



CHESAPEAKE BAY FOUNDATION

Environmental Protection and Restoration
Environmental Education

House Bill 427

Federal Clean Water Act - Authority of State

Date: February 3, 2021
To: House Environment and Transportation
Committee

Position: Support
Contact: Robin Clark, Maryland Staff Attorney,
rclark@cbf.org

Chesapeake Bay Foundation **SUPPORTS** HB 427. Under this legislation, the Maryland Department of the Environment (MDE) would have a responsibility to certify whether a project affects water quality. If a water quality impact is found, MDE would be required to impose conditions to mitigate its impact. The legislation would also state that this authority cannot be waived through a private settlement agreement that MDE enters with a regulated entity.

Section 401 of the Clean Water Act vests in states the authority and responsibility to ensure that federal projects will not negatively harm a state's water quality. A federal agency cannot issue a permit or license to conduct any activity that may result in the discharge of pollutants to navigable waters until a State certifies that the activity does not violate state water conditions.¹ The federal license must comply with applicable water quality standards or limitations.² Each State undergoes a public notice and comment process to develop and issue a water quality certification. Once issued, the water quality certification is then incorporated into the federal license or permit and must include any conditions or requirements set by the State to protect water quality.

Attached please find CBF's comments on the record to the Federal Energy Regulatory Commission on the relicensing of Conowingo Dam and the proposed settlement agreement between MDE and Exelon. Beginning on page 8, CBF details the deficiencies with MDE waiving its 401 Authority through a settlement agreement. By waiving its 401 authority through a private agreement, MDE eliminated the required public notice and comment process related to the waiver, thereby removing public accountability for that decision.

MDE's course of action related to the Conowingo relicensing set a bad precedent for future water quality certifications in Maryland. Regulated entities may now expect to be able to negotiate a private agreement with MDE that minimizes any water quality mitigation requirements, rather than navigating the license conditions and the public accountability that are standard requirements for a water quality certification.

CBF urges the Committee's FAVORABLE report on HB 427.

¹ 33 U.S.C. § 1341(a)(1).

² 33 U.S.C. § 1341(a)(1) requiring a water quality certification to ensure any discharge "will comply with the applicable provisions of sections 301, 302, 3030 [TMDLS], 306 and 307 of this Act.

Maryland Office | Philip Merrill Environmental Center | 6 Herndon Avenue | Annapolis Maryland 21403 | 410 268-8816 | CBF.ORG