies, rules, regulations, rulings and special orders which 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 special 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) To 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.

(8b) Such special orders are to be issued only after a hearing with at least thirty days' notice to the affected owners, of the time, place and purpose thereof, and they shall become effective not less than fifteen 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 forty-eight hours of the issuance of the injunction.

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

(8d) With the consent of any owner who has violated or failed, neglected or refused to obey any regulation or order of the Board, any condition of a permit or any provision of this chapter, the Board may provide, in an order issued by the Board against such person, for the payment of civil charges for past violations in specific sums not to exceed the limit specified in subsection 62.1-44.32 (a). Such civil charges shall be instead of any appropriate civil penalty which could be imposed under subsection 62.1-44.32 (a) and shall not be subject to the provisions of § 2.1-127. Such civil charges shall be paid into the state treasury and deposited by the State Treasurer into the ~~Virginia Environmental Emergency Response Fund pursuant to Chapter 25 (§ 10.1-2500 et seq.) of Title 10.1~~ *Nutrient Reduction Projects Grant Fund established pursuant to Chapter 21.1 (§ 62.1-232.1 et seq.) of this title*, excluding civil charges assessed for violations of Article 9 (§ 62.1-44.34:8 et seq.) or 10 (§ 62.1-44.34:10 et seq.) of Chapter 3.1 of Title 62.1, or a regulation, administrative or judicial order, or term or condition of approval relating to or issued under those articles.

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

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

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

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

(a) Whenever the Board shall determine that any owner, whether or not he shall have been issued a certificate for discharge of waste, has discharged sewage, industrial waste, or other waste into state waters in such quantity, concentration or manner that fish are killed as a result thereof it may effect such settlement with the owner as will cover the costs incurred by the Board and by the Department of Game and Inland Fisheries in investigating such killing of fish, plus the replacement value of the fish

183 destroyed, or as it deems proper, and if no such settlement is reached within a reasonable time the
184 Board shall authorize its executive secretary to bring a civil action in the name of the Board to recover
185 from the owner such costs and value, plus any court or other legal costs incurred in connection with
186 such action.

187 (b) If the owner is a political subdivision of the Commonwealth the action may be brought in any
188 circuit court within the territory embraced by such political subdivision. If the owner is an
189 establishment, as defined in this chapter, the action shall be brought in the circuit court of the city or the
190 circuit court of the county in which such establishment is located. If the owner is an individual or group
191 of individuals the action shall be brought in the circuit court of the city or circuit court of the county in
192 which such person or any of them reside.

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

197 (d) The proceeds of any recovery had under this subsection shall, when received by the Board, be
198 applied, first, to reimburse the Board for any expenses incurred in investigating such killing of fish. The
199 balance shall be paid to the Board of Game and Inland Fisheries to be used for the fisheries'
200 management practices as in its judgment will best restore or replace the fisheries' values lost as a result
201 of such discharge of waste, including, where appropriate, replacement of the fish killed with game fish
202 or other appropriate species. Any such funds received are hereby appropriated for that purpose.

203 (e) Nothing in this subsection shall be construed in any way to limit or prevent any other action
204 which is now authorized by law by the Board against any owner.

205 (f) Notwithstanding the foregoing, the provisions of this subsection shall not apply to any owner who
206 adds or applies any chemicals or other substances that are recommended or approved by the State
207 Department of Health to state waters in the course of processing or treating such waters for public water
208 supply purposes, except where negligence is shown.

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

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

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

222 § 62.1-44.32. Penalties.

223 (a) Any person who violates any provision of this chapter, or who fails, neglects or refuses to
224 comply with any order of the Board, or order of a court, issued as herein provided, shall be subject to a
225 civil penalty not to exceed \$25,000 for each violation within the discretion of the court. Each day of
226 violation of each requirement shall constitute a separate offense. Such civil penalties shall be paid into
227 the state treasury and deposited by the State Treasurer into the ~~Virginia Environmental Emergency~~
228 ~~Response Fund pursuant to Chapter 25 of Title 40.1~~*Nutrient Reduction Projects Grant Fund established*
229 *pursuant to Chapter 21.1 (§ 62.1-232.1 et seq.) of this title*, excluding penalties assessed for violations
230 of Article 9 (§ 62.1-44.34:8 et seq.) or 10 (§ 62.1-44.34:10 et seq.) of Chapter 3.1 of Title 62.1, or a
231 regulation, administrative or judicial order, or term or condition of approval relating to or issued under
232 those articles.

233 Such civil penalties may, in the discretion of the court assessing them, be directed to be paid into the
234 treasury of the county, city, or town in which the violation occurred, to be used for the purpose of
235 abating environmental pollution therein in such manner as the court may, by order, direct, except that
236 where the owner in violation is such county, city or town itself, or its agent, the court shall direct such
237 penalty to be paid into the state treasury and deposited by the State Treasurer into the ~~Virginia~~
238 ~~Environmental Emergency Response Fund pursuant to Chapter 25 of Title 40.1~~*Nutrient Reduction*
239 *Projects Grant Fund established pursuant to Chapter 21.1 (§ 62.1-232.1 et seq.) of this title*, excluding
240 penalties assessed for violations of Article 9 or 10 of Chapter 3.1 of Title 62.1, or a regulation,
241 administrative or judicial order, or term or condition of approval relating to or issued under those
242 articles.

243 In the event that a county, city, or town, or its agent, is the owner, such county, city, or town, or its
244 agent, may initiate a civil action against any user or users of a waste water treatment facility to recover

that portion of any civil penalty imposed against the owner proximately resulting from the act or acts of such user or users in violation of any applicable federal, state, or local requirements.

(b) Any person who willfully or negligently violates any provision of this chapter, any regulation or order of the Board, any condition of a certificate or any order of a court shall be guilty of a misdemeanor punishable by confinement in jail for not more than twelve months and a fine of not less than \$2,500 nor more than \$25,000, either or both. Any person who knowingly violates any provision of this chapter, any regulation or order of the Board, any condition of a certificate or any order of a court issued as herein provided, or who knowingly makes any false statement in any form required to be submitted under this chapter or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall be guilty of a felony punishable by a term of imprisonment of not less than one year nor more than three years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not less than \$5,000 nor more than \$50,000 for each violation. Any defendant that is not an individual shall, upon conviction of a violation under this subsection, be sentenced to pay a fine of not less than \$10,000. Each day of violation of each requirement shall constitute a separate offense.

(c) Any person who knowingly violates any provision of this chapter, and who knows at that time that he thereby places another person in imminent danger of death or serious bodily harm, shall, upon conviction, be guilty of a felony punishable by a term of imprisonment of not less than two years nor more than fifteen years and a fine of not more than \$250,000, either or both. A defendant that is not an individual shall, upon conviction of a violation under this subsection, be sentenced to pay a fine not exceeding the greater of \$1,000,000 or an amount that is three times the economic benefit realized by the defendant as a result of the offense. The maximum penalty shall be doubled with respect to both fine and imprisonment for any subsequent conviction of the same person under this subsection.

(d) Criminal prosecution under this section shall be commenced within three years of discovery of the offense, notwithstanding the limitations provided in any other statute.

CHAPTER 22.1.

NUTRIENT REDUCTION PROJECTS GRANT FUND.

§ 62.232.1 Definitions.

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

"Authority" means the Virginia Resources Authority.

"Board" means the State Water Control Board.

"Cost" means the cost of installation of a nutrient reduction project and does not mean costs related to planning and design or operation and maintenance of the project.

"Fund" means the Nutrient Reduction Project Grant Fund created by this chapter.

"Local government" means any county, city, town, municipal corporation, authority, district, commission or political subdivision of the Commonwealth.

"Nutrient reduction project" means the construction or installation of biological nutrient removal technology or other technology designed and capable of reducing nutrients entering state waters from a wastewater treatment facility.

"Person" means any corporation, association or partnership or one or more individuals.

"State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction.

§ 62.1-232.2. Creation and management of Fund.

There shall be set apart as a permanent, perpetual and nonreverting fund, to be known as the "Nutrient Reduction Project Grant Fund," that shall contain sums appropriated to the Fund by the General Assembly which shall include but not be limited to all civil charges and penalties assessed pursuant to § 62.1-44.32, except as otherwise directed therein, all interest and income from investment of moneys held in the Fund, and any other sums designated for deposit to the Fund from any source public or private. The Fund shall be administered by the Authority as prescribed in this chapter, subject to the right of the Board, following consultation with the Authority to direct distribution of grants from the Fund to particular local governments or persons. The authority may disburse from the Fund its reasonable costs and expenses incurred in the administration and management of the Fund.

§ 62.1-232.3. Deposit of money; expenditures; investments.

All money belonging to the Fund shall be deposited in an account or accounts in banks or trust companies organized under the laws of the Commonwealth or in national banking associations located in Virginia or in savings institutions located in Virginia organized under the laws of the Commonwealth or the United States. The money in these accounts shall be paid by check signed by the Executive Director of the Authority or other officers or employees designated by the Board of Directors of the Authority. All deposits of money shall, if required by the Authority, be secured in a manner determined by the Authority to be prudent, and all banks, trust companies and savings institutions are authorized to give security for the deposits. Money in the Fund shall not be commingled with other money of the

306 *Authority. Money in the Fund not needed for immediate use or disbursement may be invested or*
307 *reinvested by the Authority in obligations or securities which are considered lawful investments for*
308 *public funds under the laws of the Commonwealth.*

309 *§ 62.1-232.4. Annual audit.*

310 *The Auditor of Public Accounts, or his legally authorized representatives, shall annually audit the*
311 *accounts of the Authority, and the cost of such audit services as shall be required shall be borne by the*
312 *Authority. The audit shall be performed at least each fiscal year, in accordance with generally accepted*
313 *auditing standards and, accordingly, include such tests of the accounting records and such auditing*
314 *procedures as considered necessary under the circumstances. The Authority shall furnish copies of such*
315 *audit to the Governor, the Board and the chairmen of the House Committee on Appropriations and the*
316 *Senate Committee on Finance.*

317 *§ 62.1-232.5. Grant conditions.*

318 *Subject to any restrictions which may apply to the use of money in the Fund, the Board in its*
319 *discretion may approve the use of money in the Fund to make grants to local governments and any*
320 *person to pay up to sixty percent of the cost of any nutrient reduction project. The Board may establish*
321 *such terms and conditions on any grant as it deems appropriate in addition to the following which shall*
322 *be included: (i) concentration limitations on nutrient discharge to state waters; (ii) annual maximum*
323 *total amounts of nutrient discharge; and (iii) enforceable provisions related to project design, proper*
324 *facility operation and maintenance, and achievement and maintenance of nutrient concentrations and*
325 *total annual nutrient discharge amounts. Enforceable provisions of grants related to maintenance of*
326 *nutrient concentration limitations may allow for concentration exceedences due to naturally occurring*
327 *extreme temperatures provided that the average concentration over a thirty day period is below the*
328 *concentration limit.*

329 *Grants shall be disbursed from the Fund by the Authority in accordance with the written direction of*
330 *the Board.*

331 *§ 62.1-232.6. Procedures and criteria for grant awards.*

332 *A. The Board shall develop procedures for the application and award of grants. The procedures*
333 *shall include, but not be limited to, criteria for the evaluation of grant applications. The criteria shall*
334 *be used in prioritizing grant applications and shall include, but not be limited to, preferences for:*

335 *1. Projects located such that nutrient discharge will be reduced to state waters with documented*
336 *nutrient loads adversely affecting water quality or living resources, or that have established nutrient*
337 *reduction goals that have not been met or that are in need of additional measures for maintenance;*

338 *2. Facilities that discharge more than 500,000 gallons of waste water per day;*

339 *3. Projects designed to achieve and maintain nutrient reductions needed to meet the Commonwealth's*
340 *commitments under the Chesapeake Bay Agreement, as amended, or tributary plans developed pursuant*
341 *to Chapter 5.1 of Title 2.1 (§ 2.1-51.12:1 et seq.);*

342 *4. Public facilities over private facilities; and*

343 *5. Projects with the greatest contributions to natural resource improvement.*

344 *The criteria shall also include consideration of reports by the Commission on Local Government on*
345 *the Comparative Revenue Capacity, Revenue Effort and Fiscal Stress of Virginia's Counties and Cities.*

346 *B. Initial priority shall be given to implementing nutrient reduction projects identified in tributary*
347 *plans developed by the Secretary of Natural Resources pursuant to Article 2 (§ 2.1-51.12:1 et seq.) of*
348 *Chapter 5.1 of Title 2.1.*