

Department of Legislative Services
Maryland General Assembly
2020 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1128 (Delegate Gilchrist, *et al.*)
Environment and Transportation

Environment – Water Quality Certifications – Requests
(Water Quality Certification Improvement Act)

This bill (1) requires a person seeking a “water quality certification” to submit a request to the Maryland Department of the Environment (MDE); (2) establishes minimum requirements for such a request; (3) establishes procedural review requirements for MDE; (4) authorizes a person who meets certain requirements to petition for judicial review of a final determination by MDE on the issuance, denial, or conditioning of a water quality certification; and (5) requires MDE to adopt implementing regulations, as specified.

Fiscal Summary

State Effect: MDE expenditures may be significantly affected, as discussed below. No effect on total capital spending, but funding for other capital projects is reduced due to any capital costs incurred due to the bill’s changes. Any increase in petitions for judicial review and any increase in contested case hearings can likely be handled with existing resources.

Local Effect: To the extent that a local government undertakes a project that requires a water quality certification, project costs may increase. The bill is not anticipated to materially affect the operations or finances of the circuit courts. Local revenues are not affected.

Small Business Effect: Minimal. It is unlikely that small businesses undertake projects affected by the bill; thus, the bill is not anticipated to have a meaningful economic impact on small businesses.

Analysis

Bill Summary: “Water quality certification” means a water quality certification requested in accordance with § 401 of the federal Clean Water Act (CWA).

Request for a Water Quality Certification

This bill requires a person who is seeking a water quality certification to submit a request for the certification to MDE. A request must include (1) a description of all activities and infrastructure associated with the project; (2) project boundaries; (3) the distance of all proposed structures from the waters of the State; (4) construction access and methodology; (5) names and addresses of adjacent property owners; (6) county or State setbacks, rights-of-way, or easements that apply to the project site; (7) a description of all potential direct or indirect discharges from the project into the waters of the State; (8) a calculation of the amounts of pollution for each potential direct or indirect discharge from the project into the waters of the State and drinking water sources; (9) an identification of any waters of the State that may be affected by the project activities or are within the boundaries of the project; (10) a groundwater map (if required by MDE); (11) an evaluation of the project’s compliance, including direct and indirect discharges associated with the project, with applicable State water quality requirements, as specified (including antidegradation alternative analyses for Tier II waters that may be impacted by the project); (12) the anticipated effects that increased rainfall, sea level rise, and storm surges will have on water quality once the project is complete and for the duration of the project’s federal license; (13) a statement that meets the purpose and need statement requirements under § 401 of CWA and demonstrates that the project’s benefit to the public outweighs the project’s detriment to the public; (14) copies of all environmental information submitted to a federal agency for the project; and (15) an identification of any risk management or other actions that the requestor proposes to take in order to mitigate the project’s impact on the waters of the State.

MDE Review of Requests for Water Quality Certifications

Upon receipt of a request, MDE must begin review immediately and issue a decision on the request in accordance with the timeline for environmental review provided under CWA. MDE may issue a water quality certification with additional conditions and must deny a request if MDE is unable to affirm that the project will not adversely impact water quality.

MDE must (1) provide a 45-day public comment period for a request and (2) review all comments made within 30 days after the public comment period ends. Upon request, MDE must make a draft water quality certification (that includes specified summary information) available to all interested parties, unless doing so would exceed the timeline for environmental review under CWA. MDE must permanently post on its website (1) notice

of a receipt of such a request; (2) a draft water quality certification, if available; and (3) the issuance of a water quality certification.

If a request is denied, the requestor may resubmit the request, and if this happens, the timeline for environmental review under CWA begins again.

Judicial Review of MDE's Final Determination

A final determination by MDE on the issuance, denial, or conditioning of a water quality certification is subject to judicial review upon request of any person that (1) has legal rights, duties, interests, or privileges that are different from those of the general public and that are adversely affected by MDE's decision; (2) resides in the State; or (3) has a principal place of business in the State. A petition for judicial review must be filed (1) in writing; (2) within 30 days of the issuance, denial, or conditioning of the water quality certification; and (3) with the circuit court for the county in which the request indicates the project will occur (unless otherwise required by statute).

Required Regulations

MDE must adopt implementing regulations that (1) establish a process to request a water quality certification; (2) provide for the withdrawal of a request, as specified; (3) specify the circumstances under which a request must include groundwater mapping and require groundwater mapping under certain circumstances; (4) specify acceptable actions for risk management, as specified; and (5) specify a public comment period for a draft water quality certification that allows MDE to make a decision on the request within the timeline for environmental review provided under CWA.

Current Law:

Federal Clean Water Act

The federal CWA establishes the basic structure for regulating discharges of pollutants into the waters of the United States. Section 401 of CWA requires an applicant for a federal license or permit to conduct an activity which may result in a discharge to navigable waters to provide a certification that the discharge will comply with CWA, including water quality standards established under state law. A state may grant, grant with conditions, deny, or waive certification. A state's determination is based on whether an activity complies with key provisions of CWA, including federal effluent limitations, federal new source performance standards, toxic and pretreatment effluent standards, and any other appropriate requirement of state law. A state must act on a request for water quality certification "within a reasonable time (which shall not exceed one year) after receipt of such request." The time runs from the request for certification.

State Water Quality Certifications

COMAR 26.08.02.10 sets forth the procedures under which a water quality certification is issued by MDE, including procedures for applying for a water quality certification and procedures for providing public notice of each application for a certification. Under the regulation, if MDE determines a proposed activity will not violate applicable State water quality standards, MDE must issue the certification. The conditions of the water quality certification become automatic conditions in the federal permit or license.

Maryland's High Quality Waters (Tier II)

Tier II, high quality, waters are those that have an existing water quality that is significantly better than the minimum requirements, as specified in water quality standards. Federal antidegradation regulations ([40 CFR 131.12](#)) require states to develop and adopt a statewide antidegradation policy that protects all waters of the United States from degradation. These regulations also require states to maintain the condition of high quality (*i.e.*, Tier II) waters that have water quality that is better than the minimum standard necessary to meet designated uses. Maryland's antidegradation implementation policies and procedures are found under COMAR 26.08.02.04-1.

Background: On August 22, 2019, the U.S. Environmental Protection Agency (EPA) issued a [proposed rule](#) that would make sweeping changes in how states (and certain tribes) implement § 401 of CWA. EPA characterizes the proposed changes, issued pursuant to Executive Order [13868](#), as “the EPA’s first comprehensive effort to promulgate federal rules governing the implementation of CWA section 401.” The proposed rule “is intended to increase the predictability and timeliness of section 401 certification by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures.” EPA had previewed some of these changes in its updated § 401 [guidance document](#), issued on June 7, 2019. The public comment period for the proposed rule ended October 21, 2019.

State/Local Fiscal Effect: MDE did not respond to requests by the Department of Legislative Services for information regarding the potential fiscal effect of the bill in time for inclusion in this fiscal and policy note. However, given the breadth of the required review process regarding water quality certifications, the bill may result in a significant increase in MDE’s expenditures. The bill is silent with regard to any potential review fees, so this analysis assumes there is no material impact on State revenues.

Although the bill has no effect on total capital spending, which is established annually by the Governor and the General Assembly through the capital budget process, funding for other capital projects may be reduced due to any capital expenditures incurred as a result of the bill. The Department of General Services advises that since the bill increases the

timeline for project review for capital projects that require a water quality certification, general project costs increase for State capital projects. It is assumed that local capital projects are similarly affected.

The bill may result in additional petitions for judicial review in the State's circuit courts. However, this is not anticipated to materially affect the finances or operations of the circuit courts. The Office of Administrative Hearings anticipates that the office can handle any increase in contested case hearings with existing budgeted resources.

Additional Information

Prior Introductions: None.

Designated Cross File: None.

Information Source(s): Baltimore City; Prince George's County; Maryland Association of Counties; City of Bowie; Maryland Municipal League; Judiciary (Administrative Office of the Courts); University System of Maryland; Public School Construction Program; Department of Budget and Management; Department of General Services; Department of Natural Resources; Maryland Department of Transportation; Office of Administrative Hearings; Public Service Commission; Department of Legislative Services

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