

Stormwater Stakeholder Advisory Group
Enforcement Work Group
Friday, August 7, 2015
Final Meeting Notes¹

Location: DEQ Central Office
2nd Floor Conference Room C
629 E. Main Street, Richmond, VA

Start: 8:41 a.m.
End: 10:24 a.m.

EWG Members Present:

Peggy L. Sanner, Chesapeake Bay Foundation
Elizabeth A. Andrews, DEQ
Michael Toalson, HBAV

Chris Pomeroy, Aqua Law
James Golden, DEQ
Melanie Davenport, DEQ

Facilitator: Mark Rubin, VCU
Recorder: Gary Graham, DEQ

Guests and Public Attendees:

John Woodburn, Goochland County
Carla Pool, DEQ

I. Agenda Item: Welcome, Distribution of Handouts

Discussion: Mark Rubin thanked the Enforcement Work Group (EWG) for meeting at the early hour. Handouts (Attachments A, B, C, and D) were distributed to members and other attendees and were described briefly by Elizabeth Andrews.

II. Agenda Item: Section 62.1 – 44.15:25

Discussion: The EWG discussed revisions to the straw man for the consolidated section 62.1-44.15:25 (Attachment A). Among the issues discussed was the necessity for keeping language referring to "general health, safety, and welfare of the citizens of the Commonwealth" in lines 9 and 10. This language will be flagged, examined for relevance, and brought back to the EWG for further discussion at their next meeting.

III. Agenda Item: EWG Strawman

Discussion: The EWG discussed the consolidated sections 62.1-44.15:29 through 15:47 of the strawman (Attachment B). EWG members provided written proposals concerning sections 62.1-44.15:46 and 62.1-44.15:48. Those proposals are provided in Attachments C ("Party Aggrieved" and Standing for Judicial Review) and D (Recommended Local Enforcement Procedures for Penalties). In the discussion, it was noted that one section incorrectly referred to "civil penalties" instead of "civil charges" (i.e., Section 62.1-44.15:29.1, line 24 of p.1 of the strawman). In the discussion of section 62.1-44.15:37, line 63, concerns about stricken language referring to notices being mailed "with confirmation of delivery" were raised and the group agreed to restore the language. The group discussed an amendment in section 62.1-44.15:38, lines 143 and 144 of the strawman, concerning the use of the general term "special orders". In section 62.1-44.15:40, the possibility of replacing language in lines 184 through 188 with a reference to the Freedom of Information Act was discussed. In reviewing section 62.1-44.15:46, an argument for preserving "party aggrieved" language was made by the Chesapeake Bay Foundation (see Attachment C) and discussed. DEQ was tasked with drafting amendments to that section. The group also asked DEQ to attempt to draft a consolidated program review subsection in the State Water Control Law. These sections of the EWG strawman will be reexamined and discussed by the EWG at their next meeting.

The meeting was then adjourned. The EWG did not schedule a follow-on meeting to review the rest of the sections of the EWG strawman and Attachment D. The time and date of the next meeting will be determined later

¹Notes finalized 11/2/15

Attachment A

Attachment A

32 ~~b. Any person subject to state permit requirements under this article has failed to disclose fully~~
33 ~~all relevant material facts or has misrepresented a material fact in applying for a state permit, or~~
34 ~~in any other report or document required under this law or under the regulations of the Board;~~

Comment [eaa5]: Comparable to 44.15(5b)(2).

35 ~~c. The activity for which the state permit was issued causes unreasonable degradation of~~
36 ~~properties, water quality, stream channels, and other natural resources; or~~

Comment [y6]: Not the same as 44.15(5b)(3). DEQ recommends amending that subsection.

37 ~~d. There exists a material change in the basis on which the state permit was issued that requires~~
38 ~~either a temporary or a permanent reduction or elimination of any discharge or landdisturbing~~
39 ~~activity controlled by the state permit necessary to prevent unreasonable degradation of~~
40 ~~properties, water quality, stream channels, and other natural resources;~~

Comment [y7]: Comparable to 44.15(5b)(4).

41 ~~4. Cause investigations and inspections to ensure compliance with any state or VSMP authority~~
42 ~~permits, conditions, policies, rules, regulations, rulings, and orders which it may adopt, issue, or~~
43 ~~establish and to furnish advice, recommendations, or instructions for the purpose of obtaining~~
44 ~~such compliance.~~

Comment [eaa8]: Comparable to 44.15(6)

45 ~~5. In accordance with procedures of the Administrative Process Act (§ 2.2-4000 et seq.), adopt~~
46 ~~rules governing (i) hearings, (ii) the filing of reports, (iii) the issuance of permits and special~~
47 ~~orders, and (iv) all other matters relating to procedure, and amend or cancel any rule adopted.~~

Comment [eaa9]: Comparable to 44.15(7)

48 ~~26. Issue special orders pursuant to § 62.1-44.15(8a) to any person-owner subject to state or~~
49 ~~VSMP authority permit requirements under this article, except that for land disturbing activities~~
50 ~~that disturb 10,000 square feet of land up to one acre in areas that are not subject to the~~
51 ~~Chesapeake Bay Preservation Act (§ 62.1-44.15:67 et seq.) and that are not part of a larger~~
52 ~~common plan of development or sale that disturbs one acre or more of land, such special orders~~
53 ~~shall include civil penalties of up to \$5,000 per violation, not to exceed \$50,000 per order. Such~~
54 ~~civil penalties shall be paid into the state treasury and deposited by the State Treasurer into the~~
55 ~~Virginia Stormwater Local Assistance Fund established pursuant to § 62.1-44.15:29.1. (i) who is~~
56 ~~permitting or causing the unreasonable degradation of properties, water quality, stream channels,~~
57 ~~and other natural resources to cease and desist from such activities; (ii) who has failed to~~
58 ~~construct facilities in accordance with final approved plans and specifications to construct such~~
59 ~~facilities; (iii) who has violated the terms and provisions of a state or VSMP authority permit~~
60 ~~issued by the Board or VSMP authority to comply with the provisions of the state or VSMP~~
61 ~~authority permit, this article, and any decision of the VSMP authority, the Department, or the~~
62 ~~Board; or (iv) who has violated the terms of an order issued by the court, the VSMP authority,~~
63 ~~the Department, or the Board to comply with the terms of such order, and also to issue orders to~~
64 ~~require any person subject to state or VSMP authority permit requirements under this article to~~
65 ~~comply with the provisions of this article and any decision of the Board.~~

Comment [y10]: Note: This is to address E&SC violations, which we are not tying to the Board's special order authority set forth in 44.15 because that is for a \$32,500 cap penalty and these have a \$5,000 cap penalty.

Attachment A

66 Such special orders are to be issued in accordance with the procedures of the Administrative
67 Process Act (§ 2.2 4000 et seq.) and shall become effective not less than 15 days after the date
68 of mailing with confirmation of delivery of the notice to the last known address of any person
69 subject to state or VSMP authority permit requirements under this article, provided that if the
70 Board finds that any such person subject to state or VSMP authority permit requirements under
71 this article is grossly affecting or presents an imminent and substantial danger to (i) the public
72 health, safety, or welfare or the health of animals, fish, or aquatic life; (ii) a public water
73 supply; or (iii) recreational, commercial, industrial, agricultural, or other reasonable uses, it
74 may issue, without advance notice or hearing, an emergency special order directing any person
75 subject to state or VSMP authority permit requirements under this article to cease such
76 pollution or discharge immediately, and shall provide an opportunity for a hearing, after
77 reasonable notice as to the time and place thereof to any person subject to state or VSMP
78 authority permit requirements under this article, to affirm, modify, amend, or cancel such
79 emergency special order. If any person subject to state or VSMP authority permit requirements
80 under this article who has been issued such a special order or an emergency special order is not
81 complying with the terms thereof, the Board may proceed in accordance with § 62.144.15:48,
82 and where the order is based on a finding of an imminent and substantial danger, the court shall
83 issue an injunction compelling compliance with the emergency special order pending a hearing
84 by the Board. If an emergency special order requires cessation of a discharge, the recipient of
85 the order may appeal its issuance to the circuit court of the jurisdiction wherein the discharge
86 was alleged to have occurred.

87 The provisions of this section notwithstanding, the Board may proceed directly under § 62.1-
88 44.15:48 and Article 5 if this chapter for any past violation or violations of any provision of this
89 article or any regulation duly adopted hereunder.

90 3. With the consent of any person owner subject to state or VSMP authority permit requirements
91 under this article who has violated or failed, neglected, or refused to obey any regulation or order
92 of the Board, any order, notice, or requirement of the Department or VSMP authority, any
93 condition of a state or VSMP authority permit, or any provision of this article, the Board may
94 provide, in an order issued by the Board pursuant to § 62.1-44.15(8d) against such personowner,
95 for the payment of civil charges for violations in specific sums. Such sums shall not exceed the
96 limit specified in subsection A(1) or B(1), as applicable, of § 62.1-44.15:48, not to exceed the
97 limit specified in subsection A of § 62.1 44.15:48. Such civil charges shall be collected in lieu of
98 any appropriate civil penalty that could be imposed pursuant to subsection A of § 62.1-44.15:48
99 and shall not be subject to the provisions of § 2.2-514. Such civil charges shall be paid into the
100 state treasury and deposited by the State Treasurer into the Virginia Stormwater Management
101 Local Assistance Fund established pursuant to § 62.1-44.15:29.1.

1 Article 2.3. Stormwater Management Act

2 **§ 62.1-44.15:25. Further powers and duties of the State Water Control Board.**
3
4 **§ 62.1-44.15:29. Virginia Stormwater Management Fund established.**
5 There is hereby created in the state treasury a special nonreverting fund to be known as the
6 Virginia Stormwater Management Fund, hereafter referred to as "the Fund." The Fund shall be
7 established on the books of the Comptroller. All moneys collected by the Department pursuant to
8 ~~§§ 62.1-44.15:28, 62.1-44.15:38, and 62.1-44.15:71 and all civil penalties collected pursuant to §~~
9 ~~62.1-44.19:22~~ shall be paid into the state treasury and credited to the Fund. Interest earned on
10 moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the
11 Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund
12 but shall remain in the Fund. Moneys in the Fund shall be used solely for the purposes of
13 carrying out the Department's responsibilities under this article. Expenditures and disbursements
14 from the Fund shall be made by the State Treasurer on warrants issued by the Comptroller upon
15 written request signed by the Director.
16 An accounting of moneys received by and distributed from the Fund shall be kept by the State
17 Comptroller.

Comment (y1): See separate document.

Comment (y2): Edited to reflect CBF's proposal.

18 **§ 62.1-44.15:29.1. Virginia Stormwater Local Assistance Fund established.**
19 There is hereby created in the state treasury a special nonreverting fund to be known as the
20 Virginia Stormwater Local Assistance Fund, hereafter referred to as "the Stormwater Subfund,"
21 which shall be a subfund of the Virginia Stormwater Management Fund and administered by the
22 Department. The Stormwater Subfund shall be established on the books of the Comptroller. All
23 civil penalties collected by the Department pursuant to §§ 62.1-44.15:25(2), 62.1-44.15:38,
24 62.1-44.15:48, 62.1-44.15:71 and § 62.1-44.19:22 and civil penalties collected pursuant to §
25 62.1-44.15:25(3) shall be paid into the state treasury and credited to the Stormwater Subfund.
26 together with such other funds as may be made available to the Stormwater Subfund, which shall
27 also receive bond proceeds from bonds authorized by the General Assembly, sums appropriated
28 to it by the General Assembly, and other grants, gifts and moneys as may be made available to it
29 from any other source, public or private. Interest earned on moneys in the Stormwater Subfund
30 shall remain in the Stormwater Subfund and be credited to it. Any moneys remaining in the

Comment (y3): Added to reflect CBF's proposal.

Comment (eaa4): Added to CBF's draft in order to carry out their intent.

Comment (y5): Ditto.

Comment (eaa6): Ditto.

31 Stormwater Subfund, including interest thereon, at the end of each fiscal year shall not revert to
32 the general fund but shall remain in the Stormwater Subfund.

33 The purpose of the Stormwater Subfund is to provide matching grants to local governments for
34 the planning, design, and implementation of stormwater best management practices that address
35 cost efficiency and commitments related to reducing water quality pollutant loads. Moneys in
36 the Fund shall be used to meet: i) obligations related to the Chesapeake Bay total maximum
37 daily load (TMDL) requirements; ii) requirements for local impaired stream TMDLs; iii) water
38 quality requirements measures of the Chesapeake Bay Watershed Implementation Plan (WIP);
39 and iv) water quality requirements related to the permitting of small municipal separate storm
40 sewer systems. The grants shall be used solely for capital projects meeting all prerequisites
41 for implementation, including but not limited to: i) new stormwater best management practices;
42 ii) stormwater best management practice retrofits; iii) stream restoration; iv) low impact
43 development projects; v) buffer restoration; vi) pond retrofits; and vii) wetlands restoration. Such
44 grants shall be in accordance with eligibility determinations made by the Board Department
45 pursuant to criteria established by the Board under the authority of the Department.

Comment (eaa7): EWG edit from 7-21-15.

Comment (y8): This reflects the budget language, but we may wish to clarify what prerequisites are meant.

Comment (eaa9): WWG edit 7-21-15.

46 Moneys in the Stormwater Subfund shall be used solely for the purpose set forth herein and
47 disbursements from the Stormwater Subfund shall be made by the State Treasurer on warrants
48 issued by the Comptroller upon written request signed by the Director.

Comment (y10): Note: Item C-43 in the 2015 budget bill says eligibility determinations made by the Dept.; Item 363 says determinations made by the State Water Control Board "under the authority of the Dept" echoing the language used in 2013 when the subfund was created (when the stormwater program was at DCR).

Comment (eaa11): WWG edit 7-21-15.

Comment (y12): CBF draft said solely for "expenditures" which seemed too nebulous.

49 **§ 62.1-44.15:37. Monitoring, reports, investigations, inspections, and stop work orders.**

50 A. The VESMP authority (i) shall provide for periodic inspections of the installation of
51 stormwater management measures, (ii) may require monitoring and reports from the person
52 responsible for meeting the permit conditions to ensure compliance with the permit and to
53 determine whether the measures required in the permit provide effective stormwater
54 management, and (iii) shall conduct such investigations and perform such other actions as are
55 necessary to carry out the provisions of this article. ~~If the VSMP authority, where authorized to~~
56 ~~enforce this article, or the Department determines that there is a failure to comply with~~ Upon
57 ~~failure to comply with~~ the permit conditions ~~or conditions of land disturbance approval, or to~~
58 ~~obtain an approved plan, permit or land disturbance approval prior to commencing land~~
59 ~~disturbing activities, a locality serving as the VESMP authority or the Board Department may~~
60 ~~serve a notice to comply shall be served upon the owner, permittee, or person responsible for~~
61 ~~carrying out the permit conditions, or person conducting land disturbing activities without an~~

Comment (DH072113): The Board may delegate this authority to the DEQ pursuant to 44.14

Comment (y14): Although the SAG's proposal calls for all localities to be VESMP authorities, the Dept. needs the authority to issue notices to comply and stop work orders as part of its override authority in instances where a locality is not enforcing the laws. In addition, the Dept. remains the VESMP authority for state agencies' and federal entities' projects and linear projects with approved standard & specs.

62 ~~approved plan, permit or approval. Such notice to comply shall be served by mailing with~~
 63 ~~confirmation of delivery to the address specified in the permit or land disturbance application, if~~
 64 ~~available, or in the land records of the locality, or by delivery at the site of the development~~
 65 ~~activities to the agent or employee supervising such activities. The notice to comply shall specify~~
 66 ~~the measures needed to comply with the permit or land disturbance approval conditions, or shall~~
 67 ~~identify the plan approval or permit or land disturbance approval needed to comply with this~~
 68 ~~article, and shall specify the a reasonable time within which such measures shall be completed.~~
 69 ~~The issuance of a notice to comply by the Department shall not be considered a case decision as~~
 70 ~~defined in § 2.2-4001. Upon failure to comply within the time specified, a stop work order may~~
 71 ~~be issued in accordance with subsection B by the locality serving as the VESMP authority, where~~
 72 ~~authorized to enforce this article, or by the Board, or the permit land disturbance approval may~~
 73 ~~be revoked by the VESMP authority, or the state permit may be revoked by the Board. The~~
 74 ~~Board or the VESMP authority, where authorized to enforce this article, may pursue enforcement~~
 75 ~~in accordance with § 62.1-44.15:48.~~

76 ~~B. If a permittee fails Upon failure to comply within the time specified in with a notice to comply~~
 77 ~~issued in accordance with subsection A within the time specified, a locality serving as the~~
 78 ~~VESMP authority, where authorized to enforce this article, or the Department Board may issue~~
 79 ~~an order requiring the owner, permittee, person responsible for carrying out an approved plan, or~~
 80 ~~person conducting the land-disturbing activities without an approved plan or required permit or~~
 81 ~~land disturbance approval to cease all land-disturbing activities until the violation of the permit~~
 82 ~~has ceased, or an approved plan and required permits and approvals are obtained, and specified~~
 83 ~~corrective measures have been completed.~~

84 ~~When sSuch orders are issued by the Board, they shall be issued (i) in accordance with local~~
 85 ~~procedures if issued by a locality serving as a VSMP authority or (ii) after a hearing held in~~
 86 ~~accordance with the requirements procedures of the Administrative Process Act (§ 2.2-4000 et~~
 87 ~~seq.) if issued by the Department. Such orders shall become effective upon service on the person~~
 88 ~~by mailing, with confirmation of delivery, sent to his address specified in the land records of the~~
 89 ~~locality, or by personal delivery by an agent of the VSMP authority or Department in the manner~~
 90 ~~set forth in subsection A. However, if the VSMP authority or the Department finds that any such~~
 91 ~~violation where the alleged noncompliance is grossly affectingcausing or presents an imminent~~
 92 ~~and substantial danger of causing harmful erosion of lands or sediment deposition in waters~~
 93 ~~within the watersheds of the Commonwealth or otherwise substantially impacting water quality,~~
 94 ~~if the locality serving as VESMP authority or the Board may issue, without advance notice or~~
 95 ~~hearing procedures, an emergency order directing such person to cease immediately all land-~~
 96 ~~disturbing activities on the site and shall provide an opportunity for a hearing, after reasonable~~

Comment [eaa15]: Pursuant to 10.1-1183(11), certified mail is used only for transmitting special orders or administrative orders. So DEQ recommends using just mail for the transmittal of notices to comply.

Comment [y16]: Change in language made by EWG 6-15-15.

Comment [y17]: Ditto.

Comment [y18]: Ditto.

Comment [y19]: Note: The authority to issue stop work orders may be delegated by the Board to the Dept. pursuant to 62.1-44.14.

97 notice as to the time and place thereof, to such person, to affirm, modify, amend, or cancel such
98 emergency order.

99 ~~If a person who has been issued an order is not complying with the terms thereof, the VSMP~~
100 ~~authority or the Department may institute a proceeding in accordance with § 62.144.15.42.~~
101 The owner may appeal the issuance of any order to the circuit court of the jurisdiction wherein
102 the violation was alleged to occur or other appropriate court. Upon completion and approval of
103 corrective action or upon obtaining an approved plan or any required permits or approvals, the
104 order shall be lifted immediately.

Comment [eaa20]: This paragraph from ESCL 15:58C.

105 1989, cc. 467, 499, § 10.1-603.11; 2004, c. 372; 2012, cc. 785, 819. 2013, cc. 756, 793.

106 **§ 62.1-44.15:38. Department to review VESMPs.**

Comment [OH21]: DEQ strawman as requested by EWG at 6/15 meeting.

107 A. The Department shall develop and implement a review and evaluation schedule so that the
108 effectiveness of each VESMP authority, Municipal Separate Storm Sewer System Management
109 Program, and other MS4 permit requirements is evaluated as necessary but no less than every
110 five years. ~~The review shall include an assessment of the extent to which the program has~~
111 ~~reduced nonpoint source pollution and mitigated the detrimental effects of localized flooding.~~
112 Such reviews shall be coordinated with those being implemented in accordance with the Erosion
113 and Sediment Control Law (§ 62.144.15:51 et seq.) and associated regulations and, where
114 applicable, the Chesapeake Bay Preservation Act (§ 62.1-44.15:67 et seq.) and associated
115 regulations.

Comment [y22]: Added pursuant to SAG discussion 7-13-15.

116 B. ~~Following completion of a compliance review of a VSMP, the Department shall provide~~
117 ~~results and compliance recommendations to the Board in the form of a corrective action~~
118 ~~agreement if deficiencies are found; otherwise, the Board may find the program compliant. If,~~
119 ~~after such a review and evaluation, a VSMP is found to have a program that does not comply~~
120 ~~with the provisions of this article or regulations adopted thereunder, the Board shall establish a~~
121 ~~schedule for the VSMP authority to come into compliance. The Board shall provide a copy of its~~
122 ~~decision to the VSMP authority that specifies the deficiencies, actions needed to be taken, and~~
123 ~~the approved compliance schedule. If the VSMP has not implemented the necessary compliance~~
124 ~~actions identified by the Board within 30 days following receipt of the corrective action~~
125 ~~agreement, or such additional period as is granted to complete the implementation of the~~
126 ~~corrective action, then the Board shall have the authority to (i) issue a special order to any VSMP~~
127 ~~imposing a civil penalty not to exceed \$5,000 per day with the maximum amount not to exceed~~
128 ~~\$20,000 per violation for noncompliance with the requirements of this article and its regulations,~~

129 ~~to be paid into the state treasury and deposited in the Virginia Stormwater Management Fund~~
 130 ~~established by § 62.1-44.15:29 or (ii) revoke its approval of the VSMP.~~

131 It is the duty of the Board and it is authorized to review each VESMP for compliance with the
 132 provisions of this article, including requiring localities to furnish such information as may be
 133 necessary to accomplish the purposes of this chapter. Following completion of a compliance
 134 review, when deficiencies are found, the Board shall establish a schedule for the VESMP
 135 authority to correct the deficiencies and bring its program into compliance. If the VESMP
 136 authority fails to bring its program into compliance in accordance with the compliance schedule,
 137 then the Board shall have the authority to (i) issue a special order to any VESMP authority
 138 imposing a civil penalty not to exceed \$5,000 per violation with the maximum amount not to
 139 exceed \$50,000 per order for noncompliance with the state program, to be paid into the state
 140 treasury and deposited in the Virginia Stormwater Local Assistance Fund established by § 62.1-
 141 44.15:29.1; or, (ii) with the consent of the VESMP authority, provide in an order issued against
 142 the VESMP authority for the payment of civil charges for violations in lieu of civil penalties, in
 143 specific sums not to exceed the limit specified in this section. The Board shall not delegate to the
 144 Department its authority to issue special orders pursuant to subdivision (i) of this subsection.

145 ~~The Administrative Process Act (§ 2.24000 et seq.) shall govern the activities and proceedings~~
 146 ~~of the Board under this article and the judicial review thereof.~~

147 ~~If the Board revokes its approval of a VESMP, the Board shall find the VESMP authority~~
 148 ~~provisional and shall have the Department assist with the administration of the program until the~~
 149 ~~VESMP authority is deemed compliant with the requirements of this article and associated~~
 150 ~~regulations. Assisting with administration includes the ability to review and comment on plans to~~
 151 ~~the VESMP authority, to conduct inspections with the VESMP authority, and to conduct~~
 152 ~~enforcement in accordance with this article and associated regulations.~~

153 In lieu of issuing ~~an special order or revoking the program,~~ the Board also is authorized to may
 154 take legal action against a VESMP authority pursuant to §§ 62.1-44.23 and 62.1-44.15:48 to
 155 ensure compliance.

156 **§ 62.1-44.15:39. Right of entry.**

157 In addition to the Board's authority set forth in § 62.1-44.20, The Department, the a locality
 158 servng as a VESMP authority, where authorized to enforce this article, or any duly authorized
 159 agent of the Department or VSMP authority, thereof or any locality that is the operator of a
 160 regulated municipal separate storm sewer system may, at reasonable times and under reasonable
 161 circumstances, enter any establishment or upon any property, public or private, for the purpose
 162 of obtaining information or conducting surveys or investigations necessary in the enforcement of

Comment [y23]: The following is the new program compliance review language presented to the SAG 6/8, with 5 changes: 1) language re: reviews every 5 yrs put back in, with "as necessary" language added; 2) language added per EWG's 5/1 request authorizing the SWCB to require information from localities; 3) VSMF changed to VSLAF; 4) VSMP changed to VESMP in an effort to consolidate the two laws; and 5) penalty amounts changed and consent orders option added per EWG's request 6-15-15.

Comment [y24]: Clarified by EWG 6-30-15.

Comment [y25]: Added per EWG's request 630-15.

Comment [y26]: 5/22 The EWG recommended deleting this language as unnecessary.

Comment [y27]: 5/1 EWG recommended combining with 15:60 in ESCL, retaining sentence re: MS4s.

163 the provisions of this article. For operators of municipal separate storm sewer systems, this
 164 authority shall apply only to those properties from which a discharge enters their municipal
 165 separate storm sewer systems.

166 In accordance with a performance bond with surety, cash escrow, letter of credit, any
 167 combination thereof, or such other legal arrangement, a VESMP authority may also enter any
 168 establishment or upon any property, public or private, for the purpose of initiating or
 169 maintaining appropriate actions that are required by [the permit conditions imposed by the VESMP](#)
 170 [authority on associated with](#) a land-disturbing activity when [an owner permittee](#), after proper
 notice, has
 171 failed to take acceptable action within the time specified.

172 2004, c. 372, § 10.1-603.12:1; 2011, c. 453; 2012, cc. 785, 819; 2013, cc. 756, 793.

173
 174 **§ 62.1-44.15:40. Information to be furnished.**

175 The Board, the Department, or [a locality serving as](#) the VESMP authority, [where authorized to](#)
 176 [enforce this article](#), may require every [permit applicant](#), [every permittee](#), [for permits or land](#)
 177 [or any person subject to state permit requirements under this article](#)
[owner, including applicants disturbance approvals](#), to furnish when requested such application

materials, plans,

178 specifications, and other pertinent information as may be necessary to determine the effect of his
 179 discharge on the quality of state waters, or such other information as may be necessary to
 180 accomplish the purposes of this article. Any personal information shall not be disclosed except to
 181 an appropriate official of the Board, Department, U.S. Environmental Protection Agency, or
 182 VESMP authority or as may be authorized pursuant to the Virginia Freedom of Information Act

183 (§ 2.2-3700 et seq.). However, disclosure of records of the Department, the Board, or the
 184 VESMP authority relating to (i) active federal environmental enforcement actions that are
 185 considered confidential under federal law, (ii) enforcement strategies, including proposed
 186 sanctions for enforcement actions, and (iii) any secret formulae, secret processes, or secret
 187 methods other than effluent data used by any [permittee owner](#) or under that [permittee's](#)
 189 [owner's](#)

190 direction is prohibited. Upon request, such enforcement records shall be disclosed after a
 proposed sanction resulting from the investigation has been determined by [the Department](#), the Board, or
 the [locality serving as a](#) VESMP authority. This section shall not be construed to

191 prohibit the disclosure of records related to inspection reports, notices of violation, and
 192 documents detailing the nature of any land-disturbing activity that may have occurred, or similar
 193 documents.

194 2004, c. 372, § 10.1-603.12:2; 2005, c. 102; 2012, cc. 785, 819; 2013, cc. 756, 793.

195 **§ 62.1-44.15:41. [Private rights; liability](#)Liability of common interest communities.**

Comment (y28): Note: There is no comparable provision in the ESCL.

Comment (y29): EWG recommended this new language 5/1.

196 A. Whenever a common interest community cedes responsibility for the maintenance, repair, and
 197 replacement of a stormwater management facility on its real property to the Commonwealth or
 198 political subdivision thereof, such common interest community shall be immune from civil
 199 liability in relation to such stormwater management facility. In order for the immunity
 200 established by this subsection to apply, (i) the common interest community must cede such
 201 responsibility by contract or other instrument executed by both parties and (ii) the
 202 Commonwealth or the governing body of the political subdivision shall have accepted the
 203 responsibility ceded by the common interest community in writing or by resolution. As used in
 204 this section, maintenance, repair, and replacement shall include, without limitation, cleaning of
 205 the facility, maintenance of adjacent grounds that are part of the facility, maintenance and
 206 replacement of fencing where the facility is fenced, and posting of signage indicating the identity
 207 of the governmental entity that maintains the facility. Acceptance or approval of an easement,
 208 subdivision plat, site plan, or other plan of development shall not constitute the acceptance by the
 209 Commonwealth or the governing body of the political subdivision required to satisfy clause (ii).
 210 The immunity granted by this section shall not apply to actions or omissions by the common
 211 interest community constituting intentional or willful misconduct or gross negligence. For the
 212 purposes of this section, "common interest community" means the same as that term is defined in
 213 § 55-528.

214 B. Except as provided in subsection A, the fact that any permittee holds or has held a permit or
 215 state permit issued under this article shall not constitute a defense in any civil action involving
 216 private rights.

217 2004, c. 372, § 10.1-603.12:3; 2010, c. 853; 2012, cc. 785, 819; 2013, cc. 756, 793.

218 § 62.1 44.15:42. Enforcement by injunction, etc.
 219 A. It is unlawful for any person to fail to comply with any stop work order, emergency order issued
 220 in accordance with § 62.1 44.15:37, or a special order or emergency special order issued in
 221 accordance with § 62.144.15:25 that has become final under the provisions of this article. Any
 222 person violating or failing, neglecting, or refusing to obey any rule, regulation, ordinance, approved
 223 standard and specification, order, or permit condition issued by the Board, Department, or VSMP
 224 authority as authorized to do such, or any provisions of this article, may be compelled in a
 225 proceeding instituted in any appropriate court by the Board, Department, or VSMP authority where
 226 authorized to enforce this article to obey same and to comply therewith by injunction, mandamus, or
 227 other appropriate remedy.

228 B. Any person violating or failing, neglecting, or refusing to obey any injunction, mandamus, or
 229 other remedy obtained pursuant to this section shall be subject, in the discretion of the court, to a
 230 civil penalty in accordance with the provisions of § 62.1 44.15:48.

Comment [y30]: 5/1 EWG recommended deleting because covered by 62.1-44.22.

Comment [y31]: Unnecessary because of 15:48 as revised below.

231 ~~2004, c. 372, § 10.1-603.12:4; 2012, cc. 785, 819; 2013, cc. 756, 793.~~

232 ~~§ 62.1-44.15:43. Testing validity of regulations; judicial review.~~

233 ~~A. The validity of any regulation adopted by the Board pursuant to this article may be~~
 234 ~~determined through judicial review in accordance with the provisions of the Administrative~~
 235 ~~Process Act (§ 2.2-4000 et seq.).~~

236 ~~B. An appeal may be taken from the decision of the court to the Court of Appeals as provided by~~
 237 ~~law.~~

238 ~~2004, c. 372, § 10.1-603.12:5; 2013, cc. 756, 793.~~

239 ~~§ 62.1-44.15:44. Right to hearing.~~

240 ~~Any permit applicant, permittee, or person subject to state permit requirements under this article~~
 241 ~~aggrieved by any action of the Department or Board taken without a formal hearing, or by~~
 242 ~~inaction of the Department or Board, may demand in writing a formal hearing by the Board,~~
 243 ~~provided a petition requesting such hearing is filed with the Board within 30 days after notice of~~
 244 ~~such action.~~

245 ~~2004, c. 372, § 10.1-603.12:6; 2012, cc. 785, 819; 2013, cc. 756, 793; 2014, cc. 303, 598.~~

246 ~~§ 62.1-44.15:45. Hearings.~~

247 ~~When holding hearings under this article, the Board shall do so in a manner consistent with §~~
 248 ~~62.1-44.26. A locality holding hearings under this article shall do so in a manner consistent with~~
 249 ~~local hearing procedures.~~

250 ~~2004, c. 372, § 10.1-603.12:7; 2012, cc. 785, 819; 2013, cc. 756, 793; 2014, cc. 303, 598.~~

251 ~~§ 62.1-44.15:46. Appeals.~~

252 ~~Any permittee or party aggrieved by a state permit or enforcement decision of the Department or~~
 253 ~~Board under this article, or any person who has participated, in person or by submittal of written~~
 254 ~~comments, in the public comment process related to a final decision of the~~
 255 ~~Department or Board under this article, whether such decision is affirmative or negative, is~~
 256 ~~entitled to judicial review thereof shall be in accordance with § 62.1-44.29, the provisions of the~~
 257 ~~Administrative Process Act (§ 2.2-4000 et seq.) if such person meets the standard for obtaining~~
 258 ~~judicial review of a case or controversy pursuant to Article III of the Constitution of the United~~
 259 ~~States. A person shall be deemed to meet such standard if (i) such person has suffered an actual~~
 260 ~~or imminent injury that is an invasion of a legally protected interest and that is concrete and~~
 261 ~~particularized; (ii) such injury is fairly traceable to the decision of the Department or the Board~~

Comment [y32]: EWG recommended deleting 5/22 because same as 62.1-44.24.

Comment [y33]: EWG recommended deleting 5/22 because covered by 62.1-44.25.

Comment [y34]: EWG recommended deleting 5/22 because covered by 62.1-44.26.

Comment [y35]: The EWG recommended deleting the first paragraph 5/22 because covered by 62.1-44.29 (but requested that 44.29 be amended to cover ESC, SWM and CBPA programs). These edits reflect that recommendation. CBF requested that the first sentence of this section be retained. EWG to discuss.

Ann Neil Cosby recommends deleting the second paragraph and using language from 62.1-44.15:62 in ESCL instead.

Comment [eaa36]: Note: This would extend Art. III standing to ESC cases, which are based on state law. Currently ESCL 15:62 just says appeals of final decisions of the Board or Dept. shall be subject to judicial review in acc. with the APA. The other alternative is to say that appeals of final decisions of the Board re: the issuance or enforcement of permits and re: Ches. Bay land disturbing activities are governed by 44.29, but appeal of all other Board decisions shall be pursuant to the APA.

262 ~~and not the result of the independent action of some third party not before the court, and (iii)~~
 263 ~~such injury will likely be redressed by a favorable decision by the court.~~

264 ~~The provisions of the Administrative Process Act (§ 2.24000 et seq.) shall not apply to decisions~~
 265 ~~rendered by localities. Appeals of decisions rendered by localities shall be conducted in~~
 266 ~~accordance with local appeal procedures and shall include an opportunity for judicial review in~~
 267 ~~the circuit court of the locality in which the land disturbance occurs or is proposed to occur.~~
 268 ~~Unless otherwise provided by law, the circuit court shall conduct such review in accordance with~~
 269 ~~the standards established in § 2.24027, and the decisions of the circuit court shall be subject to~~
 270 ~~review by the Court of Appeals, as in other cases under this article.~~

271 A final decision by a locality, county, city, or town, when serving as a VESMP authority, shall be
 272 subject to judicial review, provided that an appeal is filed within 30 days from the date of any
 273 written decision adversely affecting the rights, duties, or privileges of the person engaging in or
 274 proposing to engage in land-disturbing activities.

Comment [DH072137]: This language is from ESCL 15:62. Compare with 15:74.F in CBPA. Which is preferred?

275 1989, cc. 467, 499, § 10.1-603.13; 2004, c. 372; 2012, cc. 785, 819; 2013, cc. 756, 793; 2014, cc.
 276 303, 598.

277 ~~§ 62.1-44.15:47. Appeal to Court of Appeals.~~

278 ~~From the final decision of the circuit court an appeal may be taken to the Court of Appeals as~~
 279 ~~provided in § 17.1-405.~~

280 ~~2004, c. 274, § 10.1-603.13.1, 2013, cc. 756, 793.~~

Comment [y38]: EWG recommended deleting 5/22 because covered by 62.1-44.30.

281 **§ 62.1-44.15:48. Penalties, injunctions, and other legal actions.**

282
 283 **§ 62.1-44.15:49. Enforcement authority of MS4 localities.**

284 ~~A~~ Localities shall adopt ~~an~~ stormwater ordinance pursuant to the conditions of a MS4 permit
 285 that is consistent with this article ~~and its associated regulations~~ and that contains provisions
 286 ~~including the Virginia Stormwater Management Program (VSMP) General Permit for Discharges~~
 287 ~~of Stormwater from Construction Activities and shall include additional provisions~~ as required to
 288 comply with a state MS4 permit. Such locality may utilize the civil penalty provisions in
 289 subsection ~~A~~2 of § 62.1-44.15:48, the injunctive authority as provided for in subdivision ~~DE~~1 of
 290 § 62.1-44.15:48, ~~and~~ the civil charges as authorized in subdivision ~~DE~~2 of § 62.1-44.15:48, ~~and~~
 291 ~~the criminal provisions in § 62.1-44.32~~ to enforce the ordinance. At the request of another MS4,
 292 the locality may apply the penalties provided for in this section to direct or indirect discharges to
 293 any MS4 located within its jurisdiction.

Comment [DH39]: DEQ drafted a strawman for this section as requested by the EWG at 6/15 meeting.

Comment [y40]: Chris P. to report back on possible amendments to this section and, specifically, what the highlighted clause means. Proposed amendments to subsection A and deletion of subsections B and C recommended by DEQ, but EWG to discuss whether subsection A needs to be retained.

294 ~~B. Any person who willfully and knowingly violates any provision of such an ordinance is guilty~~
295 ~~of a Class 1 misdemeanor.~~

296 ~~C. The local ordinance authorized by this section shall remain in full force and effect until the~~
297 ~~locality has been approved as a VSMP authority.~~

298 2008, c. 13, § 10.1-603.14:1; 2012, cc. 785, 819; 2013, cc. 756, 793.

Comment [eaa41]: Note: DEQ recommends deleting because inconsistent with 44.32.

299 **Article 2.5. Chesapeake Bay Preservation Act**

300 **§ 62.1-44.15:70. Exclusive authority of Board to institute legal actions.**

301 The Board shall have the exclusive authority to institute or intervene in legal and administrative
302 actions to ensure compliance by local governing bodies with this article and with any criteria or
303 regulations adopted hereunder.

304 1988, cc. 608, 891, § 10.1-2104; 1997, c. 266; 2013, cc. 756, 793.

305 **§ 62.1-44.15:71. Program compliance.**

306 ~~Program compliance reviews conducted in accordance with § 62.144.15:69 and the regulations~~
307 ~~associated with this article shall be coordinated where applicable with those being implemented~~
308 ~~in accordance with the erosion and sediment control and stormwater management provisions of~~
309 ~~this chapter and associated regulations. The Department may also conduct a comprehensive or~~
310 ~~partial program compliance review and evaluation of a local government program more~~
311 ~~frequently than the standard schedule.~~

312 ~~Following completion of a compliance review of a local government program, the Department~~
313 ~~shall provide results and compliance recommendations to the Board in the form of a corrective~~
314 ~~action agreement should deficiencies be found; otherwise, the Board may find the program~~
315 ~~compliant. When deficiencies are found, the Board will establish a schedule for the local~~
316 ~~government to come into compliance. The Board shall provide a copy of its decision to the local~~
317 ~~government that specifies the deficiencies, actions needed to be taken, and the approved~~
318 ~~compliance schedule. If the local government has not implemented the necessary compliance~~
319 ~~actions identified by the Board within 30 days following receipt of the corrective action~~
320 ~~agreement, or such additional period as is granted to complete the implementation of the~~
321 ~~compliance actions, then the Board shall have the authority to issue a special order to any local~~
322 ~~government imposing a civil penalty not to exceed \$5,000 per day with the maximum amount~~
323 ~~not to exceed \$20,000 per violation for noncompliance with the state program, to be paid into the~~
324 ~~state treasury and deposited in the Virginia Stormwater Management Fund established by § 62.1~~
325 ~~44.15:29.~~

326 It is the duty of the Board and it is authorized to review as necessary each Chesapeake Bay
327 Preservation Act program for compliance with the provisions of this article, including requiring
328 localities to furnish such information as necessary to accomplish the purposes of this chapter.
329 Following completion of a compliance review, when deficiencies are found, the Board shall
330 establish a schedule for the local government to correct the deficiencies and bring its program
331 into compliance. If the local government fails to bring its program into compliance in accordance
332 with the compliance schedule, then the Board shall have the authority to (1) issue a special order



Comment [y43]: The following is the new program compliance review language presented to the SAG 6/8, with three changes: 1) language added per EWG's 5/1 request authorizing the SWCB to require information from localities, 2) VSMF changed to VSLAF; and 3) penalty amounts changed and consent special orders added per EWG request 6-15-15.

333 to any local government imposing a civil penalty not to exceed \$5,000 per violation with the
 334 maximum amount not to exceed \$50,000 per order for noncompliance with the state program, to
 335 be paid into the state treasury and deposited in the Virginia Stormwater Local Assistance Fund
 336 established by § 62.1-44.15:29.1; or (ii) with the consent of the locality, provide in an order
 337 issued against the locality for the payment of civil charges for violations in lieu of civil penalties,
 338 in specific sums not to exceed the limit specified in this section. The Board shall not delegate to
 339 the Department its authority to issue special orders pursuant to subdivision (i) of this subsection.

Comment [y44]: Clarified by EWG 6-30-15.

340 The Administrative Process Act (§ 2.24000 et seq.) shall govern the activities and proceedings
 341 of the Board under this article and the judicial review thereof.

Comment [y45]: Added per EWG's request 630-15.

342 In lieu of issuing an special order, the Board is also authorized to take legal action pursuant to §§
 343 62.1-44.23 and 62.1-44.32 against a local government to ensure compliance.

Comment [y46]: 5/22 EWG recommended this sentence for deletion as unnecessary because of 44.29. But relying upon 44.29 extends Article III standing to appeals of the Board's decisions under this state law. EWG to discuss.

344 **§ 62.1-44.15:74. Local governments to designate Chesapeake Bay Preservation Areas;**
 345 **incorporate into local plans and ordinances; impose civil penalties.**

346 E. In addition to any other remedies which may be obtained under any local ordinance enacted to
 347 protect the quality of state waters in Chesapeake Bay Preservation Areas, counties, cities, and
 348 towns in Tidewater Virginia may incorporate the following penalties into their zoning,
 349 subdivision, or other ordinances:

350 1. Any person who (i) violates any provision of any such ordinance or (ii) violates or fails,
 351 neglects, or refuses to obey any local governmental body's or official's final notice, order, rule,
 352 regulation, or variance or permit condition authorized under such ordinance shall, upon such
 353 finding by an appropriate circuit court, be assessed a civil penalty not to exceed \$5,000 for each
 354 day of violation. Such civil penalties may, at the discretion of the court assessing them, be
 355 directed to be paid into the treasury of the county, city, or town in which the violation occurred
 356 for the purpose of abating environmental damage to or restoring Chesapeake Bay Preservation
 357 Areas therein, in such a manner as the court may direct by order, except that where the violator is
 358 the county, city, or town itself, or its agent, the court shall direct the penalty to be paid into the
 359 state treasury.

360 2. With the consent of any person who (i) violates any provision of any local ordinance related to
 361 the protection of water quality in Chesapeake Bay Preservation Areas or (ii) violates or fails,
 362 neglects, or refuses to obey any local governmental body's or official's notice, order, rule,
 363 regulation, or variance or permit condition authorized under such ordinance, the local
 364 government may provide for the issuance of an order against such person for the one-time
 365 payment of civil charges for each violation in specific sums, not to exceed \$10,000 for each
 366 violation. Such civil charges shall be paid into the treasury of the county, city, or town in which

367 the violation occurred for the purpose of abating environmental damage to or restoring
368 Chesapeake Bay Preservation Areas therein, except that where the violator is the county, city, or
369 town itself, or its agent, the civil charges shall be paid into the state treasury. Civil charges shall
370 be in lieu of any appropriate civil penalty that could be imposed under subdivision 1. Civil
371 charges may be in addition to the cost of any restoration required or ordered by the local
372 governmental body or official.

373 F. Localities that are subject to the provisions of this article may by ordinance adopt an appeal
374 period for any person aggrieved by a decision of a board that has been established by the locality
375 to hear cases regarding ordinances adopted pursuant to this article. The ordinance shall allow the
376 aggrieved party a minimum of 30 days from the date of such decision to appeal the decision to
377 the circuit court.

Comment [y47]: Compare with 15:62 in ESCL,
now incorporated into 15:46. Which version is
preferred?

378 **SWCL:**

379 **§ 62.1-44.3. Definitions.**

380 Unless a different meaning is required by the context, the following terms as used in this chapter
381 shall have the meanings hereinafter respectively ascribed to them:

382 "Certificate" means any certificate or permit issued by the Board.

383 "Land disturbance approval" means an approval allowing a land-disturbing activity to commence
384 issued by a Virginia Erosion and Stormwater Management Program authority after the
385 requirements of § 62.1-44.15:34 have been met.

Comment [eaa48]: DEQ recommends adding this definition here, rather than in 33.15:24, because the term is used in some sections of the SWCL outside of the SWMA.

386 **§ 62.1-44.5. Prohibition of waste discharges or other quality alterations of state waters**
387 **except as authorized by permit; notification required.**

388 A. Except in compliance with a certificate or permit or land disturbance approval issued by the
389 Board or other entity authorized by the Board to issue a certificate or permit pursuant to this
390 chapter, it shall be unlawful for any person to:

391 1. Discharge into state waters sewage, industrial wastes, other wastes, or any noxious or
392 deleterious substances;

393 2. Excavate in a wetland;

394 3. Otherwise alter the physical, chemical or biological properties of state waters and make them
395 detrimental to the public health, or to animal or aquatic life, or to the uses of such waters for
396 domestic or industrial consumption, or for recreation, or for other uses; or

397 4. On and after October 1, 2001, conduct the following activities in a wetland:

398 a. New activities to cause draining that significantly alters or degrades existing wetland acreage
399 or functions;

400 b. Filling or dumping;

401 c. Permanent flooding or impounding; or

402 d. New activities that cause significant alteration or degradation of existing wetland acreage or
403 functions.

404 5. Discharge stormwater into state waters from Municipal Separate Storm Sewer Systems or land
405 disturbing activities subject to regulation pursuant to § 62.1-44.15:34.

406 B. Any person in violation of the provisions of subsection A who discharges or causes or allows
407 (i) a discharge of sewage, industrial waste, other wastes or any noxious or deleterious substance
408 into or upon state waters or (ii) a discharge that may reasonably be expected to enter state waters
409 shall, upon learning of the discharge, promptly notify, but in no case later than 24 hours the
410 Board, the Director of the Department of Environmental Quality, or the coordinator of
411 emergency services appointed pursuant to § 44-146.19 for the political subdivision reasonably
412 expected to be affected by the discharge. Written notice to the Director of the Department of
413 Environmental Quality shall follow initial notice within the time frame specified by the federal
414 Clean Water Act.

415 Code 1950, § 62.1-17; 1968, c. 659; 1970, c. 638; 1990, c. 717; 1996, c. 119; 2000, cc. 1032,
416 1054; 2001, cc. 354, 383; 2004, c. 372; 2013, cc. 756, 793.

417 **§ 62.1-44.15. Powers and duties; civil penalties.**

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

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

434 (5a) All certificates issued by the Board under this chapter shall have fixed terms. The term of a
435 Virginia Pollution Discharge Elimination System permit shall not exceed five years. The term of
436 a Virginia Water Protection Permit shall be based upon the projected duration of the project, the
437 length of any required monitoring, or other project operations or permit conditions; however, the
438 term shall not exceed 15 years. The term of a Virginia Pollution Abatement permit shall not
439 exceed 10 years, except that the term of a Virginia Pollution Abatement permit for confined
440 animal feeding operations shall be 10 years. The Department of Environmental Quality shall

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

450 (5b) Any certificate or land disturbance approval issued by the Board under this chapter may,
 451 after notice and opportunity for a hearing, be amended or revoked on any of the following
 452 grounds or for good cause as may be provided by the regulations of the Board:

- 453 | 1. The owner has violated any regulation or order of the Board, any condition of a certificate, or
 454 | land disturbance approval, any provision of this chapter, or any order of a court, where such
 455 violation results in a release of harmful substances into the environment or poses a substantial
 456 | threat of release of harmful substances into the environment, or presents a hazard to human
 457 | health, or causes unreasonable property degradation, or the violation is representative of a pattern
 458 of serious or repeated violations which, in the opinion of the Board, demonstrates the owner's
 459 disregard for or inability to comply with applicable laws, regulations, or requirements;
- 460 2. The owner has failed to disclose fully all relevant material facts or has misrepresented a
 461 material fact in applying for a certificate, or land disturbance approval, or in any other report or
 462 document required under this law or under the regulations of the Board;
- 463 | 3. The activity for which the certificate or land disturbance approval was issued endangers
 464 human health or the environment or causes unreasonable property degradation and can be
 465 regulated to acceptable levels or practices by amendment or revocation of the certificate or land
 466 disturbance approval; or
- 467 | 4. There exists a material change in the basis on which the certificate, permit or land disturbance
 468 approval was issued that requires either a temporary or a permanent reduction or elimination of
 469 any discharge or land disturbing activity controlled by the certificate, permit or land disturbance
 470 approval necessary to protect human health or the environment or to stop or prevent
 471 unreasonable degradation of property.

472 (5c) Any certificate issued by the Board under this chapter relating to dredging projects governed
 473 under Chapter 12 (§ 28.2-1200 et seq.) or Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 may be

Comment [eaa49]: Although the definition of "certificate" has been expanded to include permits, we added "certificate" here and "permit" later in this subdivision because the subdivision currently uses two different terms.

474 conditioned upon a demonstration of financial responsibility for the completion of compensatory
 475 mitigation requirements. Financial responsibility may be demonstrated by a letter of credit, a
 476 certificate of deposit or a performance bond executed in a form approved by the Board. If the
 477 U.S. Army Corps of Engineers requires demonstration of financial responsibility for the
 478 completion of compensatory mitigation required for a particular project, then the mechanism and
 479 amount approved by the U.S. Army Corps of Engineers shall be used to meet this requirement.

480 (6) To make investigations and inspections, to ensure compliance with conditions of any
 481 certificates, ~~or land disturbance approvals.~~ standards, policies, rules, regulations, rulings and
 482 special orders which it may adopt, issue or establish and to furnish advice, recommendations, or
 483 instructions for the purpose of obtaining such compliance. In recognition of §§ 32.1-164 and
 484 62.1-44.18, the Board and the State Department of Health shall enter into a memorandum of
 485 understanding establishing a common format to consolidate and simplify inspections of sewage
 486 treatment plants and coordinate the scheduling of the inspections. The new format shall ensure
 487 that all sewage treatment plants are inspected at appropriate intervals in order to protect water
 488 quality and public health and at the same time avoid any unnecessary administrative burden on
 489 those being inspected.

Comment (y50): Struck so that "orders" covers special orders and stop work orders.

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

Comment (y51): Ditto.

494 (8a) Except as otherwise provided in §. 62.1-44.15:38 and Articles 2.4 (§ 62.144.15:51 et seq.)
 495 and 2.5 (§ 62.1-44.15:67 et seq.), issue special orders to owners, including owners as defined in §
 496 62.1-44.15:24. (i) who are permitting or causing the pollution, as defined by § 62.1-44.3, of state
 497 waters or the unreasonable degradation of properties, to cease and desist from such pollution or
 498 degradation. (ii) who have failed to construct facilities in accordance with final approved plans
 499 and specifications to construct such facilities in accordance with final approved plans and
 500 specifications, (iii) who have violated the terms and provisions of a certificate or land
 501 disturbance approval issued by the Board to comply with such terms and provisions, (iv) who
 502 have failed to comply with a directive from the Board to comply with such directive, (v) who
 503 have contravened duly adopted and promulgated water quality standards and policies to cease
 504 and desist from such contravention and to comply with such water quality standards and policies,
 505 (vi) who have violated the terms and provisions of a pretreatment permit issued by the Board or
 506 by the owner of a publicly owned treatment works to comply with such terms and provisions or

507 (vii) who have contravened any applicable pretreatment standard or requirement to comply with
 508 such standard or requirement; and also to issue such orders to require any owner to comply with
 509 the provisions of this chapter and any decision of the Board. Except as otherwise provided by a
 510 separate article, orders issued pursuant to this subsection may include civil penalties of up to
 511 \$32,500 per violation, not to exceed \$100,000 per order. The Board may assess penalties under
 512 this subsection if (a) the person has been issued at least two written notices of alleged violation
 513 by the Department for the same or substantially related violations at the same site, (b) such
 514 violations have not been resolved by demonstration that there was no violation, by an order
 515 issued by the Board or the Director, or by other means, (c) at least 130 days have passed since
 516 the issuance of the first notice of alleged violation, and (d) there is a finding that such violations
 517 have occurred after a hearing conducted in accordance with subdivision (8b). The actual amount
 518 of any penalty assessed shall be based upon the severity of the violations, the extent of any
 519 potential or actual environmental harm, the compliance history of the facility or person, any
 520 economic benefit realized from the noncompliance, and the ability of the person to pay the
 521 penalty. The Board shall provide the person with the calculation for the proposed penalty prior to
 522 any hearing conducted for the issuance of an order that assesses penalties pursuant to this
 523 subsection. The issuance of a notice of alleged violation by the Department shall not be
 524 considered a case decision as defined in § 2.2-4001. Any notice of alleged violation shall include
 525 a description of each violation, the specific provision of law violated, and information on the
 526 process for obtaining a final decision or fact finding from the Department on whether or not a
 527 violation has occurred, and nothing in this section shall preclude an owner from seeking such a
 528 determination. Such civil penalties shall be paid into the state treasury and deposited by the State
 529 Treasurer into the Virginia Environmental Emergency Response Fund (§ 10.1-2500 et seq.),
 530 except that civil penalties assessed for violations of Article 9 (§ 62.1-44.34:8 et seq.) or Article
 531 11 (§ 62.1-44.34:14 et seq.) shall be paid into the Virginia Petroleum Storage Tank Fund in
 532 accordance with § 62.1-44.34:11, and except that civil penalties assessed for violations of Article
 533 2.3 (§ 62.1-44.15:24 et seq.) and 2.5 (§ 62.1-44.15:67 et seq.) shall be paid into the Virginia
 534 Stormwater Local Assistance Fund in accordance with the provisions of § 62.1-44.15:4829.1.

535 (8d) Except as otherwise provided in § 62.1-44.15:38, § 62.1-44.15:25(3) and § 62.1-44.15:71,
 536 with the consent of any owner who has violated or failed, neglected or refused to obey any
 537 regulation or order of the Board, any condition of a certificate, permit or land disturbance

Comment [eaa52]: Certificate has been defined to include permits, but not vice versa. So adding "certificate" here.

538 [approval](#), or any provision of this chapter, the Board may provide, in an order issued by the
539 Board against such person, for the payment of civil charges for past violations in specific sums
540 not to exceed the limit specified in § 62.1-44.32 (a). Such civil charges shall be instead of any
541 appropriate civil penalty which could be imposed under § 62.1-44.32 (a) and shall not be subject
542 to the provisions of § 2.2-514. Such civil charges shall be paid into the state treasury and
543 deposited by the State Treasurer into the Virginia Environmental Emergency Response Fund (§
544 10.1-2500 et seq.), excluding civil charges assessed for violations of Article 9 (§ 62.1-44.34:8 et
545 seq.) or 10 (§ 62.1-44.34:10 et seq.) of Chapter 3.1, or a regulation, administrative or judicial
546 order, or term or condition of approval relating to or issued under those articles, or civil charges
547 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
548 a regulation, administrative or judicial order, or term or condition of approval relating to or
549 issued under [those](#) articles.

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

553 | (10) To adopt such regulations as it deems necessary to enforce the general [soil erosion control](#)
554 | [and stormwater management and](#) water quality management programs of the Board in all or part
555 of the Commonwealth, except that a description of provisions of any proposed regulation
556 which
557 are more restrictive than applicable federal requirements, together with the reason why the more
558 restrictive provisions are needed, shall be provided to the standing committee of each house of
559 the General Assembly to which matters relating to the content of the regulation are most properly
559 referable.

560 (18) To be the lead agency for the Commonwealth's nonpoint source pollution management
561 program, including coordination of the nonpoint source control elements of programs developed
562 pursuant to certain state and federal laws, including § 319 of the federal Clean Water Act and §
563 6217 of the federal Coastal Zone Management Act. Further responsibilities include the adoption
564 of regulations necessary to implement a nonpoint source pollution management program in the
565 Commonwealth, the distribution of assigned funds, the identification and establishment of
566 priorities to address nonpoint source related water quality problems, the administration of the
567 Statewide Nonpoint Source Advisory Committee, and the development of a program for the
568 prevention and control of soil erosion, sediment deposition, and nonagricultural runoff to
569 conserve Virginia's natural resources.

570 **§ 62.1-44.19:22. Enforcement and penalties.**

571 A. Transfer of certified nutrient credits by an operator of a nutrient credit-generating entity may
572 be suspended by the Department until such time as the operator comes into compliance with this
573 article and attendant regulations.

574 B. Any operator of a nutrient credit-generating entity who violates any provision of this article,
575 or of any regulations adopted hereunder, shall be subject to a civil penalty not to exceed \$10,000
576 within the discretion of the court. The Department may issue a summons for collection of the
577 civil penalty, and the action may be prosecuted in the appropriate circuit court. When the
578 penalties are assessed by the court as a result of a summons issued by the Department, the court shall
579 direct the penalty to be paid into the state treasury and deposited by the State Treasurer into
580 the Virginia Stormwater [Management Local Assistance](#) Fund established pursuant to § 62.1-
581 44.15:29.1.

582 2012, cc. 748, 808, § 10.1-603.15:4; 2013, cc. 756, 793.

583 **§ 62.1-44.20. Right to entry to obtain information, etc.**

584 Any duly authorized agent of the Board may, at reasonable times and under reasonable
585 circumstances, enter any establishment or upon any property, public or private, for the purpose
586 of obtaining information or conducting surveys or investigations necessary in the enforcement of
587 the provisions of this chapter.

588 Code 1950, § 62.1-34; 1968, c. 659; 1970, c. 638.

589 **§ 62.1-44.21. Information to be furnished to Board.**

590 The Board may require every owner to furnish when requested such plans, specifications, and
591 other pertinent information as may be necessary to determine the effect of the wastes from his
592 discharge on the quality of state waters, or such other information as may be necessary to
593 accomplish the purposes of this chapter. The Board shall not at any time disclose to any person
594 other than appropriate officials of the Environmental Protection Agency pursuant to the
595 requirements of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) any
596 secret formulae, secret processes, or secret methods other than effluent data used by any owner
597 or under that owner's direction.

598 Code 1950, § 62.1-35; 1968, c. 659; 1970, c. 638; 1974, c. 237.

599 **§ 62.1-44.22. Private [actions](#) rights not affected.**

600 The fact that any owner holds or has held a certificate [or land disturbance approval](#) issued under
601 this chapter shall not constitute a defense in any civil action involving private rights.

602 Compliance with the provisions of this chapter shall be prima facie evidence in any legal or
 603 equitable proceeding for damages caused by erosion or sedimentation that all requirements of
 604 law have been met and the complaining party must show negligence in order to recover any
 605 damages.

606 Code 1950, § 62.1-36; 1968, c. 659; 1970, c. 638.

Comment [y53]: 5/1 the EWG recommended leaving this section alone, but asked DEQ to look at 44.15:63H in ESCL and consider whether it needs to be included. Since these address two different things, we recommend adding it into one section.

607 **§ 62.1-44.23. Enforcement by injunction, etc.**

608 Any person violating or failing, neglecting or refusing to obey any rule, regulation, order, water
 609 quality standard, pretreatment standard, approved standard and specification, or requirement of or
 610 any provision of any certificate or land disturbance approval issued by the Board, or by the
 611 owner of a publicly owned treatment works issued to an industrial user, or any provisions of
 this
 612 chapter, except as provided by a separate article, may be compelled in a proceeding instituted in
 613 any appropriate court by the Board to obey same and to comply therewith by injunction,
 614 mandamus or other appropriate remedy.

615 Code 1950, § 62.1-37; 1952, c. 702; 1968, c. 659; 1970, c. 638; 1977, c. 263; 1988, c. 167; 1990,
 616 c. 717; 1994, c. 489; 2013, cc. 756, 793.

617 **§ 62.1-44.24. Testing validity of regulations; judicial review.**

618 (1) The validity of any regulation may be determined through judicial review in accordance with
 619 the provisions of the Administrative Process Act (§ 2.2-4000 et seq.).

620 (2) [Repealed.]

621 (3) An appeal may be taken from the decision of the court to the Court of Appeals as provided by
 622 law.

623 1970, c. 638; 1984, c. 703; 1986, c. 615.

624 **§ 62.1-44.25. Right to hearing.**

625 Any owner under Articles 2.3 and 2.5 and §§ 62.1-44.16, 62.1-44.17, and 62.1-44.19 aggrieved
 626 by any action of the Board taken without a formal hearing, or by inaction of the Board, may
 627 demand in writing a formal hearing of such owner's grievance, provided a petition requesting
 628 such hearing is filed with the Board. In cases involving actions of the Board, such petition must
 629 be filed within thirty days after notice of such action is mailed to such owner by certified mail.

630 1970, c. 638.

631 **§ 62.1-44.26. Hearings.**

632 A. The formal hearings held by the Board under this chapter shall be conducted pursuant to §
 633 2.2-4009 or 2.2-4020 and may be conducted by the Board itself at a regular or special meeting of
 634 the Board, or by at least one member of the Board designated by the chairman to conduct such
 635 hearings on behalf of the Board at any other time and place authorized by the Board.

Comment (y54): Recommended by EWG 5/22.

636 B. A verbatim record of the proceedings of such hearings shall be taken and filed with the Board.
 637 Depositions may be taken and read as in actions at law.

638 C. The Board shall have power to issue subpoenas and subpoenas duces tecum, and at the request
 639 of any party shall issue such subpoenas. The failure of a witness without legal excuse to appear
 640 or to testify or to produce documents shall be acted upon by the Board in the manner prescribed
 641 in § 2.2-4022. Witnesses who are subpoenaed shall receive the same fees and mileage as in civil
 642 actions.

643 1970, c. 638; 1977, c. 291; 1993, c. 897; 2008, cc. 276, 557.

644 **§ 62.1-44.29. Judicial review.**

645 Any owner aggrieved by or any person who has participated, in person or by submittal of written
 646 comments, in the public comment process related to a final decision of the Board under Article
 647 2.3 of this chapter or §§ 62.1-44.15 (5), 62.1-44.15 (8a), (8b), and (8c), 62.1-44.15:20, 62.1-
 648 44.15:21, 62.1-44.15:22, 62.1-44.15:23, 62.1-44.16, 62.1-44.17, 62.1-44.19, or 62.1-44.25, or —
 649 62.1-44.15:71, whether such decision is affirmative or negative, is entitled to judicial review
 650 thereof in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 et
 651 seq.)

Comment (y55): This language added per EWG request 5/22.

651 if such person meets the standard for obtaining judicial review of a case or controversy pursuant
 652 to Article III of the United States Constitution. A person shall be deemed to meet such standard
 653 if (i) such person has suffered an actual or imminent injury which is an invasion of a legally
 654 protected interest and which is concrete and particularized; (ii) such injury is fairly traceable to
 655 the decision of the Board and not the result of the independent action of some third party not
 656 before the court; and (iii) such injury will likely be redressed by a favorable decision by the
 657 court.

658 1970, c. 638; 1986, c. 615; 1996, c. 1032; 2000, cc. 1032, 1054; 2007, c. 659.

659 **§ 62.1-44.30. Appeal to Court of Appeals.**

660 From the final decision of the circuit court an appeal may be taken to the Court of Appeals as
 661 provided in § 17.1-405.

662 1970, c. 638; 1984, c. 703.

663 **§ 62.1-44.31. Violation of special order or certificate or failure to cooperate with Board.**

664 It shall be unlawful for any owner to fail to comply with any special order adopted by the Board,
 665 which has become final under the provisions of this chapter, or to fail to comply with a

Comment (y56): Amended so it covers special orders and stop work orders.

666 pretreatment condition incorporated into the permit issued to it by the owner of a publicly owned
 667 treatment works or to fail to comply with any pretreatment standard or pretreatment requirement,
 668 or to discharge sewage, industrial waste or other waste in violation of any condition contained in
 669 a certificate or land disturbance approval issued by the Board or in excess of the waste covered
 670 by such certificate, or land disturbance approval, or to fail or refuse to furnish information,
 671 plans, specifications or other data reasonably necessary and pertinent required by the Board
 672 under this chapter.

673 For the purpose of this section, the term "owner" shall mean, in addition to the definition
 674 contained in § 62.1-44.3 and § 62.1-44.15:24, any responsible corporate officer so designated in
 675 the applicable discharge permit.

676 Code 1950, § 62.1-43; 1952, c. 478; 1968, c. 659; 1970, c. 638; 1977, c. 263; 1988, c. 167.

677 **§ 62.1-44.32. Penalties.**

678 (a) Except as otherwise provided in this chapter, any person who violates any provision of this
 679 chapter, or who fails, neglects, or refuses to comply with any regulation, certificate, land
 680 disturbance approval or order of the Board, or order of a court, issued as herein provided, shall
 681 be subject to a civil penalty not to exceed \$32,500 for each violation within the discretion of the
 682 court. Each day of violation of each requirement shall constitute a separate offense. Such civil
 683 penalties shall be paid into the state treasury and deposited by the State Treasurer into the
 684 Virginia Environmental Emergency Response Fund pursuant to Chapter 25 of Title 10.1,
 685 excluding penalties assessed for violations of Article 2.3 (§ 62.1-44.15:24 et seq.), 2.5 (§ 62.1-
 686 44.15:67 et seq.), 9 (§ 62.1-44.34:8 et seq.) or 10 (§ 62.1-44.34:10 et seq.) of Chapter 3.1 of Title
 687 62.1, or a regulation, administrative or judicial order, or term or condition of approval relating to
 688 or issued under those articles.

Comment [y57]: This is consistent with subdivision (b) below, and with ESCL 15:63 and SWMA 15:48.

689 Such civil penalties may, in the discretion of the court assessing them, be directed to be paid into
 690 the treasury of the county, city, or town in which the violation occurred, to be used for the
 691 purpose of abating environmental pollution therein in such manner as the court may, by order,
 692 direct, except that where the owner in violation is such county, city or town itself, or its agent,
 693 the court shall direct such penalty to be paid into the state treasury and deposited by the State
 694 Treasurer into the Virginia Environmental Emergency Response Fund pursuant to Chapter 25 of
 695 Title 10.1, excluding penalties assessed for violations of Article 2.3, 2.5, 9 or 10 of Chapter 3.1
 696 of Title 62.1, or a regulation, administrative or judicial order, or term or condition of approval
 697 relating to or issued under those articles.

698 In the event that a county, city, or town, or its agent, is the owner, such county, city, or town, or
 699 its agent, may initiate a civil action against any user or users of a waste water treatment facility
 700 to recover that portion of any civil penalty imposed against the owner proximately resulting from

701 the act or acts of such user or users in violation of any applicable federal, state, or local
702 requirements.

703 (b) Except as otherwise provided in this chapter, any person who willfully or negligently violates
704 any provision of this chapter, any regulation or order of the Board, any condition of a certificate or
705 land disturbance approval of the Board, or any land disturbance approval, ordinance or order of a
706 locality acting as a Virginia Erosion and Stormwater Management Program authority, or any
707 order of a court shall be guilty of a misdemeanor punishable by confinement in jail for not
more

708 than 12 months and a fine of not less than \$2,500 nor more than \$32,500, either or both. Any
709 person who knowingly violates any provision of this chapter, any regulation or order of the
710 Board, any condition of a certificate or land disturbance approval of the Board, or any land
711 disturbance approval, ordinance or order of a locality acting as a Virginia Erosion and Stormwater
712 Management Program authority, or any order of a court issued as herein provided, or
713 who knowingly makes any false statement in any form required to be submitted under this
714 chapter or knowingly renders inaccurate any monitoring device or method required to be
715 maintained under this chapter, shall be guilty of a felony punishable by a term of imprisonment
716 of not less than one year nor more than three years, or in the discretion of the jury or the court
717 trying the case without a jury, confinement in jail for not more than 12 months and a fine of not
718 less than \$5,000 nor more than \$50,000 for each violation. Any defendant that is not an
719 individual shall, upon conviction of a violation under this subsection, be sentenced to pay a fine
720 of not less than \$10,000. Each day of violation of each requirement shall constitute a separate
721 offense.

722 (c) Except as otherwise provided in this chapter, any person who knowingly violates any
723 provision of this chapter, and who knows at that time that he thereby places another person in
724 imminent danger of death or serious bodily harm, shall, upon conviction, be guilty of a felony
725 punishable by a term of imprisonment of not less than two years nor more than 15 years and a
726 fine of not more than \$250,000, either or both. A defendant that is not an individual shall, upon
727 conviction of a violation under this subsection, be sentenced to pay a fine not exceeding the
728 greater of \$1 million or an amount that is three times the economic benefit realized by the
729 defendant as a result of the offense. The maximum penalty shall be doubled with respect to both
730 fine and imprisonment for any subsequent conviction of the same person under this subsection.

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

733 Code 1950, § 62.1-44; 1968, c. 659; 1970, c. 638; 1974, c. 237; 1977, c. 263; 1980, c. 378; 1981,
734 cc. 582, 596; 1989, c. 627; 1990, cc. 13, 717; 1991, c. 718; 2005, c. 706; 2013, cc. 756, 793.

735

5
736 **Title 10.1. Conservation; Chapter 25. Virginia Environmental Emergency**
737 **Response Fund**

738 **§ 10.1-2500. Virginia Environmental Emergency Response Fund established.**

739 A. There is hereby established the Virginia Environmental Emergency Response Fund, hereafter
740 referred to as the Fund, to be used (i) for the purpose of emergency response to environmental
741 pollution incidents and for the development and implementation of corrective actions for
742 pollution incidents, other than pollution incidents addressed through the Virginia Underground
743 Petroleum Storage Tank Fund, as described in § 62.1-44.34:11 of the State Water Control Law,
744 (ii) to conduct assessments of potential sources of toxic contamination in accordance with the
745 policy developed pursuant to § 62.1-44.19:10, and (iii) to assist small businesses for the purposes
746 described in § 10.1-1197.3.

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

750 1. Noncompliance penalties assessed pursuant to § 10.1-1311, civil penalties assessed pursuant
751 to subsection B of § 10.1-1316 and civil charges assessed pursuant to subsection C of § 10.1-
752 1316.

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

756 3. Civil charges assessed pursuant to subdivision 8d of § 62.1-44.15 and civil penalties assessed pursuant
757 to subsection (a) of § 62.1-44.32, excluding assessments made for violations of Articles [2.3 \(§](#)
758 [62.1-44.15:24 et seq.](#)), [2.5 \(§ 62.1-44.15:67 et seq.\)](#), 9 (§ 62.1-44.34:8 et seq.) or 10 (§ 62.1-
759 44.34:10 et seq.), of Chapter 3.1 of Title 62.1, or a regulation, administrative or judicial
760 order, or term or condition of approval relating to or issued under those articles.

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

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

764 6. Civil penalties assessed in conjunction with special orders by the Director pursuant to § 10.1-
765 1186 and by the Waste Management Board pursuant to subsection G of § 10.1-1455.

766 1991, c. 718; 1992, c. 812; 1997, cc. 624, 850; 1998, c. 837; 2000, cc. 17, 1043.

To: Stormwater Stakeholder Advisory Group
From: CBF
Date: July 10, 2015
Re: "Party Aggrieved" and Standing for Judicial Review

Question Presented

The Stormwater Stakeholder Advisory Group ("SAG") is considering whether and how to merge two existing judicial review statutes: § 62.1-44.29, currently codified within the State Water Control Law ("SWCL") and § 62.1-44.15:46, currently part of the Stormwater Management Act ("SMA"). The SAG is considering a proposal to merge the SMA provision into the SWCL's general judicial review provision. The SWCL provision would incorporate an expanded definition of "owner" (and therefore of "owner aggrieved") to include permittees. Despite this expansion, we conclude that the SMA term, "party aggrieved," should be carried over and expressly included within a consolidated version of § 62.1-44.29 in order to ensure that the consolidation works no substantive change to the judicial review/standing framework.

Statutes to be Merged

Section 62.1-44.29 provides the general framework for obtaining judicial review of certain decisions made by the State Water Control Board ("Board"). Specifically, it confers standing to seek judicial review, in accordance with the Administrative Process Act, on any "owner aggrieved" by or any person who has participated in the public comment process related to a final decision of the Board under listed statutes¹ within the SWCL provided such person meets the standard for obtaining judicial review under art. III of the U.S. Constitution. This provision does not include any reference to "party aggrieved."

Section 62.1-44.15:46 provides the framework for obtaining judicial review of certain stormwater-related decisions made by the Board and the Department of Environmental Quality ("DEQ"). Specifically, it confers standing to seek judicial review, in accordance with the Administrative Process Act, on any "permittee or party aggrieved" by a state permit² or enforcement decision of the Board or DEQ or on any person who has participated in the public comment process related to a final Board or DEQ decision under the SMA, provided such person meets the standard for obtaining judicial review under art. **III** of the U.S. Constitution.³

Discussion

The meaning of the term, "party aggrieved," is at the core of this inquiry, but ascertaining its intended meaning is challenging. Found in 62.1-44.15:46, the term is not defined there or in any other provision in the SMA or the SWCL. The Virginia Administrative Process Act (APA) also uses the term "party aggrieved" without textual definition, simply authorizing any "person affected by and claiming

¹ §§ 62.1-44.15(5) (VPDES and other permits), 62.1-44.15(8a)-(8c) (special orders, penalties, etc.), 62.1-44.15:20-23 (wetlands), 62.1-44.16-17 (industrial and other wastes), 62.1-44.19 (sewage), and 62.1-44.25 (board hearings).

² State permit in this context means an MS4 or federally-required construction permit.

³ Va. Code § 62.1-44.15:46 (2015).

the unlawfulness of any regulation or party aggrieved by and claiming unlawfulness of a case decision" to seek judicial review.⁴

The courts have explored the meaning of "aggrieved" in numerous cases.⁵ The instances where "party aggrieved" is at issue are fewer, but do yield some clues. In *Environmental Defense Fund*, 12 Va. App. 456, 404 S.E., 2d 728 (1991), the court took a narrow, technical approach to deny standing to petitioner EDF. It reasoned that EDF was not an "owner aggrieved" under the SWCL's 62.1-44.29 -- the basic law -- because it was not an "owner" as required by that law. It rejected EDF's contention that the apparently-broader APA term, "party aggrieved," could be used to expand standing under the SWCL.

In other cases, the court's approach is much less technical. In *Friends of the Rappahannock, et al. v. Caroline County*, 286 Va. 38, 743 S.E. 2d 143 (2013), a land use case, the court also denied standing to petitioner. Here, however, the court essentially conflated the meaning of "aggrieved party" with "justiciable interest," concluding "any distinction between an 'aggrieved party' and 'justiciable interest' is a distinction without a difference." In that case, the court outlined numerous factors constituting justiciable interest: an actual controversy such that the complainant's legal rights or interests would be affected by the outcome of the case. If such alleged rights or interests are not ownership interests, then the complainant must occupy real property within or in close proximity to the property that is the subject of the decision such that the complainant has a direct, immediate, pecuniary and substantial interest in the decision at issue. *Id.*, FOR, 286 Va. at 48.

The cases represent fairly divergent views, albeit views that have arisen in different contexts. However, to ensure that no review rights are lost by the proposed statutory merger, we recommend being very explicit in the merged statute. The phrase "aggrieved party" should be explicitly carried over and recited in the merged SWCL statute.

⁴ Va. Code § 2.2-4026 (2015). The APA defines "case" or "case decision" as "any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, or of threatened or contemplated private action, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit." 2.2-4001.

⁵ Courts have repeatedly addressed the meaning of "aggrieved" as it relates to standing. See, e.g., *Nicholas, et al. v. Lawrence*, 161 Va. 589, 593, 171 S.E. 673 (1933) ("aggrieved" tax petitioner matter must have immediate, pecuniary and substantial interest in the litigation, peculiar to himself); *Virginia Beach Beautification Comm'n. v. Bd. of Zoning Appeals*, 231 Va. 415, 419-20, 344 S.E. 2d 899, 903 (1986) (the word "aggrieved" contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally); *Environmental Defense Fund*, 12 Va. App. at 463, 404 S.E. 2d at 11.

37 right to appeal. With respect to matters of law, the burden shall be on the party seeking review to
38 designate and demonstrate an error of law subject to review by the court. With respect to issues
39 of fact, the duty of the court shall be limited to ascertaining whether there was substantial
40 evidence in the record to reasonably support such findings.

41 [NOT APPLICABLE] d. In addition, a locality may, by ordinance, establish a uniform schedule
42 of civil penalties for violations of fats, oils, and grease standards; infiltration and inflow
43 standards; and other specified provisions of any ordinance (other than industrial pretreatment
44 requirements of the State Water Control Law (§ 62.1-44.2 et seq.) or federal Clean Water Act
45 (33 U.S.C. § 1251 et seq.). The schedule of civil penalties shall be uniform for each type of
46 specified violation, and the penalty for any one violation shall be a civil penalty of not more than
47 \$100 for the initial summons, not more than \$150 for each additional summons and not more
48 than a total amount of \$3,000 for a series of specified violations arising from the same operative
49 set of facts. The locality may issue a civil summons ticket for a scheduled violation. Any person
50 summoned or issued a ticket for a scheduled violation may make an appearance in person or in
51 writing by mail to the treasurer of the locality prior to the date fixed for trial in court. Any person
52 so appearing may enter a waiver of trial, admit liability and pay the civil penalty established for
53 the offense charged. If a person charged with a scheduled violation does not elect to enter a
54 waiver of trial and admit liability, the violation shall be tried in the general district court in the
55 same manner and with the same right of appeal as provided for by law. In any such trial, the
56 locality shall have the burden of proving by a preponderance of the evidence the liability of the
57 alleged violator. An admission of liability or finding of liability under this section shall not be
58 deemed an admission at a criminal proceeding, and no civil action authorized by this section
59 shall proceed while a criminal action is pending.

60 e. This subdivision shall neither preclude a locality from proceeding directly in circuit court to
61 compel compliance with its sewer use standards or seek civil penalties for violation of the same
62 nor be interpreted as limiting any otherwise applicable legal remedies or sanctions. Each day
63 during which a violation is found to have existed shall constitute a separate violation, and any
64 civil penalties imposed under this subdivision shall be applied to the purpose of abating,
65 preventing or mitigating environmental pollution.

66 f. For purposes of enforcement of standards established under this subdivision, "locality" shall
67 mean the locality's director of public utilities or other designee of the locality with responsibility
68 for administering and enforcing sewer use standards or, in the case of a wastewater authority or
69 sanitation district, its chief executive.