



Testimony of Chesapeake Utilities Corporation in Opposition to HB 1128

February 28, 2020

Section 401 of the Clean Water Act (“CWA”) provides that a federal agency, or a State operating pursuant to delegated authority pursuant to CWA Section 402(b), cannot issue a permit on any activity that may result in a discharge into navigable waters unless the State where the discharge originates certifies that the discharge meets the State’s water quality standards or limitations. If the State fails or refuses to act on the request for certification “within a reasonable period of time (which shall not exceed one year) after receipt of the request” the State is deemed to have waived the certification requirement. *See* CWA Section 401(a)(1). This process is known as the Section 401 Water Quality Certification (“WQC”) and is administered in Maryland by the Maryland Department of the Environment (“MDE”).

MDE’s regulations implementing its WQC program are at COMAR 26.08.02.10-13. A WQC is issued in conjunction with the issuance of a water discharge permit which has its own application, public notification, public hearing and appeal requirements. MDE commonly combines the public hearing on both the underlying permit and water quality certification applications. A WQC is only issued if MDE determines that the proposed activity will not cause violation of applicable State water quality standards. Like the underlying State permit, the WQC can be issued with conditions that are legally binding on the applicant.

A party aggrieved by MDE’s decision concerning a WQC may appeal the decision in a contested case pursuant to Md. State Government Article of the Maryland Annotated Code § 10-201 *et seq.* A final decision or order in a contested case can be appealed by an aggrieved party to the Circuit Court.

HB 1128 proposes significant changes to the Maryland WQC program and is opposed by Chesapeake Utilities Corporation for the following reasons.

1. This legislation will impose additional obligations on every water discharge permit applicant in the State. A WQC is required for anyone seeking a water discharge permit issued pursuant to the Clean Water Act. MDE operates as the issuing authority for discharge permits issued to Maryland applicants and is authorized to do so pursuant to the delegation authority under the CWA. A WQC from MDE certifying that any discharge meets State water quality standards is required in each instance. Therefore, this legislation would affect every discharge permit issued in the State, including not only major pipelines, which was the target of similar legislation last year, but other water discharge permits, including wetland permits. This would encompass virtually every significant construction project and impact road, bridge and other infrastructure projects.

2. **The proposed legislation is premature.** Changing Maryland law in anticipation of the adoption of federal regulatory amendments is premature and bad precedent. The proposed changes to the federal WQC regulations were proposed in August 2019 and have yet to be finalized. If and when the regulations are adopted, they are likely to be appealed. Changing State law in anticipation of changes to a federal regulatory program is premature and disrupts a State permitting and regulatory scheme that has worked properly for decades. In the event that the federal regulatory amendments are finalized, which results in the need to amend and/or strengthen the State water quality certification program, changes to the State’s program can be done at that time.

3. **The underlying federal law is not being changed.** The water quality certification process derives from Section 401 of the Clean Water Act, which requires that an applicant for a federal license or permit to conduct activity that may result in the discharge into “navigable waters” must obtain a certification from the State in which the discharge originates, that such discharge meets the water quality standards in the State of origin. Therefore, the underlying basis of the WQC requirement in federal law is not being undermined by the proposed change in federal WQC regulations.

4. **MDE has regulations in place to implement its WQC program.** Maryland has adopted regulations implementing the water quality certification in the State. *See* COMAR 26.08.02.10 *et seq.* These regulations include many of the elements that are contained in HB 1128. The existing regulations detail the information that an applicant is required to include in its request for water quality certification. In addition to the specific information requested under the current program, such as the description of the facility and the discharge at issue, the regulations authorize MDE to request “any other information” the Department determines “is necessary for evaluation of the impact of the activity on water quality”. Therefore, MDE has the authority to request information from an applicant that relates to the impact of a proposed discharge to State water quality, which is the purpose of the water quality certification process.

5. **The legislation requires the submission of information and evaluations that go beyond the purpose of determining whether a proposed discharge meets the State’s water quality standards.** Some of the information requested in HB 1128 is extraneous to the question of whether a given discharge meets the State’s water quality standards. For instance, any request for information requesting a “groundwater map” in the area is beyond the scope of the water quality certification. The authority to require a water quality certification is derivative of the CWA’s regulation of “point source” discharges to “navigable waters”. Groundwater is not included within the definition of “navigable waters”. Therefore, any request for information relating to groundwater in the vicinity of the discharge is irrelevant.

HB 1128 Section 9-354(B)(7) provides that a request for water quality certification should include “a description of all potential direct or indirect discharges from the project into waters of the State”. As noted above, the water quality certification relates only to point source discharge to navigable waters. These are direct discharges to surface waters and neither the Clean Water Act



nor the State law defines what constitutes an “indirect discharge”. Furthermore, the requested information in HB 1128 includes “discharges from the project into waters of the State”, which includes discharges to groundwater, as the definition of “waters of the State” includes both surface and groundwater. This is beyond the scope of a water quality certification requirement under Section 401 of the Clean Water Act.

6. HB 1128 requires an evaluation of certain issues that are beyond the scope of a Section 401 water quality certification. Under this legislation, applicants will be required to evaluate “whether the project, including direct and indirect discharges associated with the project, is in a Chesapeake Bay resource protection area”. Neither the Clean Water Act nor State law defines what constitutes a “indirect discharge”. Furthermore, whether a given discharge is in a “Chesapeake Bay Resource Protection Area” is irrelevant as a water quality certification is required for **any** discharge to navigable waters regardless of where it is located.

The proposed legislation also requires the evaluation of 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”. *See* 9-354(B)(12). There is an overwhelming scientific consensus that climate change and sea level rise are indisputably occurring. However, what impacts such changes will have on increased rainfall, sea level rise or storm surges and if, and when, these increases or changes will occur is far from certain. Therefore, any evaluation of these effects would be pure conjecture and subject to challenge in virtually every instance. Without an agreed upon methodology of evaluating these effects, placing the burden on the WQC applicant to quantify these unquantifiable effects potentially makes every water quality certification decision indefensible. This is particularly a concern for discharges related to activity that do not directly or indirectly contribute to climate change impacts on sea level rise.

For the above stated reasons, Chesapeake Utilities Corporation respectfully requests that the Committee give HB 1128 an unfavorable report.