

**REPORT OF THE
STATE WATER COMMISSION ON**

**Operation of Small Private
Investor-Owned Water Systems
(HJR 652)**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



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WATER COMMISSION
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REPORT ON THE OPERATION OF
SMALL PRIVATE INVESTOR-OWNED AND
HOMEOWNER ASSOCIATION-OPERATED WATER SYSTEMS
(HJR 652)

I. STUDY AUTHORIZATION

The 1993 Session of the General Assembly passed HJR 652, which requested the State Water Commission to study the operation of small private investor-owned and homeowner association-operated public water systems (see Appendix A). The Commission is charged with (i) analyzing component expenses of the overall costs of providing drinking water, including the costs associated with financing, capital improvement, maintenance, monitoring and testing; (ii) examining ways to ensure that owners operating small systems are financially and technically capable of operating such systems; and (iii) determining what alternatives should be available to customers in instances of abandonment by the owner or operator, or where the operator fails to provide safe drinking water to customers.

II. BACKGROUND

A. Nature of Problem

During the last four years the Commission has examined various aspects of the Health Department's administration of the federal Safe Drinking Water Act. The Commission has served as a forum for discussion of the relative merits of retaining state primacy over the program, and the financial impact of the federal mandates on the operation of drinking water systems, especially the smaller privately owned systems. In November 1992, Ms. Nancy Amber, Executive Director of the Housing Study Commission, testified before the Commission regarding problems associated with exempting drinking water systems which serve fewer than 25 consumers from Health Department regulation. Many of the complaints heard by the Housing Study Commission during public hearings involved manufactured home parks (MHPs). It was noted that some MHPs have intentionally maintained their number of residents below 25 in order to avoid regulation. In an effort to determine how many small systems, specifically MHPs, are not currently subject to regulatory requirements, the Health Department surveyed local health departments. Their very rough estimates indicate that there may be close to 6,000 unregulated systems, of which 1,000 could be MHPs. Several regulatory options were presented to the Water Commission, all of which would expand the coverage of the waterworks statutes. Options recommended for consideration included:

1. Regulation of water systems serving MHPs by referencing the definition in the manufactured Home Lot Rental Act, thereby reducing the minimum connection threshold subject to regulation from 15 to 10, or requiring all MHPs that provide continual residential facilities to be regulated.
2. Regulation of all systems that serve piped water to the public, except those serving one single-family residence occupied by a landowner and his family, or those with four or fewer connections all serving residences on the same farm.

Each of these options admittedly would entail a significant expense to those being regulated as well as those enforcing the regulations.

Reacting to the Housing Study Commission's options, Health Department officials suggested that changing the definition of public waterworks would have a significant ripple effect throughout the entire body of the highly technical regulations. The current definition of waterworks is consistent with federal law, and there is concern on their part that a change in the definition might affect our status as a primacy state and, perhaps, jeopardize the Department's federal primacy grant.

The Health Department estimated that the initial costs of monitoring the 6,000 very small systems could exceed \$18.7 million. Agency officials contend that given the high costs, the historical low occurrence rate of most contaminants, and the long periods of exposure required before any adverse health effect occurs, it might be appropriate to consider reducing the scope of monitoring for the 6,000 water systems initially to those contaminants with acute health effects. Such a two-tier approach would require that all the very small systems be monitored for coliform bacteria and nitrates, and be subject to additional monitoring when a particular system is shown to be vulnerable to other contaminants. The annual costs of such a program during the initial three years would be approximately \$525,000.

At the November 1992 meeting, a related concern regarding the operation of small water systems was brought to the Commission's attention by Delegate John Davies. He stated that small waterworks owned/operated by real estate developers or homeowners' associations are a growing source of concern for residents and local governments. In many instances, the owners of these systems are finding that complying with mandates of the SDWA is very expensive. Although these systems were initially viewed as a profitable enterprise, many developers have found that they lack the technical ability and financial capacity to comply with the regulations. Delegate Davies noted that the typical water system had been constructed 20 years ago in conjunction with a residential subdivision. In the interim, little maintenance had been performed and as a result many of the facilities are falling into disrepair. Even though they are still receiving fees from residents, many system operators are not dedicating this revenue to system operation and maintenance. In some cases,

private owners are abandoning these small water systems, and counties are reluctant to take over the operation of the poorly managed facilities.

Delegate Davies noted that these problems generally involve small waterworks with between 25 and 50 connections. In response to this situation, he patroned H.B. 2070 (see Appendix B), which requires the owner of a private system to apply fees paid by customers only to expenses directly related to the provision of water. This requirement would not apply to (i) water systems operated by a governmental entity, (ii) water systems operated by a public utility regulated by the State Corporation Commission, or (iii) private wells serving a single residence. The misapplication of water fees by the owner of a private system would be a Class 2 misdemeanor. Legislative action on the bill was delayed, pending the outcome of the Commission's study. However, the legislature passed HJR 652, requesting the State Water Commission to examine the issues associated with the operation of small private investor-owned or homeowner association-operated water systems.

B. Safe Drinking Water Act and the State's Role

In 1974 Congress passed the federal Safe Drinking Water Act (SDWA) to protect the public from health hazards resulting from contaminated drinking water. Under the Act, the Environmental Protection Agency (EPA) is responsible for establishing regulations defining safe drinking water quality for public water systems and ensuring that all public water systems provide water to consumers which meets the definition of "safe." The Act contemplates that primary responsibility would reside with the states. To assume responsibility for the program's administration (primacy), the state must adopt its own drinking water regulations which are at least as stringent as those of the federal government.

In Virginia, the Health Department is the state agency authorized to administer the SDWA. The agency carries out this responsibility through surveillance and sanitary surveys of waterworks, technical reviews of engineering plans and specifications, monitoring of drinking water quality, training of waterworks owners and operators, and emergency assistance. The SDWA applies only to water which is provided to consumers by public water systems (waterworks). Virginia's definition of a public water supply is the same as the one used by EPA. The Code of Virginia (§ 32.1-167) defines waterworks as "a system that serves piped water for drinking or domestic use to (i) the public, (ii) at least fifteen connections or (iii) an average of twenty-five individuals for at least sixty days out of the year."

Waterworks may be publicly or privately owned and operated and fall into one of three categories, based on the characteristics of the population served. A community waterworks is one that serves 25 or more year-round residents, such as municipal water utilities, apartment complexes, mobile home parks, nursing homes,

and correctional institutions.¹ A transient noncommunity waterworks serves a transient population of at least 25 people at least 60 days a year and includes campgrounds, motels, hotels, and restaurants. A third category, the nontransient noncommunity waterworks, serves a fairly consistent nonresidential population of at least 25 of the same people for at least six months per year. Examples of this type of system are factories and schools that have their own water supplies.

In Virginia, more than 4,000 waterworks are regulated by the Health Department. About one-half of these are noncommunity systems, followed in number by community systems (1,559), and nontransient noncommunity systems (approximately 700). However, community waterworks provide drinking water to the vast majority of Virginians (5.3 million). A majority of Virginia residences (57 percent) are served by 14 very large community water systems, each serving more than 100,000 customers. By contrast, approximately 75 percent of the 1,559 community water systems are classified as very small systems, providing drinking water to 500 or fewer customers. Thus, even though very small waterworks comprise the majority of the systems, they serve a small percentage of the total consuming population.

C. Regulation of Waterworks in Virginia

While the Health Department assumes the primary responsibility for the regulation of waterworks in Virginia, a number of entities play an important role in overseeing the siting and operations of drinking water systems. Prior to the construction of a water supply system which will serve three or more connections, the person or corporation seeking to establish such a facility is required to (i) notify the State Board of Health and (ii) notify the local government in writing as well as to appear in person at a regular meeting of the local governing body (Va. Code § 15.1-341). In his notice to the local governing body, the applicant must indicate the number and nature of the connections. If the applicant fails to notify the State Board of Health or the local government and thereafter constructs such a system, he may be charged with a misdemeanor and fined between \$25 and \$500, or imprisoned in jail for 30 days to six months, with each day of violation constituting a separate offense.

The granting of an operating permit depends largely on such technical considerations as facility design and construction, with little attention paid to the financial and management capabilities of system's owner or operator. Three agencies regulate, in some form, the operations of waterworks. Under the Virginia Code, the State Board of Health "shall have general supervision and control over all water supplies and waterworks in the Commonwealth insofar as the bacteriological, chemical, radiological and physical quality of waters furnished for drinking or domestic use may affect the public health and welfare and may require that all

¹ Small community waterworks are the focus of HJR 652.

water supplies be pure water" (§ 32.1-169). No person may establish a waterworks or water supply system without first obtaining a written permit from the State Health Commissioner. The permit application is to be accompanied by a certified copy of the maps, plans and construction specifications; a description of the source of the proposed water supply; and the type of storage, purification or treatment to be used. If the system has been designed by a professional engineer and meets the appropriate design and performance criteria, and the facility has been approved by the local government, a permit for construction will be issued by the Health Department. There is no requirement to have any expertise or prior experience in the management of a water system, although a licensed operator has to be employed by a water system serving more than 400 persons.

The Health Code does include a financial responsibility requirement for permit holders. Under § 32.1-174.1, the Board of Health may require privately owned water systems to post bonds or deposit funds into an escrow account. If an owner fails to pay the waterworks' electric bill, ceases operation of the system, or fails to provide water to his customers for more than a 48-hour period, the Board or the affected local governing body may request the court to order forfeiture of the bond or escrow account. If the system is placed in receivership, the proceeds of the forfeiture may be awarded to the locality once the court has vested receivership in the locality. It should be noted that the Department has chosen not to require bonding or the escrowing of funds by waterworks owners.

Waterworks serving more than 400 persons are required to employ a licensed operator. The Board of Waterworks and Wastewater Works Operators is responsible for the licensing of operators. The Board may require water systems serving less than 400 to employ a licensed operator if the system is certified as a waterworks. An operator is the person in "responsible charge," whose duties include testing or evaluation to control waterworks operation (§ 54.1-2300). The license attests to the competency of an operator to supervise and operate waterworks, and is issued for specific operator classifications. The type of classification depends on the size of the population served and the kind of water treatment employed.

A private company which furnishes water to 50 or more customers is defined as a public utility and as such is subject to the regulatory authority of the State Corporation Commission (SCC). As a regulated entity, the company has to obtain a certificate of public convenience and necessity before providing service. In issuing a certificate, the SCC considers whether the waterworks has obtained an operator's permit and is in good standing with the Health Department. It defers to the Health Department on questions concerning the quality of service. As a certificated company, a waterworks has to furnish reasonably adequate services and facilities at reasonable and just rates. If the SCC finds rates to be unjust, unreasonable, insufficient or unjustly discriminatory, it may amend the rate schedule. While only water companies serving 50 or more customers are regulated, § 56-265.1 of the

Utility Facilities Act prohibits water systems furnishing water to 10 or more customers from abandoning the service "unless and until approval is granted by the Commission or all the customers receiving such services agree to accept ownership of the company."²

There is a less rigorous regulatory scheme for certificated water companies with gross annual operating revenues of less than one million dollars. Under the Small Water or Sewer Public Utility Act (§ 56-265.13:1 et seq.) rate schedules are not set by the SCC. However, the agency, on its own motion or upon petition by (i) at least 25 percent or 250 affected customers, whichever is less, or (ii) the company staff, will hold a hearing regarding the quality of services. The Commission may order such improvements or changes in service, regulations, practices and rates as are just and reasonable, and can order the company to refund, with interest, the portion of the rates or charges which are not justified.

III. VIABILITY OF SMALL WATER SYSTEMS

A. Elements of Viability Programs

Nationally, small drinking water systems³ serve only eight percent of the population, yet they account for 93 percent of the maximum contaminant level (MCL) violations and 94 percent of the monitoring and reporting violations.⁴ Virginia's statistics, as noted earlier, reflect the national figures. This is but one indication that small systems face a number of significant barriers in complying with the treatment requirements of the SDWA. Some of the obstacles which will need to be overcome if these systems are to perform in a reliable manner include:

- Insufficient revenue to cover the full costs of providing water services over the long term;
- Insufficient access to capital to complete construction and/or provide for contingencies and major replacement needs;
- Operator's lack of recognition of management responsibilities;
- Lack of an explicit management plan to ensure the performance of necessary functions of administration, operation and maintenance;

² The SCC defines customer as the person who receives the bill.

³ Defined by E.P.A. as those systems serving a population of 3,300 or fewer.

⁴ Ensuring the Viability of New, Small Drinking Water Systems, U.S. E.P.A., Office of Water, April 1989, p. i.

- Lack of technical knowledge of state and federal regulations and how to comply with them;
- Lack of information on sources of assistance;
- Lack of economies of scale, leading to higher per customer costs of operations; and
- Lack of affordable technologies to enable systems to comply with regulations.

In prior years, performance demands placed on small systems have been minimal. Water was abundant, inexpensive to treat and deliver on a small scale, and, in most instances, taken for granted by consumers. Local and state officials had little or no reason to be concerned that procedures were in place which would assure customers that their drinking water needs would be met. Small systems were being created because they were seen as viable entities. In this low-cost environment there was no pressure on the operators of small systems to fully account for their costs of services. Needs which were not apparent at the time, such as maintaining a facility's infrastructure, were ignored, giving rise to the perception that small systems could provide inexpensive water service. Circumstances changed in 1974 with the passage of the SDWA, which required higher performance standards to be met by water supply systems. Twelve years later, the 1986 amendments expanding performance standards required small systems to (i) replace many of their existing plants, (ii) place greater emphasis on operation and maintenance procedures, (iii) provide additional capital investment for facilities to treat contaminants, and (iv) perform additional monitoring to document the extent of contaminants. A 1990 Department of Health study, "The Impact of the Safe Drinking Water Act Amendments of 1986 on the Commonwealth of Virginia," estimated that the costs of complying with the new amendments would be between \$51 million to \$143 million annually statewide, with the highest cost being borne by the customers of Virginia's smallest water systems.

In the past, many states have dealt with the difficulties that small systems are having in complying with the SDWA by providing technical assistance. Virginia sought to enhance its technical assistance through passage of legislation during the 1992 Session, creating the Waterworks Technical Assistance Program. The program is financed by operation fees collected from public waterworks. While technical assistance continues to be provided to small systems, a number of states, with the support of EPA, have recently adopted a more aggressive stance regarding the development and operation of small systems. By developing "viability programs," states have sought to:

- Control the creation of small water supply systems by identifying those systems having technical, financial, or managerial weaknesses which may render them incapable of complying with SDWA regulations; and
- Protect customers of existing systems by intervening in instances where there have been chronic performance deficiencies by unresponsive system owners or operators.

A viable system, then, "is one which is self-sustaining; has the commitment; and has the financial, managerial, and technical capability to reliably meet performance requirements on a long-term basis."⁵ There are proposals in Congress to adopt this concept through amendments to the SDWA. The law would be amended to prohibit the establishment of new public water systems unless viability can be ensured. This may be done by requiring a permit, bond or an assurance from some other governmental entity that compliance with the SDWA will be maintained. States would be required, as a condition of receiving state revolving funds or grants, to prepare a long-term plan providing for consolidation or regionalization of existing nonviable systems.

Some of the key elements of viability programs are:

1. Water Supply Planning. Effective planning may reduce the demand for the small water system. The planning process engaged in by several states designates water systems' present and future service areas. The process is used to determine whether there is a need for a new system and to specify how to achieve future system development and expansion most efficiently. The goal of such planning is to develop compatible design standards so future interconnections are possible and promote the sharing of facilities by adjacent systems.
2. Permit Application Process. The process for permitting of new facilities can provide an opportunity for a state to evaluate systems before installation. The review may consist of an analysis of the financial, managerial, and technical qualifications of all small system owners with periodic updates. An applicant could be required to develop a business plan. The business plan is a screening mechanism to identify nonviable entities. It could include:
 - A facilities plan that describes the proposed facilities' rehabilitation and replacement needs as well as future needs to meet SDWA requirements;
 - A management plan that describes measures to ensure performance of those functions necessary to properly administer the systems; and

⁵ State Initiatives to Address Non-Viable Small Water Systems in Pennsylvania, Wade Miller Associates, Inc., August 1991, p. 2-6.

- A financial plan that demonstrates adequate revenues to meet cash flow requirements, adequate limited capitalization and access to additional capital to meet contingent needs. This information is usually reviewed by the permitting authority (e.g., Health Department) or the public utilities commission and in some states by both agencies.
3. Satellite Systems. States that have a water supply planning process encourage satellite agreements in which operators of large systems, with the capacity to expand, will take over ownership of a small private system or will provide management and operation services under contract. In the latter instance the contractor provides technical assistance in his role as a "circuit rider."
 4. Financial Assistance. Several states which promote area-wide water supply planning by counties, provide financial assistance to localities. Because the costs of such planning are high, states have awarded matching grants for such activities as the formation of water authorities, water supply planning, wellhead protection, and studies to determine the feasibility of regionalization or consolidation of water supply systems. In a number of states, grants are also made to (i) municipally owned water companies for the planning, design, modification or construction of drinking water facilities made necessary by the SDWA; (ii) water companies for treatment of contaminated water supply wells; and (iii) investor-owned water companies which serve fewer than 1,000 customers, for emergency assistance to restore service. Typically, grant programs are financed by the state through a bond issue.
 5. Other Viability Measures. A number of states have enacted statutes aimed at ensuring the reliable delivery of water service by requiring certain financial assurances, and receivership or takeover authority. Specific examples include:
 - Requiring escrow accounts in which funds are deposited by the system's owner sufficient to cover repair and replacement of the highest-cost water treatment plant unit. Some states require that a second account be established with sufficient funds to ensure initial operation and maintenance. This requirement would expire when the water system becomes self-sufficient.
 - Requiring a demonstration of financial responsibility by the owner, either in the form of a bond, letter of credit or cash deposit, to ensure that the system is built.
 - Ordering a private water company or a municipally operated system to temporarily manage or take over the operation of a system. This power is invoked when the state has to intervene to protect water system customers from public health risks. A system would be subject to such action if it had

repeatedly violated drinking water regulations and failed to comply with a SCC notice and an administrative order.

B. Viability Programs of Selective States

The states which have adopted extensive viability programs water systems are treated similarly to other public services by having to demonstrate a need exists before being able to establish new facilities. In states such as Washington, Connecticut, and Maryland, many of the key elements described in the previous section are closely linked. Plans developed for area-wide water service are used to (i) determine whether there is a need for new systems and (ii) specify how to achieve future water system development and expansion most efficiently. The permit process is used to control small system creation by encouraging interconnections and satellite operations whenever possible. If interconnections or satellite management is not found to be feasible, the permitting authority ensures the viability of the proposed system through financial, operational, and managerial revenues.⁶ The following is a description of several state viability programs.

1. Connecticut

A severe drought in 1980 resulted in water shortages in several regions of Connecticut which drew attention to small system owners' and operators' lack of financial and human resources and the need for better water supply management. A Water Resources Task Force, formed in 1984-1985, recommended three pieces of legislation that established a viability control program. The program's objective is to restrict the creation of new small systems by promoting interconnections and satellite management, and by decreasing the number of existing nonviable small systems through the use of receivership and acquisition statutes. The program consists of (i) a comprehensive water supply planning requirement, modeled after Washington's program, (ii) a joint certification process for new systems, administered by Connecticut's Department of Health Services (DOHS) and the Department of Public Utility Control (DPUC), and (iii) takeover laws also jointly administered by these two agencies.

The Connecticut Plan for Public Water Supply Coordination establishes "exclusive service areas" for existing utilities, using an area-wide planning approach. The utility accepts responsibility for all new and existing water systems in its service area, thereby reducing demand for new potentially nonviable small systems. A water system plan is developed which consists of area supplement and individual water system plans. The supplement defines service area boundaries for the regions, evaluates the water systems in the management area, and describes area-wide supply issues. All water companies serving more than 1,000 customers, and any water systems specifically requested by the DOHS, are required to write

⁶ Ensuring the Viability, pp. iv-v.

individual plans. Each plan must describe the company structure and assets, existing sources and their safe yields and performance; the current population served; and service projections for five, 20 and 50 years. Companies are also required to define future service areas.

Two state agencies, DOHS and DPUC, are responsible for regulating the state's public drinking water supply. Together, they have the authority to restrict small system creation. As its primary responsibility, DOHS ensures the adequacy of the state's water quality and quantity. In carrying out this function, it has final approval power over the individual water supply plans and, because of its technical expertise, reviews proposed projects, long-range water supply plans, water quality charts, and permits. DPUC regulates the rates of all public service companies, including water companies serving more than 50 customers. In conjunction with DOHS, it has authority to approve a certificate of public convenience and necessity for the creation or expansion of any water system serving 25 to 1,000 persons.

The joint DOHS and DPUC certification process for new systems provides the state with the authority to control the formation of new systems. This certification power extends to all proposed water systems, regardless of ownership. The certification process established an expressed first preference for providing service to new areas through connections to existing systems. The creation of a new water system is allowed only when the state determines that an interconnection or a satellite system is not feasible. If such a determination is made, the technical, managerial, and financial qualifications of the owners are then evaluated by the state as part of the approval process. Connecticut law further discourages the creation of small systems by requiring municipalities which approved a new system without having obtained a certificate from the state to be responsible for the operation of such a system if the system is unable to provide adequate service.

To protect the customers of existing systems, DPUC and DOHS have the option of invoking various takeover laws which place a failing system into receivership or authorize acquisition by another system. If DPUC determines, after notice and a hearing, that a water company is unable or unwilling to provide adequate service to its customers, the agency can petition the court for an order attaching the company's assets and placing it under the sole control and responsibility of a receiver (Conn. G.S. § 16-262L). In a related procedure, DPUC, the municipality served by a water company, or an organization representing 20 percent of the company's customers can petition the court for an order attaching the company's assets and placing it in receivership if the (i) company has failed to supply water to consumers for at least five days during the preceding three months, (ii) Department of Health Services determines that the company has not met the drinking water standards, or (iii) the petitioner has reasonable cause to believe the customers have not received and are unlikely to receive adequate service due to gross mismanagement of the company. Upon the filing of the petition, the company has to show cause why such an order of attachment and receivership should not be

issued. If the company is placed in receivership and the receiver finds there has been a misappropriation or wrongful diversion of company assets or income, the court can order compensatory damages.

Connecticut laws also authorize the acquisition of water companies which do not provide adequate service. If DPUC and DOHS find that a water company has failed to comply with orders concerning the availability or potability of water, a hearing may be held to determine what actions should be taken. One option is the acquisition of the water company by the most suitable public or private entity. DPUC, in consultation with DOHS, after determining that the costs of improvements to and acquisition of the water company are "necessary and reasonable," can order acquisition by the most suitable company. The acquiring company may recover, through its rate structure, all reasonable costs. The acquired company has the right to be compensated in an amount agreed upon by the parties involved, subject to approval by DPUC and DOHS (Conn. G.S. §§ 16-262N through 16-262Q).

2. Maryland

Maryland is considered to have the strongest controls on the development and operation of small systems. Maryland uses its county water supply planning program and a rigorous permit process to ensure the viability of new and existing small water systems. Each county is required to develop comprehensive area-wide water supply plans which identify service areas, service needs over the next 10 years, and methods for financing each new system. The plans must be approved by the Maryland Department of the Environment (MDE) and are updated every two years. MDE may refuse to issue any permit for construction or alteration of a water system that does not submit a plan or correct inadequacies of its plan. In addition to its plan review and approval authority, MDE may "require that community water supply systems be constructed to allow the connection of those systems to a larger system, if that system becomes available."⁷

Prospective owners of private community systems have to provide certain financial and operational assurances. Under the "Requirements for Proposed Privately Owned Water Systems," owners of such systems must submit (i) a financial management plan to MDE, detailing estimated operating costs and revenues, and (ii) an operation and maintenance plan. Both of these plans have to be developed with the concurrence of county officials. Privately owned systems also must deposit sufficient funds into an escrow account to cover future operation and maintenance, and system repair and replacement. The state can waive this requirement if there is a binding agreement between the developer and the county under which the developer, owner, or builder of the new private system will eventually transfer the system to public ownership.

⁷ Annotated Code of Maryland, § 9-510 (a) (5).

With respect to regulatory authority over existing systems, MDE may investigate existing water systems to determine if they are operating efficiently and are meeting state and federal water quality standards. If a system is not being properly maintained and represents a potential public health risk, MDE may appoint a new manager or order system alternatives or extensions. The costs of upgrading the system can be assessed against the system's owner.

3. Washington

In Washington the development of viability measures for small water systems was driven by the rapid growth in population and development pressures of the 1970s. These changes resulted in an inefficient pattern of small water system development. In response, the state formulated a drinking water program which uses its drinking water supply planning process and its permit requirements to discourage the creation of new small systems and encourage the consolidation of existing nonviable systems. Enactment, in 1977, of the Public Water System Condemnation Act gave counties a significant role in the planning and development of water supply systems. The Act established a planning process for counties to (i) delineate present and future water system service areas, (ii) establish minimum design and fire flow standards, (iii) plan future water system development, (iv) develop procedures for authorizing new systems, (v) develop shared or joint use of facilities agreements, and (vi) develop satellite support systems to provide management, operations, and maintenance assistance to small systems. The local planning effort results in service area pacts among the existing water systems, approved by both the county and Washington's Department of Social and Health Services (DSHS), to provide water service to a defined area. These agreements allow water utilities to identify their respective areas and plan for the future, thereby eliminating competition, duplication, and inefficient extension of facilities. Minimum design standards are intended to make future systems extensions easier by ensuring compatibility. Developers are also required to meet these design specifications. It is anticipated that such measures will result in lower operating, maintenance, and replacement costs.

Among the most successful of the Act's provisions is the establishment of satellite systems. These satellite systems offer small systems that lack revenue and technical expertise, a method for ensuring the reliability, quantity, and quality of the water supply. Under this system responsibility is transferred from the owner of a small system to another entity capable of providing service. Presumably, there should be savings in operations and management costs because of the economies of scale involved when a large system takes over the operation of a smaller one. DSHS recommends that municipal corporations be the entities that provide satellite support because of their financing capabilities.

Another form of shared service is the joint use of facilities, an arrangement by which individual water systems having quantity or quality problems agree to share facilities. The most common example of this type of arrangement is the interconnection of two systems. Water utilities may also share water sources, reservoirs, or storage tanks.

While the local government plays an essential role in water system planning, the state continues to have an oversight responsibility. Project reports must be submitted to DSHS for written approval before the installation of any new water system, expansion of an existing system, or construction of system improvements. These reports contain an operations program, engineering calculations, long-term management plans, a description of how the system will be operated and maintained, and an environmental impact statement, all of which help to ensure that a viable system is constructed. Further assurance is provided by "reliability" regulation, a provision applying to any proposed water system or expansion. It requires that "systems be constructed, operated, and maintained to protect against failures of the power, supply, treatment process, equipment, or structure with appropriate back-up facilities."⁸

4. Highlights of Viability Measures in Other States

Arizona -- The Department of Water Resources requires persons developing a residential subdivision with more than 200 units, before any units can be sold, to obtain a Certificate of Assured Water Supply that includes either a bond, letter of credit, or cash deposit. This is done to ensure that the system will be built. After the subdivision is constructed, the remaining funds in the account are returned to the developer.

California -- California recently enacted legislation which requires a demonstration of financial responsibility as a condition for receiving an operating permit for public water systems. The demonstration is to be in such an amount so as to provide for ongoing operation, maintenance, and upgrading of the system, including compliance with the monitoring and treatment requirements as well as any contingencies. For privately owned systems not regulated by DPUC, the financial assurance may be a trust fund, letter of credit, security bond or other equivalent mechanism. Because DPUC has adopted stringent standards for demonstrating financial viability, during the past 10 years no water company has obtained a certificate of public convenience and necessity. Among the data which have to be submitted are expected revenue, expenses, depreciation, and operational plans.

⁸ Washington Administrative Code, § 248-54-201, Office of Environmental Health Programs, DSHS, May 1988.

Michigan -- Michigan law contains provisions that require privately owned water systems serving groups of dwelling units (e.g., subdivisions) to deposit funds into an escrow account; however, these systems are allowed to be constructed only if the locality in which the system is to be located refuses to accept ownership. If such responsibility is not assumed by the local government, the state agency may require, as a condition of assurance for a construction permit, that the developer place money in an escrow account. The size of the account depends on the number of units proposed but cannot be less than \$5,000 or more than \$50,000.

Pennsylvania -- In 1991, Pennsylvania contracted with Wade Miller Associates, Inc., to study viability assurance methods. The state was interested in developing a cost model and screening method that examine cost of service based on full costs of accounting. Although a financial model or assurance test has not yet been developed, the state is considering a requirement that new community water systems submit a business plan. The plan would include a facilities plan, a management plan, and a financial plan. The facilities plan would describe the physical scope of the plant; estimate construction, operation and maintenance costs; and assess the plant's ability to meet future compliance requirements. The management plan would identify the plant's managers and operations and include a plan for administration, operation and maintenance, as well as assurances to properly operate through cooperative agreements, if needed. The financial plan would seek to assure regulators that the current revenue is sufficient to operate the system and the owner has the ability to raise adequate capital. While these measures were being developed, the legislature enacted a statute which authorizes the awarding of grants for the formation of water authorities, county water supply planning/wellhead protection and small water system regionalization.

IV. COMMISSION DELIBERATIONS

A part of its examinations of the issues raised by HJR 652, the Commission sought testimony from (i) officials of agencies charged with the responsibility of regulating private water companies, (ii) affected customers, and (iii) representatives of the industry.

A. Testimony of State Regulators

At the state level, the operation of private investor-owned water systems is regulated by the State Health Department and the State Corporation Commission. Dr. Suzanne Dandoy, Deputy Commissioner of Health, discussed her agency's role in ensuring that Virginia residents have safe drinking water. She identified as a major problem the increasing number of regulations being added to the SDWA. These additional mandates are placing a financial and operational burden on small waterworks. However, by law, EPA as well as the states cannot consider the

financial impact of their regulations on small systems. The Department is limited in its authority to address the viability of waterworks. It can only assure that when the water system is proposed, it is designed, constructed and operated in a manner which protects the public's health. In 1980, the Department was authorized by statute to require waterworks owners to post bond or deposit funds in order to ensure the continued operation of the waterworks in instances of abandonment by a system owner. However, the Department found that no bonding company would provide such coverage for environmental health issues. A negative reaction to the escrow requirement, combined with the unavailability of such coverage, resulted in the agency not requiring owners to demonstrate financial responsibility. The Department, according to Dr. Dandoy, is again considering required escrow accounts, but has postponed any final action pending the outcome of the Commission's deliberations.

As partial solutions to the problems she discussed, Dr. Dandoy made the following recommendations:

- The General Assembly should ask Congress to consider the economic impact of regulations on both small and large waterworks.
- The State Water Commission should continue to study the viability issue. If a decision is made to develop economic viability criteria, the Department would like to play a role in establishing such criteria.
- The General Assembly should provide additional funds to the Virginia Water Supply Revolving Fund. These funds would then be allocated to those local governments willing to take over the operation of failing investor-owned waterworks.
- The General Assembly should amend the statutes (§ 62.1-233 et seq.) authorizing the Fund to allow for signature loans, in amounts not to exceed \$40,000.

For water systems not currently regulated, the Department recommends that:

- The Code be amended to allow local governments to regulate small systems through local ordinances. To assure conformity the Department would be given authority to establish minimum criteria.
- The State Water Commission consider prohibiting the construction of drinking water systems that serve multiple connections unless they meet the current definition of waterworks (15 connections or 25 people).

The SCC regulates private water companies as public utilities. Ms. Debra Ellenberg, SCC Deputy General Counsel, presented an overview the agency's jurisdiction and discussed some of the problems related to the operation of small water companies. The SCC currently oversees the operation of 70 water companies, a majority (59 percent) of which serve 200 or fewer customers. The agency's

jurisdiction extends to those privately owned companies serving 50 customers or more that began operation after January 1, 1970. These companies must receive a certificate of public convenience and necessity, which gives them the exclusive right to operate within an agency-delineated area. The companies are subject to the entire range of the SCC's regulatory authority, including rate and quality of service requirements. Although companies serving fewer than 50 customers are not defined as public utilities and therefore not subject to SCC regulatory jurisdiction, companies which serve 10 or more customers must receive SCC approval before abandoning service to the customers. When the SCC reviews an application for a certificate it examines (i) the company's organizational structure to ensure it will conduct its business as a public utility, (ii) whether the company is in good standing with the Health Department, and (iii) the reasonableness of the rate structure.

Water companies with revenues of less than one million dollars may increase their rates without a public hearing, so long as they notify their customers 45 days before the date of the proposed increase. This abbreviated procedure is authorized under the Small Water or Sewer Public Utility Act. Under the provisions of this act, a public hearing on the rate request must be held if requested by the smaller of 250 customers or 25 percent of the company's customers. The SCC also may initiate a hearing upon its own motion. The water utilities with revenue over one million dollars are subject to the same rate-making procedures as other public utilities and, therefore, are prohibited from using the abbreviated rate-making process.

Ms. Ellenberg identified a number of problems associated with the operation of certificated water companies including frequent outages, the unpleasant taste and odor of the water, inferior piping, limited water supply and storage capacity, an inability to raise capital for needed improvements, and operating incapability. The SCC has the ability to respond to some of the service problems in using either rate or show cause proceedings. It can order necessary improvements and has exercised its authority to fine companies for failure to comply with agency directives. The agency has a limited number of options when a company does not comply with agency directives. It can revoke a certificate but the water company retains its assets, while the customers lose their water service. The SCC does not have the authority to place the company in receivership.

B. Problems Associated With the Operation of Small Water Systems: Customers' Perspective.

The Commission received testimony regarding the operation of water companies serving two residential subdivisions. A homeowner in the Oak Park subdivision in Madison County discussed residents' efforts to resolve their water problems. Their water has an unpleasant taste, and contains iron and manganese, substances that have discolored white and pastel clothing. The residents have discussed the problem with the system's owner, who has suggested that the problem could be

addressed by a rate increase. The rates were subsequently raised in September. The increase is currently being reviewed by the SCC as part of the company's certification process. The homeowners considered the option of installing individual filters, but that would have cost each homeowner \$600. The system operator informed the residents that the installation of such filters would increase each resident's bill \$91 per month. Consequently, the residents examined the option of forming a homeowners association to operate the system. Faced with the prospect of having to comply with new EPA drinking water mandates, they decided against taking over the system. There is concern among residents that the increasing cost of water will eventually cause many to lose their homes. While Madison County has refused to take over operation of this system, it has required any new system created in the county to be operated by the Rapidan Public Service Authority.

Senator R. Edward Houck discussed similar problems experienced by the Lake Wilderness property owners' association. In 1987, 68 customers began having water service problems, such as extended periods of receiving no water, low water pressure, dirty and foul-smelling water, and water-related damage to appliances and clothing. At that time a SCC hearing officer found serious problems with the water company's operation. Six years later, the property owners have still not received relief from these problems, according to Senator Houck. The original 68 disaffected customers have increased to more than 600 individuals. Senator Houck raised the question of how a system can grow 10-fold when it was already experiencing operational problems.

C. Operation of Private Investor-Owned Water Systems: Operators' Perspective.

Several operators of private investor-owned systems discussed issues surrounding the operation of small systems. Mr. Bob Jebson, President of Environmental Systems, testified that developers use the availability of a central water system to maximize the yield from land sales. In many instances these systems are poorly constructed. Once the land is sold, the developer has little or no interest in maintaining or upgrading the system. In order to make the land more attractive, the developer establishes property covenants that limit the fees for water service. However, such fees do not provide the funds necessary to meet the increasing demands placed on system owners as a result of new federal drinking water standards. Mr. Jebson suggested that the financial burden placed on small systems could be alleviated by instituting a separate regulatory scheme for small systems and by making financial assistance available to the owners of such systems.

While situations similar to the one discussed by Mr. Jebson make the acquisition of small private systems unattractive investments, problems with small

systems are not primarily a function of the type of ownership (i.e., private vs. public), the size, or even the age of system. According to Mr. Jesse Royall, Jr., Vice President of Sydnor Hydrodynamics, other factors play a more significant role in determining the success of a water system's operation. First, it is important that the original design of the system take into account the prospects for growth and have the flexibility to adjust to changes in regulatory requirements. Second, owning and operating a water system are not part-time activities. It is essential that owners understand the system's operation and be able to financially manage the facility. Third, the quantity of the source of the water supply may change over time; thus, owners must plan and allow for capital expenditures and the hiring of qualified personnel to oversee the design and operation of the system. Last, many small systems, due to the lack of full-time staff, are unable to maintain compliance with the SDWA. It is very costly to retain additional personnel to respond to changing regulatory requirements. Whether such requirements are administrative or technical, the costs of compliance are more than customers are willing to pay.

To remedy these problems, Mr. Royall recommended the following:

- Minimum standards, including demonstration of the financial strength of water system ownership, should be established.
- Separate financial accounting of utilities from other business activities should be required.
- The state revolving loan fund should be capitalized and available to private systems.
- State laboratory funding for water quality tests should be increased.
- Regional management of small systems should be encouraged.
- Significant legislation should not be introduced until efforts of professional associations and proposed changes in federal law have been considered.
- Control over the formation of unregulated systems through the adoption of minimum standards should be established.

D. Costs of Providing Drinking Water

Mr. Jason Gray, Manager of Environmental Programs for the Virginia Water Project, discussed the cost of providing drinking water to a small service population. His organization has been able to install indoor plumbing and develop drinking water systems for rural low-income communities in a very cost-effective manner by providing a combination of financial and technical assistance. Mr. Gray estimated the component costs of a small drinking water system to be the following: (i) water well, \$15,000-\$25,000, depending on the geology of the area, (ii) chlorination tank, \$15,000-\$20,000, and (iii) storage tank \$50,000-\$75,000. The total capital costs could be as low as \$80,000 or as high as \$120,000. Added to this total is the cost of the distribution system, which typically is \$25-\$35 per foot of water line. The cost of testing for water quality is currently paid for by the state's Consolidated

Laboratory; however, the costs of a new testing requirement for Phase II contaminants may not be paid for by the state. Such tests could be \$8,000-\$10,000 per well. In addition to these costs, there is \$50,000 in annual operating costs which includes employment of a licensed operator. Mr. Gray reiterated the fact that many small systems (i) have inadequate financial and operational management, (ii) are operated by owners who either lack the interest or the ability to manage these systems, and (iii) typically serve a low income population and, therefore, have a limited capacity to generate the revenue needed to maintain the system.

Congress has recognized the financial impact that new drinking water requirements have had on the operation of water systems, particularly small systems, and has responded by proposing the creation of a drinking water revolving loan fund. This fund is patterned after the existing wastewater revolving fund, and similarly will require a 20-percent state match. The U.S. Senate recently began work on an appropriation bill that allocates \$600 million for FY 1994, and one billion dollars for each of the next four years, to finance the revolving fund.

Mr. Gray concluded his testimony by recommending that:

- Water systems serving between two and 15 connections be regulated as a semipublic classification of waterworks. Such systems would be tested for bacteria and nitrates; however, if such systems install a class II well, they will be exempt from such testing.
- Funding for the Division of Consolidated Laboratory be increased.
- Managerial and financial capacities (viability) be major criteria in deciding whether to approve an operating permit for a water system. Such criteria should be developed by the Health Department in consultation with the SCC.
- All water systems be required to establish escrow accounts for operations, maintenance, and capital improvements.
- The feasibility of periodic review and renewal of permits be examined.
- The relative merits of regional or cooperative management of small nonconnected systems be explored.

V. Findings and Recommendations

Amendments to the SDWA have imposed new mandates on those entities providing drinking water services to Virginia's citizens. The additional expense of meeting these requirements has affected the operation of all water systems whether public or private; however, no water provider has felt the impact of the new regulatory requirements more than the small private investor-owned water companies. The ability of these companies to reliably deliver drinking water which meets federal as well as state standards depends, in large measure, on how effective

they are in overcoming certain obstacles which characterize operations of small water companies: (i) the absence of economies of scale; (ii) a lack of technical knowledge and ability; and (iii) limited access to capital. The inability of a system's owner/operator to address these factors will severely limit his capacity to complete needed construction or facility upgrading and at the same time provide for contingencies.

Testimony received by the Commission indicated that while many small systems are complying with the provisions of the SDWA, others are having difficulty or are unable to consistently provide safe drinking water. As evidence presented to the Commission shows, small systems, particularly small private investor-owned systems, are responsible for the vast majority of the violations of drinking water regulations. Some have suggested in testimony before the Commission that the apparent direct relationship between the size of the system and the number of violations justifies expanding the state's authority to regulate systems which serve fewer than the current threshold of 15 connections or 25 individuals. Rather than expand the current regulatory scheme, the Commission finds merit in adopting a policy which seeks to determine the viability of these small private investor-owned water companies. Such a policy would provide a regulatory agency, in this instance the SCC, with the additional tools that will enable it to (i) identify those small systems which are having, or may have, technical, financial or managerial weakness that could render them incapable of complying with the SDWA regulations and (ii) intervene in instances where there have been chronic deficiencies in performance by unresponsive system owners or operators. Therefore, the Commission recommends that the General Assembly enact the following measures:

Recommendation #1: Amend the Utility Facilities Act to require any company proposing to construct facilities, on or after January 1, 1995, which intends to make water service available to more than 50 residential building lots, to seek a certificate of public convenience and necessity from the SCC. The application for the certificate would include a comprehensive business plan detailing the technical, managerial and financial resources which would be devoted to the operation of the service. A certificate would not be granted by the SCC unless the comprehensive business plan reasonably ensures that system performance requirements for providing drinking water can be met over the long term at reasonable costs (SB 453, Appendix C).

Recommendation #2: Authorize the SCC to appoint a receiver to operate a small water utility which is unable or unwilling to provide adequate service to its customer. A small utility would be deemed unable or unwilling to provide adequate service if any one of the following has occurred:

- The utility has failed to supply water service to consumers for five days or more during the preceding three months;
- The Department of Health has certified that the utility has not met the Department's water quality standards for drinking water;
- The utility is grossly mismanaged; or
- The utility has failed to comply with an SCC order.

When there is an immediate and serious danger to customers and the utility is unwilling or unable to provide adequate service, the SCC would be authorized to appoint a temporary receiver for a period not to exceed 60 days. The proposed legislation also empowers the SCC to (i) require the payment of restitution in instances of misappropriation or wrongful diversion of the assets or income of the utility and (ii) assess a civil penalty of \$5,000 for misappropriation or willful diversion of funds (SB 138, Appendix D).

Recommendation #3: Authorize the SCC to suspend rate increases of small water utilities for up to 60 days. The proposed legislation would also limit these companies to one rate increase per year (applications for emergency rate increases would be exempt) and would require the companies to file a schedule of their rates and charges with the SCC. This proposal, suggested by the SCC, would close a loophole in the Small Water and Sewer Public Utility Act. Under the Act, small water companies are able to raise their rates without having to go through the more extensive procedure for rates and charges required of larger public service companies. As a result, small water companies may raise rates without SCC approval. The SCC, on its own motion or upon receiving a petition of a certain number of customers, can, after the fact, initiate a proceeding to review the increase. If it finds that the increase is unreasonable it may order a refund. However, according to testimony by SCC officials, by the time the agency has issued such an order, the company has instituted another increase. This results in a cycle of "show cause" hearings followed by company rate increases. The Commission as well as the SCC believes that the recommended legislation will put an end to this cycle (SB 147, Appendix E).

While acknowledging that the majority of small privately operated water companies have been able to reliably supply water to their customers at reasonable costs, the Commission has documented instances where this has not apparently been the case. Enactment of the proposed legislation will provide the SCC with additional tools for assessing the capabilities of those seeking to operate small water companies; and for protecting consumers. The effective implementation of these recommendations will require a greater degree of cooperation and

coordination between the SCC and Health Department than has been evidenced in the past. The Commission recognizes that these measures, although limited, are a significant first step in addressing the issues facing both operators and customers of small private water companies.

Respectfully submitted,

Delegate Lewis W. Parker, Jr., Chairman
Senator Charles J. Colgan, Vice-Chairman
Delegate Watkins M. Abbitt, Jr.
Delegate J. Paul Councill, Jr.
Delegate Glenn R. Croshaw
Delegate James H. Dillard II
Delegate William P. Robinson, Jr.
Delegate A. Victor Thomas
Delegate Clifton A. Woodrum
Senator Elmo G. Cross, Jr.
Senator Clarence A. Holland
Senator Robert E. Russell, Sr.
Senator Stanley C. Walker
The Honorable J. Granger Macfarlane

APPENDICES

APPENDIX A
1993 SESSION

LD9032198

HOUSE JOINT RESOLUTION NO. 652

Offered January 26, 1993

Requesting the State Water Commission to study drinking water systems owned by developers or operated by home owner associations.

Patrons—Davies, Connally, Cooper, Councill, Parker, Thomas, Van Yahres and Wilder;
Senators: Houck, Robb and Walker

Referred to the Committee on Rules

WHEREAS, the State Department of Health is charged with the responsibility of establishing regulations which ensure that all water systems which serve the public provide safe drinking water to Virginians; and

WHEREAS, the Department of Health currently regulates all water systems that provide "...piped water for drinking or domestic use to (i) the public, (ii) at least fifteen connections or (iii) an average of twenty-five individuals for at least sixty days out of the year" (Virginia Code § 32.1-167); and

WHEREAS, the United States Congress, in 1986, adopted amendments to the Safe Drinking Water Act and mandated standards for 83 specified contaminants; and

WHEREAS, estimates are that waterworks owners will face an annual cost of between \$51 million and \$143 million for monitoring and treatment to comply with the new regulations; and

WHEREAS, small systems most frequently experience the lack of resources (money and qualified staff) and management expertise necessary to comply with the new requirements; and

WHEREAS, the lack of resources and expertise, coupled with aging infrastructure, underdesigned and undersized systems, increasing numbers of regulated compounds, and antiquated equipment, further reflects the problems associated with the operation of small systems; and

WHEREAS, 900 of the approximately 1,200 very small systems (serving fewer than 500 people) are classified as private investor-owned or homeowner association-operated waterworks; and

WHEREAS, many of these systems are owned by persons engaged in unrelated businesses (e.g., real estate development, or apartment or manufactured home park ownership) who find responsibility for these waterworks to be a "nuisance," according to a Department of Health report (House Document No. 30, 1990); and

WHEREAS, the Virginia Housing Study Commission in its 1992 Annual Report notes that an increasing number of manufactured home park residents have expressed concern about unsafe drinking water provided them by park operators; and

WHEREAS, the Virginia Housing Study Commission, following public hearings and study has made recommendations pursuant to such concerns and referred such recommendations to the State Water Commission; and

WHEREAS, this situation in several instances has resulted in the abandonment of small water systems by owners or operators; and

WHEREAS, local government has been reluctant to assume responsibility for operating abandoned systems; now, therefore, be it

RESOLVED by the House of Delegates, the Senate concurring, That the State Water Commission study the operation of small private investor-owned and homeowner association-operated water systems. The Commission as part of its study should (i) analyze the component expenses of the overall costs of providing drinking water including the costs associated with financing, capital improvement, maintenance, monitoring and testing; (ii) examine ways to ensure that owners operating small water systems are financially and technically capable of operating such systems, and (iii) determine what alternatives should be available to customers in instances of abandonment by the owner or operator or where

1 the operator fails to provide safe drinking water to customers.

2 All agencies of the Commonwealth shall provide assistance to the Commission for this
3 study as appropriate.

4 The Commission shall complete its work in time to submit its findings and
5 recommendations to the Governor and the 1994 Session of the General Assembly as
6 provided in the procedures of the Division of Legislative Automated Systems for the
7 processing of legislative documents.

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LD5538198

HOUSE BILL NO. 2070

Offered January 26, 1993

A BILL to amend the Code of Virginia by adding in Chapter 5 of Title 18.2 a section numbered 18.2-111.2 and in Chapter 6 of Title 32.1 an article numbered 2.2, consisting of sections numbered 32.1-176.8 and 32.1-176.9, relating to misapplication of fees for private water systems: penalty.

Patrons—Davies, Connally, Cooper, Councill, Orrock, Parker, Van Yahres and Wilder;
Senators: Houck, Robb and Walker

Referred to the Committee on Health, Welfare and Institutions

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding in Chapter 5 of Title 18.2 a section numbered 18.2-111.2 and in Chapter 6 of Title 32.1 an article numbered 2.2, consisting of sections numbered 32.1-176.8 and 32.1-176.9, as follows:

§ 18.2-111.2. Misapplication of water fees; penalty.—If any person knowingly applies or disposes of any water fees other than as required by § 32.1-176.9, he shall be guilty of a Class 2 misdemeanor.

Article 2.2.

Private Water Systems.

§ 32.1-176.8. Definitions.—As used in this article:

“Customer” means any individual who obtains water for domestic use from a private water system.

“Domestic use” means normal family or household use, including flushing toilets and drinking, laundering, bathing, cooking, heating, and cleaning.

“Governmental entity” means the federal government, the Commonwealth, a town, city, county, service authority, sanitary district, or any other governmental body established under state law, including departments, divisions, boards or commissions.

“Owner” means an individual, group of individuals, partnership, firm, association, or corporation which supplies or proposes to supply water to any person within this Commonwealth from or by means of any private water system, but shall not include (i) any governmental entity or (ii) any public utility subject to regulation by the State Corporation Commission pursuant to Chapter 10 (§ 56-232 et seq.), Chapter 10.2 (§ 56-256.10 et seq.), and Chapter 10.2:1 (§ 56-265.13:7 et seq.) of Title 56.

“Private water system” means a system that serves piped water for domestic use to more than one separately metered household connection and shall include all structures, equipment and appurtenances used in the storage, collection, purification, treatment and distribution of water except the piping and fixtures inside of the building where such water is delivered. “Private water system” shall not include any private well, as defined in § 32.1-176.3.

“Water fees” means any rates, fees, deposits, penalties, and other charges paid by a customer to an owner for the services furnished or to be furnished by a private water system.

§ 32.1-176.9. Application of water fees; penalty.—All water fees received by an owner shall be deemed to be trust funds, to be held and applied by the owner only for the purposes of (i) paying the cost of maintaining, repairing and operating the private water system, including reserves for such purposes and for the replacement and depreciation of the private water system, (ii) paying any charges assessed by a governmental entity or public service corporation for the cost of water purchased by the owner and resold to customers via the private water system, (iii) paying the cost of constructing the improvements which are part of the private water system, including all labor and material, the cost of all lands, property, rights, easements, franchises, and permits acquired which are deemed necessary for such construction, the cost of all machinery equipment.

1 and financing charges, the cost of engineering and legal expenses, plans, specifications,
2 and such other expenses as may be necessary or incident to such construction, and (iv)
3 providing a margin of safety for making such payments.

4 Any person who violates any provision of this section is guilty of a Class 2
5 misdemeanor.

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APPENDIX C
1994 SESSION

LD4938633

SENATE BILL NO. 453
Offered January 25, 1994

A BILL to amend and reenact § 56-265.1 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 56-265.3:1, relating to certificates to furnish water and sewer service.

—————

Patrons—Colgan, Cross, Holland, C.A., Russell and Walker; Delegates: Abbitt, Council, Dillard, Robinson, Thomas and Woodrum

—————

Referred to the Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That § 56-265.1 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 56-265.3:1 as follows:

§ 56-265.1. Definitions.

In this chapter the following terms shall have the following meanings:

(a) "Company" means a corporation, an individual, a partnership, an association, a joint-stock company, a business trust, a cooperative, or an organized group of persons, whether incorporated or not; or any receiver, trustee or other liquidating agent of any of the foregoing in his capacity as such; but not a municipal corporation or a county.

(b) "Public utility" means any company which owns or operates facilities within the Commonwealth of Virginia for the generation, transmission or distribution of electric energy for sale, for the production, transmission, or distribution, otherwise than in enclosed portable containers, of natural or manufactured gas or geothermal resources for sale for heat, light or power, or for the furnishing of telephone service, sewerage facilities or water; however, the term "public utility" shall not include any of the following:

(1) ~~Any~~ Except as otherwise provided in § 56-265.3:1, any company furnishing sewerage facilities, geothermal resources or water to less than fifty customers. Any company furnishing water or sewer services to ten or more customers and excluded by this subdivision from the definition of "public utility" for purposes of this chapter nevertheless shall not abandon the water or sewer services unless and until approval is granted by the Commission or all the customers receiving such services agree to accept ownership of the company.

(2) Any company generating and distributing electric energy exclusively for its own consumption.

(3) Any company (A) which furnishes electric service together with heating and cooling services, generated at a central plant installed on the premises to be served, to the tenants of a building or buildings located on a single tract of land undivided by any publicly maintained highway, street or road at the time of installation of the central plant, and (B) which does not charge separately or by meter for electric energy used by any tenant except as part of a rental charge. Any company excluded by this subdivision from the definition of "public utility" for the purposes of this chapter nevertheless shall, within thirty days following the issuance of a building permit, notify the State Corporation Commission in writing of the ownership, capacity and location of such central plant, and it shall be subject, with regard to the quality of electric service furnished, to the provisions of Chapters 10 (§ 56-232 et seq.) and 17 (§ 56-509 et seq.) of this title and regulations thereunder and be deemed a public utility for such purposes, if such company furnishes such service to 100 or more lessees.

(4) Any company, or affiliate thereof, making a first or direct sale, or ancillary transmission or delivery service, of natural or manufactured gas to fewer than ten commercial or industrial customers, which are not themselves "public utilities" as defined in this chapter, for use solely by such purchasing customers at facilities which are not located in a territory for which a certificate to provide gas service has been issued by the Commission under this chapter and which, at the time of the Commission's receipt of the

1 notice provided under § 56-265.4:5, are not located within any area, territory, or jurisdiction
2 served by a municipal corporation that provided gas distribution service as of January 1,
3 1992, provided that such company shall comply with the provisions of § 56-265.4:5.

4 (5) Any company which is not a public service corporation and which provides
5 compressed natural gas service at retail for the public.

6 (c) "Commission" means the State Corporation Commission.

7 (d) "Geothermal resources" means those resources as defined in § 45.1-179.2.

8 § 56-265.3:1. Certificates to furnish water and sewer service.

9 Any company proposing to construct facilities after January 1, 1995, ultimately
10 intended to make water or sewer service available to more than fifty residential building
11 lots shall, prior to construction or financial commitments therefor, organize a public
12 service corporation and seek certificates of public convenience and necessity pursuant to
13 §§ 56-265.2 and 56-265.3. The application for such certificates shall include (i) a
14 comprehensive business plan detailing the technical, managerial and financial resources to
15 be devoted to operation of the water or sewer service; (ii) proof of receipt of, or
16 application for, a permit for the facilities pursuant to Virginia Department of Health
17 requirements under Article 2 (§ 32.1-167 et seq.) of Chapter 6 of Title 32.1; and (iii) such
18 other information as is now or hereafter deemed appropriate by the Commission, including
19 proof of the issuance of a bond or the deposit of funds in escrow as may be required by
20 the Department of Health pursuant to § 32.1-174.1. Certificates of public convenience and
21 necessity shall not be granted by the Commission unless, in addition to the findings
22 required by §§ 56-265.2 and 56-265.3, it also finds that the comprehensive business plan
23 presented in the application reasonably assures that system performance requirements for
24 providing water supply can be met over the long term and at reasonable costs. The
25 Commission may issue such certification with any conditions or restrictions as public
26 interest may require.

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Official Use By Clerks	
<p>Passed By The Senate</p> <p>without amendment <input type="checkbox"/></p> <p>with amendment <input type="checkbox"/></p> <p>substitute <input type="checkbox"/></p> <p>substitute w/amdt <input type="checkbox"/></p>	<p style="text-align: center;">Passed By</p> <p>The House of Delegates</p> <p>without amendment <input type="checkbox"/></p> <p>with amendment <input type="checkbox"/></p> <p>substitute <input type="checkbox"/></p> <p>substitute w/amdt <input type="checkbox"/></p>
Date: _____	Date: _____
Clerk of the Senate	Clerk of the House of Delegates

APPENDIX D
1994 SESSION

LD4939633

SENATE BILL NO. 138
Offered January 19, 1994

A BILL to amend the Code of Virginia by adding a section numbered 56-265.13.6.1. relating to the appointment of a receiver for small water and sewer public utilities; penalty.

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Patrons—Colgan, Cross, Holland, C.A., Russell and Walker; Delegates: Abbitt, Council, Croshaw, Dillard, Robinson, Thomas and Woodrum

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Referred to the Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 56-265.13.6.1 as follows:

§ 56-265.13.6.1. Appointment of receiver; penalty.

A. The Commission may, either upon petition of twenty-five percent or 250 of the affected customers, whichever is less, or upon petition of its staff, appoint a receiver to operate a small water or sewer utility which is unable or unwilling to provide adequate service to its customers. The utility shall be deemed to be unable or unwilling to provide adequate service if the Commission finds, after notice to the utility and hearing, that:

1. The utility has failed to supply water or sewer service to consumers for five days or more during the preceding three months; or

2. The Virginia Department of Health has certified that the utility has not met Department standards regarding the quality of public drinking water; or

3. The utility is grossly mismanaged; or

4. The utility has failed to comply with an order of the Commission.

Upon appointment, the receiver shall take possession of the assets of the utility and operate them in the best interests of the customers. Control of and responsibility for the utility shall remain in the receiver until the utility can, in the best interests of customers, be returned to the original owners, transferred to new owners, or liquidated, whichever the Commission may determine to be in the public interest.

B. If a petition of the Commission staff with verifying affidavits alleges that (i) there is an immediate and serious danger to customers and (ii) the utility is unwilling or unable to provide adequate service, the Commission may appoint a temporary receiver ex parte, pending notice and hearing and appointment of a receiver pursuant to subsection A. Such ex parte appointment shall be limited to a period of not longer than thirty days. However, the thirty-day period may be extended by Commission order for a period not to exceed an additional thirty days.

C. The provisions of §§ 8.01-583 through 8.01-590 shall apply mutatis mutandis.

D. If the Commission determines that the utility's actions that caused it to be placed under the control and responsibility of the receiver, under this section, were due to misappropriation or wrongful diversion of the assets or income of such utility or to other willful misconduct by any director, officer, or manager of the utility, it may require such director, officer, or manager to make restitution to the utility. In addition to the foregoing, any such director, officer, manager, or affiliate that commits such misappropriation or wrongful diversion or fails, neglects, or refuses to obey an order, rule, direction, or requirement of the Commission to make restitution to the utility shall be subject to a civil penalty of no more than \$5,000 for each offense, and each day of such conduct shall constitute a separate offense.

APPENDIX E
1994 SESSION

LD4941633

SENATE BILL NO. 147
Offered January 20, 1994

A BILL to amend and reenact §§ 56-265.13:5, 56-265.13:6, and 56-265.13:7 of the Code of Virginia, relating to notice of rate changes for small water and sewer public utilities.

Patrons—Colgan, Cross, Holland, C.A., Russell and Walker; Delegates: Abbitt, Council, Croshaw, Dillard, Robinson, Thomas and Woodrum

Referred to the Committee on Commerce and Labor

Be it enacted by the General Assembly of Virginia:

1. That §§ 56-265.13:5, 56-265.13:6, and 56-265.13:7 of the Code of Virginia are amended and reenacted as follows:

§ 56-265.13:5. Notice of rate changes.

A. A small water or sewer utility shall make a copy of its current rates, charges, fees, rules and regulations available for public inspection during regular business office hours in its designated business office where bills can be paid.

B. A *Unless a* small water or sewer utility shall ~~notify~~ *notifies* in writing all of its customers of any changes in its rates, charges, fees, rules and regulations at least forty-five days in advance of any change in any one of them, *the utility shall not make any such changes.* A copy of such notification shall be forwarded to the Commission at the same time as provided to the customers. The notice to the customers shall identify the nature of the change, the effective date of the change, and in the case of changes in rates, fees, and charges, shall identify the new rates, fees, and charges.

§ 56-265.13:6. Public hearing on application; prohibition of multiple rate increases within any twelve-month period.

A. Upon application to the Commission by at least twenty-five percent of all customers affected by a rate change or by 250 affected customers, whichever number is lesser, or by the small water or sewer utility itself, or by the Commission, upon its own motion, a hearing shall be held after at least thirty days' notice to the small water or sewer utility and to its customers. The Commission may order such improvements or changes in service, regulations, measurements, practices, acts, and rates of such utility as are just and reasonable.

When a hearing is ordered, the Commission shall have the authority to ~~declare suspend~~ such rates, tolls, and charges *for no more than sixty days and to declare them to be interim thereafter* and subject to refund with interest until such time as the Commission has made its final determination in the proceeding. Upon completion of the hearing and decision, the Commission may order such public utility to refund, with interest at a rate set by the Commission, the portion of such rates, tolls, or charges found not justified by its decision.

B. The ~~rates or charges~~ *customers* of a small water or sewer utility shall not be ~~increased~~ *notified of an increase in the utility's rates or charges* more than once within any twelve-month period. This limitation shall not ~~apply to~~ *prohibit applications for* increases in rates or charges pursuant to § 56-245.

§ 56-265.13:7. Regulation by State Corporation Commission.

A. Every small water or sewer utility subject to this chapter shall be subject only to the following provisions: §§ ~~56-233.1~~ 56-234.4, ~~56-235.1~~, 56-236, 56-239, 56-245.1, 56-246, 56-247.1 through 56-248, 56-249 through 56-249.2, 56-250, 56-254, 56-256 through 56-265, and Chapters 1 (§ 56-1 et seq.), 2 (§ 56-47 et seq.) and 10.1 (§ 56-265.1 et seq.) of Title 56. Small water or sewer utilities shall not be subject to Chapters 3 (§ 56-55 et seq.) and 4 (§ 56-76 et seq.) of Title 56.

B. The Commission is authorized to promulgate any rules necessary to implement this chapter.