Testimony in Support of House Bill 1128 – Environment – Water Quality Certifications – Requests ('Water Quality Certification Improvement Act')
Position: Favorable with Sponsor Amendments

February 28, 2020

Dear Chairman Barve and Members the Committee:

Thank you for this opportunity to submit testimony in support House Bill 1128, which seeks to improve Maryland's process for reviewing and deciding upon projects that trigger the need for a Clean Water Act Section 401 Water Quality Certification ('401 WQC'). Maryland Waterkeepers, along with the undersigned organizations, are committed to ensuring a healthy Chesapeake Bay watershed, and understand the importance of ensuring a thorough, yet efficient, state 401 WQC review process.

Section 401 is the single most powerful authority granted to states under the Clean Water Act (CWA). It is the only mechanism for states to have a say in proposed projects, like dams and interstate pipelines, that are federally licensed, but could negatively impact state waterways. It grants states the ability to "certify" whether a major, federally-licensed project, like a pipeline or dam, will have an impact on state water quality standards. States ultimately can approve a project, approve with conditions, deny, or waive the "Water Quality Certification." Denial of Water Quality Certification means that the state is certain a proposed project will have a negative impact on local waterways. States rarely deny certification, and instead, place permit-like conditions on the project.

In Maryland, the requirement for a section 401 WQC is triggered for about 2200-2500 applications or requests a year for dredge and fill activities. Roughly 95 percent of those are covered under the Maryland's State Programmatic General Permit (MDSPGP-5). About 5 percent of those requests, or 100-200, are larger projects that trigger further action by the Maryland Department of the Environment (MDE). With these 100-200 requests, MDE must thoroughly review the potential water-pollution impacts from the project and address those through permit conditions, or deny 401 WQC. The more thorough process for the 100-200 applications is often referred to as "individual permit" or "individual water quality certification."

The intention of House Bill 1128 is seven-fold: (1) to improve, update, and codify the basic information that MDE needs at the outset for 401 WQC requests so that MDE has all the information it needs to make a determination about whether a project will negatively impair Maryland's water quality standards; (2) to establish public notice for draft individual WQCs and final individual WQCs, along with improved public notice for 401 WQC requests; (3) to establish public comment for projects that require an individual WQC (i.e. approx. 100-200 significant projects a year); (4) to ensure that both MDE and the 401 WQC applicant are considering the anticipated effects that increased rainfall, sea level rise, and storm surges will

have on water quality, in addition to the anticipated project pollution discharges; (5) to create a more efficient and streamlined process so that MDE can expedite its review of these 401 WQC requests; (6) to improve the appeal process for final Water Quality Certifications issued by the state by bringing it in line with the appeal process for the Wetlands & Waterways Permits, among other environmental laws, and; (7) to respond to EPA's Proposed Rule that seeks to limit state authority to review and issue 401 WQCs in a number of ways.

1. Background

Courts have overwhelmingly affirmed the broad authority that the CWA grants to states and tribes to review and determine the fate of certain federal projects that would negatively impact local waterways.[1] States have wielded the authority given to them through the CWA with increasing efficacy in the last few years to prevent a handful of projects from being developed within their borders, because those projects would have had lasting impacts on the quality of their local waterways. However, the U.S. Environmental Protection Agency (EPA) submitted a Proposed Rule in August 2019 in response to a presidential Executive Order that aims to significantly limit the state's abilities to make 401 determinations.[2] The Proposed Rule received close to 125,000 comments from the public, including a very strong oppositional letter from Secretary Ben Grumbles of MDE, stating the Proposed Rule would

> ***undermine state authority and jeopardize the ability of states to protect their waters from pollution associated with federally permitted activities... EPA puts forth a series of constraints on state implementation of CWA 401 that are contrary to law…and fundamentally different from the positions EPA has taken over the past 40 plus years in overseeing the implementation of CWA Section 401. The cumulative effect of these constraints is to substantially diminish the authority reserved by Congress to the states to protect their waters from pollution***.[3]

The Proposed Rule, when finalized, will significantly erode state authority under the CWA by: (1) preventing states from denying projects that will, as a whole, directly and negatively impact the state's water quality; (2) preventing states from placing conditions on projects that relate to the overall water quality impacts of a project, rather than just the specific "discharge" from the project; (3) restricting the time available to states and tribes to review and make decisions about

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[1] See *S.D. Warren Co. v. Maine Board of Environmental Protection, et. al* (2006)("State certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now §401 was first proposed: "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements." 116 Cong. Rec. 8984 (1970). These are the very reasons that Congress provided the States with power to enforce "any other appropriate requirement of State law," 33 U. S. C. §1341(d). by imposing conditions on federal licenses for activities that may result in a discharge…)

[2] See Docket ID EPA-HQ-OW-2019-0405-0025 Updating Regulations on Water Quality Certification

[3] See full comment letter from MDE attached ('MDE Comment Letter')

major projects impacting their local waterways; and, (4) providing an outsized role for federal agencies in the WQC process, in the name of economic development. The Proposed Rule would grant substantial discretion to the federal government to force multi-state projects through, without state or local buy-in. If finalized as is, the Proposed Rule would represent a major shift in how Section 401 under the Clean Water Act is implemented and enforced by states and tribes.

2. House Bill 1128 -- Basic Contents of a 401 WQC Request (See 9-354, 9-357)

In MDE's Comment Letter on the Proposed Rule, Secretary Grumbles stated, "[t]here is no question that states have the legal authority regulate the quality of their waters more stringently than federal law might require." Secretary Grumbles went on to say, "[i]f the narrow requirements of the Proposed Rule are adopted, these requests are likely to include inadequate information…" In this vein, House Bill 1128 would define the minimum requirements for a Water Quality Certification "request," and require MDE to publish regulations that fully specify what contents are needed for a 401 WQC request. This would (1) put the applicant or requestor on notice for what information MDE needs to make a thorough assessment of the project's associated water pollution impacts, and (2) expedites the process by ensuring MDE receives all the information necessary to approve, approve with conditions, or deny certification for any given project at the outset.

Much of the information specified in House Bill 1128 under this section is already required under existing regulation[4] or in MDE's Guidance titled "Key Elements under Maryland Regulations for a Request/Application for a CWA 401 Water Quality Certification (COMAR 26.08.02.10)." House Bill 1128 does require applicants to submit a few additional pieces currently not required, but they are not burdensome (i.e. listing any applicable county or state setbacks, rights of way, or easements that apply to the project site). One additional requirement for the 401 WQC request under House Bill 1128 was made in the vein of updating the regulations, which were last updated in 2001, in light of potential water quality impacts that could arise due to climate change. We feel strongly that predicted impacts (i.e. increased sea level rise and rainfall/storm events, etc.) should be considered by both MDE and the 401 WQC project requestor or applicant. Some of the bill language is also tailored to put more of the burden on the applicant to identify, quantify, and evaluate all associated pollution impacts. This eases the administrative burden on MDE.

Lastly, when criticizing the Proposed Rule and discussing how it would lead to a scenario where project applicants submitted inadequate information, Secretary Ben Grumbles stated, "Examples of such omitted information include (i) a description and quantification of water quality impacts; (ii) the extent of discharges; (iii) methods of construction; and (iv) potential post-construction discharges." Much of this information, which MDE considers to be essential to making the 401 WQC determination, would be codified in this section of House Bill 1128.

3. House Bill 1128 -- Timeline for Reviewing 401 WQC Requests (See 9-354)

[4] COMAR 26.08.02.10

EPA's Proposed Rule stipulates that the one-year "CWA clock" for states to make a decision on a water quality certification begins when the state receives the initial request, even if an incomplete request was submitted. In its comment on the Proposed Rule, MDE responded by saying, "[i]t is unreasonable to start the time period for a state certification decision before a state has been given substantially all of the information needed to make that decision." EPA's Proposed Rule went even so far as to say that the recommended timeline for review for many projects is 60 days, which MDE has already begun to follow, even though it largely has been asking for extensions due to the required 45-day notice period for all 401 WQC projects. The language in this section re-affirms the Clean Water Act's timeline for review, which is stated to be one year. Currently, the one-year clock begins after the appropriate state agency receives a "complete application." State agencies have the authority to determine when the application is deemed complete.

In addition to affirming the timelines under the federal Clean Water Act, the language in this section is needed because it's unclear how states can do their due diligence in ensuring that a project won't dramatically impact local water quality without having all the relevant information to make that determination.

4. **House Bill 1128 -- Requiring Denial for Certain 401 WQC Requests (See 9-354)**

House Bill 1128 requires Maryland to deny 401 WQC requests if MDE is "unable to affirm that the project will not adversely impact water quality." Hopefully there would not be a scenario where MDE would approve a 401 WQC request when it was unable to affirm that the project would not adversely impact water quality, even with conditions placed on the WQC. This would not be in line with the Clean Water Act or Maryland's regulation in COMAR 26.08.02.10. In this regulation, it states: **"**The Federal Act *prohibits the issuance of a federal permit or license* to conduct any activity which may result in any discharge to *navigable waters* unless the applicant provides **a certification from this State that the activity does not violate State water quality standards or limitations**...If the Department determines the proposed activities will not cause a violation of applicable State water quality standards, the Department shall issue the water quality certification." In a similar vein, over the last few years New York denied the 401 WQC request for the construction of the Constitution Pipeline because it was unable to affirm that the project would not adversely impact the state's water quality standards. We feel it is important to clarify a protective standard in Maryland and prevent projects from moving forward until MDE has all the information it needs to make a clear determination one way or the other.

5. **House Bill 1128 -- Improving Public Notice (See 9-355); New Comment (See 9-355) and Appeal Requirements (See 9-356)**

House Bill 1128 would improve the public notice and comment process by requiring requests for certification, draft Water Quality Certifications, and final Water Quality Certifications to be posted on the Department's website. Currently, only the 401 WQC request is required to be publicly noticed through either "(a) Joint notice with the federal permitting agency; (b) Joint notice with other State agencies; or (c) Selected mailings to State, county, or municipal authorities and other parties known

to be interested in the matter."[5] Most of the time the Department publishes notice in the Maryland Register and follows a 45-day notice period. To streamline the process, we feel that public notice could be improved by also providing notice for the draft WQC and final WQC. It's important that the public is aware of the major projects that require an individual WQC to ensure the MDE has all the information on hand to make a thorough determination. In that vein, we also feel strongly that the 100-200 projects a year that require an individual WQC be subject to a public comment period.

Finally, House Bill 1128 would improve the appeal process for final Water Quality Certifications issued by the state by requiring that appeals work through the state's Administrative Procedure Act.[6] Currently, there is vague language in COMAR 26.08.02.10 that first requires any person aggrieved by a WQC decision to file an appeal in the office of administrative hearings. However, in the experience of Waterkeepers, WQC decision appeals have been held in limbo for years, without any clear rules or timelines for when decisions have to be made. Without exhausting all state remedies, many would-be appellants are not able to file in federal court. This prevents any true remediation or appeal process for Maryland-issued WQC decisions. House Bill 1128 would rectify this scenario and bring the appeal process in line with other similar permits and laws.

6. Conclusion

For the reasons outlined above, we urge the Committee to adopt a favorable report on House Bill 1128.

Sincerely,

Betsy Nicholas
Executive Director
Waterkeepers Chesapeake

Katlyn Schmitt
Legal & Policy Director
Waterkeepers Chesapeake

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[5] COMAR 26.08.02.10
[6] State Government Article, §10-201 et seq., Annotated Code of Maryland

Legislative Director
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President
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Mark Posner
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Maryland
Department of
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Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor

Ben Grumbles, Secretary
Horacio Tablada, Deputy Secretary

October 21, 2019

The Honorable Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Docket ID EPA-HQ-OW-2019-0405-0025
Updating Regulations on Water Quality Certification

Dear Administrator Wheeler:

As Secretary of the Maryland Department of the Environment (MDE), I have been asked by Governor Larry Hogan to provide comments on the above-referenced proposed rule (Proposed Rule) governing water quality certification under Section 401 of the Clean Water Act (CWA), which was promulgated by the Environmental Protection Agency (EPA) on August 22, 2019.

Maryland has previously expressed, in its April 15, 2019 letter to EPA, the strong recommendation that changes to regulations implementing the CWA not undermine Maryland's progress and substantial investment of state resources in restoring the Chesapeake Bay. This includes concern over changing the definition of "Waters of the United States" in a manner which would threaten downstream state water quality. MDE believes that Maryland's progress could be further hindered by the Proposed Rule.

The Proposed Rule, issued by EPA in response to Executive Order 13868, would, if finalized and upheld, undermine state authority and jeopardize the ability of states to protect their waters from pollution associated with federally permitted activities. There is no question that states have the legal authority regulate the quality of their waters more stringently than federal law might require.[1] Yet, in this proposed rule, EPA puts forth a series of constraints on state implementation of CWA Section 401 that are contrary to law and fundamentally different from the positions EPA has taken over the past 40 plus years in overseeing the implementation of CWA Section 401. The cumulative effect of these constraints is to substantially diminish the authority reserved by Congress to the states to protect their waters from pollution.

In particular, by altering the scope of CWA Section 401 certification review, and granting authority to federal permitting agencies to review and effectively "approve" or "disapprove" state–issued

[1] *See* 33 U.S.C. §1311(b)(1)(C) (permitting states to impose "any more stringent limitation" to achieve water quality) and *PUD No.1 of Jefferson Co. v. Wash. Dept. of Ecology*, 511 U.S. 700, 723 (1994) (stating that the CWA "explicitly recognizes States' ability to impose stricter standards").

certifications, the Proposed Rule has the effect of transferring decision-making authority from the states to the federal permitting agencies. Such a fundamental change could only be made by Congress.

This cover letter summarizes MDE's major concerns, which are described in greater detail in Attachment 1. Some of these comments were previously submitted by MDE and other states in response to Executive Order 13868.

1. **Reduction of State Authority**

MDE strongly objects to the cumulative impact of the proposed changes, as they are an unlawful reduction of state authority reserved to states by Congress. The Proposed Rule weakens state authority and does not comport with Congressional intent in the CWA to "recognize, preserve, and protect the primary responsibilities and rights *of States* to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.[2]

2. **Increase in Federal Oversight**

The Proposed Rule creates a new oversight role for the federal permitting or licensing agency that is not articulated anywhere in CWA Section 401. The legislative history of the CWA reflects that Congress intended *no federal role* in the review and "approval" of state certification decisions under Section 401. The Proposed Rule nonetheless gives the federal permitting or licensing agency the authority to determine whether a denial of a Section 401 certification is based on reasons "within the scope of section 401," and it gives the federal permitting or licensing agency the authority to determine whether a state-imposed condition satisfies EPA's proposed definition of a "water quality requirement." MDE objects to these provisions, as this authority is not articulated in the CWA and the legislative history is clear as to Congressional intent that the appropriate venue for a challenge to a state certification decision is *state* review in *state* court.

Subpart E of the Proposed Rule states that EPA "may, and upon request shall, provide federal agencies, certifying authorities, and project proponents with assistance regarding determinations, definitions and interpretations with respect to the meaning and content of water quality requirements, as well as assistance with respect to the application of water quality requirements in particular cases and in specific circumstances concerning a discharge from a proposed project or a certified project." This language impermissibly expands the role Congress has established for EPA in CWA Section 401(b). The legislative history makes clear that Congress did not intend that EPA have any authority to independently review state certifications, and that Section 401(b) was intended to limit EPA's role to cases where a state has *requested* assistance.

[2] 33 U.S.C. §1251(b) (emphasis added).

3. Reduction in the Scope of State Review & Certification

a. Point Source Issue

CWA Section 401 requires certification for any federally-permitted activity that may result in a "*discharge* to navigable waters."[3] While it is well established that the term "discharge" is broader than the term "point source,"[4] the Proposed Rule limits state certification review to discharges from a point source. MDE objects to this proposal because it is contrary to the plain language of the CWA and related Supreme Court decisions.

b. Definition of Water Quality Requirements

The Proposed Rule limits the scope of state review to assuring that a discharge from a federally licensed or permitted activity will comply with applicable provisions of CWA Sections 301, 302, 303, 306 and 307 and *only* EPA-approved state or tribal CWA regulatory program provisions. This contradicts the language of CWA Section 401(d), which requires that certifications include conditions to assure compliance with "any applicable effluent limitations and other limitations, under 1311 or 1312 of this title, standard of performance under section 1316 of this title or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, *and with any other appropriate requirement of state law*" (emphasis added). MDE strongly disagrees with this proposal because it is contrary to the purpose of CWA Section 401, which is to ensure that *state* requirements for water quality—not solely federally approved state requirements for water quality—are met by federal permittees/licensees.

4. Mandate on States to Develop the Least Stringent Condition

The Proposed Rule requires states to include in any Section 401 certification that contain conditions a "statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements." There is nothing in the statutory language or legislative history that suggests that Congress intended to place this burden on states. Even if such a requirement was legal under the CWA, it introduces a new analytical step in the certification process that will make it more difficult for states to act expeditiously on applications for water quality certifications.

5. Impacts on Other Jurisdictions

The Proposed Rule states that "the Administrator *at his or her discretion* may determine that the discharge from the certified project may affect water quality in a neighboring jurisdiction" (emphasis added). This conflicts with CWA Section 401(a)(2), which requires EPA to notify neighboring states "whenever a discharge may affect, as determined by the Administrator, the quality of the waters of any other State." Nothing in the language of the CWA supports a conclusion that this requirement is discretionary.

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[3] 33 U.S.C. §1341(a)(1) (emphasis added).
[4] *See S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) (concluding that the term "discharge" is broader than "point source").

MDE is also concerned about the lack of articulated criteria to ensure that the EPA Administrator accurately determines whether there may be an effect on water quality in another state. Such criteria should be provided in regulation, and they should address how EPA would determine when there *may* be an impact to another state, the information that EPA must provide to states, and a requirement to develop operating procedures with individual states to ensure effective implementation of this important provision of the CWA.

6. Review Process Flaws

The Proposed Rule prescribes a list of what is to be included in a certification request, but based on MDE's experience regulating water quality matters, the list lacks basic information that would likely be necessary for a state to appropriately and efficiently render a decision on the request. Examples of such omitted information include (i) a description and quantification of water quality impacts; (ii) the extent of discharges; (iii) methods of construction; and (iv) potential post-construction discharges. States should be permitted to define what information is needed for a "complete" application, including project-specific information identified in pre-request meetings.

The Proposed Rule defines the start of the "reasonable period of time" for state decisions as the date the certification request is made. As described above, if the narrow requirements of the Proposed Rule are adopted, these requests are likely to include inadequate information. It is unreasonable to start the time period for a state certification decision before a state has been given substantially all of the information needed to make that decision.

The Proposed Rule states that, if the federal permitting agency receives the state certification decision prior to the end of the "reasonable period of time" and finds it deficient, the federal permitting agency may offer the state the opportunity to remedy the deficiency—but if not remedied in time, the federal agency will declare "waiver." The Proposed Rule does not establish any timeframe in which the federal permitting agency must provide a state this opportunity for a remedy. In order for such an opportunity to be meaningful, the federal permitting agency must be required to act promptly, and to give the state as much time as possible to respond.

MDE suggests that EPA focus on revisions that will ensure a more efficient 401 certification review process by states, including: (a) requiring applicants for federal permits or licenses to communicate with state authorities before the submittal of a request for Section 401 certification to obtain a list of necessary project-specific information; (b) requiring applicants for federal permits or licenses to submit all information that a state requires when the request for certification is made; (c) establishing the date that a state acknowledges that all the necessary information has been provided as the date of receipt of the Section 401 request; (d) allowing states up to six months to conduct their review with provisions for extension for up to an additional six months if a state requests the additional time; and (e) allowing states to deny certification in the event that an applicant fails to provide the required information that would allow a state to affirm that water quality-related requirements of state law have been met.

The Proposed Rule also undermines efficient review for federal consistency under the Coastal Zone Management Act (CZMA). Federal consistency review under the CZMA provides states with an

important tool to manage coastal uses and resources, to facilitate cooperation and coordination with federal agencies, to work with nonfederal entities seeking federal approval and authorizations, and to balance competing interests such as energy development, tourism, recreation, and ecological protection. The Proposed Rule does not consider interactions of 401 certification and CZMA. MDE recommends that the timeframe for Section 401 review should never be shorter than the CZMA federal consistency period (6 months)—particularly for activities in the coastal zone.

7. Pre-request Procedures for Administrator Certifications

MDE supports required pre-application meetings/communications and early coordination and identification of potential issues and information needs as EPA has prescribed for certifications performed by the Administrator. MDE supports EPA placing into regulation similar requirements for "applicants" for Section 401 certification.

8. Factual Errors Regarding Maryland Review Process for Conowingo Dam

There is also one matter that MDE respectfully requests that EPA correct for the record. The preamble to the Proposed Rule includes an incorrect description of the factual circumstances surrounding the State of Maryland's review process for the water quality certification for the re-licensing of the Conowingo Dam hydroelectric project. It describes the Conowingo water quality certification process as an example of a situation where: "certifying authorities have requested 'additional information' in the form of multi-year environmental investigations and studies…before the authority would begin review of the certification request." As support for this statement, footnote 44 cites the opinion of the U.S. District Court for the District of Columbia in *Exelon Generation Co. v. Grumbles,*[5] claiming that the "State of Maryland's request for a multi-year sediment study resulted in Exelon withdrawing and resubmitting its certification request multiple times to prevent waiver while the company completed the study."[6]

The court's opinion in *Exelon* did not address the issue of waiver. Rather, the State of Maryland had filed a motion to dismiss based on numerous grounds, including venue. The court's opinion denied the motion to dismiss *as to venue only*;[7] the remainder of the motion remains pending. To the extent court's opinion describes the Conowingo certification application process at all, it relies exclusively on the factual allegations of Exelon's complaint, which the court must accept as true solely for the purposes of ruling on a motion to dismiss. The court did not make any independent determination on the truthfulness of those allegations.

MDE also rejects the assertion that the applicant in the Conowingo matter withdrew its request for a water quality certification "to prevent waiver." At the time the applicant withdrew its request, MDE had unequivocally stated its intent to *deny* the request due to insufficient information provided with respect to the impacts of the activity on water quality.[8] The applicant could have allowed MDE to

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[5] 380 F. Supp. 3d 1; 2019 WL 1429530 (D.D.C. 2019).
[6] 84 Fed Reg. 44114.
[7] The State has filed a motion for reconsideration of the court's ruling as to venue, which is pending.
[8] Public Notice, Department of the Environment solicits comment, schedules public hearing on Water Quality Certification application for proposed Conowingo Dam relicensing, Md. Dep't of the Env't (Nov. 18, 2014).

proceed with the denial, then challenged the denial through appropriate judicial means. Instead, the applicant voluntarily withdrew the request, presumably to avoid that outcome.[9]

MDE remains available to coordinate with EPA on improvements to the CWA Section 401 certification process. Please do not hesitate to contact me or Mr. Lee Currey at lee.currey@maryland.gov for additional information and questions.

Sincerely,

Ben Grumbles
Secretary

cc: Jeannie Haddaway-Riccio, Secretary, Maryland Department of Natural Resources
Tiffany Waddell, Senior Advisor & Director, Federal Relations
Maryland Congressional Delegation

Attachment

[9] The request was resubmitted shortly thereafter, consistent with longstanding policy of the Federal Energy Regulatory Commission allowing license applicants to withdraw requests for water quality certifications, provided that a new request is submitted within 90 days.