ORAL ARGUMENT NOT YET SCHEDULED

Nos. 21-1139 and 21-1186 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WATERKEEPERS CHESAPEAKE, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

Petition for Review of Order of the Federal Energy Regulatory Commission, 174 FERC ¶ 61,217 (March 19, 2021)

BRIEF OF INTERVENOR STATE OF MARYLAND, DEPARTMENT OF THE ENVIRONMENT

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April 22, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Except for Amici Maryland Charter Boat Association, Inc., National Wildlife Federation, and Maryland State Senator Stephen S. Hershey, Jr. and Delegates Jay A. Jacobs, Dana C. Jones, and Vaughn M. Stewart, the parties appearing before this Court are as stated in Briefs for Petitioners and Respondent.

B. References to the rulings at issue are as stated in Brief for Respondent.

C. Counsel is not aware of any related case.

/s/ Jonathan E.C. May
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Assistant Attorney General

April 22, 2022

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

The Maryland Department of the Environment is a state agency within the executive branch of the State of Maryland. It is not a nongovernmental corporate party, does not issue stock, and is not required to file a corporate disclosure statement pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure.

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GLOSSARY

COMAR	Code of Maryland Regulations
Commission or FERC	Federal Energy Regulatory Commission
Department	Maryland Department of the Environment
JA	Joint Appendix
Licensee	Exelon Generation Company, LLC, now Constellation Energy Company, LLC
License Order	*Exelon Generation Co.*, 174 FERC ¶ 61,217 (2021), R. 1257
Maryland Reply Comments	Reply Comments of Maryland Department of Environment, Jan. 31, 2020, R. 1165
Offer of Settlement	Joint Offer of Settlement and Explanatory Statement of Exelon Generation Company, LLC and Maryland Department of the Environment, Oct. 29, 2019, R. 1055
P. Br.	Petitioners' Brief
Project	Conowingo Hydroelectric Project
R.	Record Item
Rehearing Order	*Exelon Generation Co.*, 176 FERC ¶ 61,029 (2021), R. 1285
Resp. Br.	Respondent's Brief

Settlement	Conowingo Dam Water Quality Settlement Agreement, Oct. 29, 2019
Waterkeepers	Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper Association, ShoreRivers, and Chesapeake Bay Foundation

PRELIMINARY STATEMENT

Petitioners Waterkeepers Chesapeake, Lower Susquehanna Riverkeeper Association, ShoreRivers, and Chesapeake Bay Foundation ("Waterkeepers") initiated this action to seek review of the Federal Energy Regulatory Commission's ("FERC" or "Commission") decision to issue a renewed 50-year license for the Conowingo Hydroelectric Project ("Project"), owned and operated by Exelon Generation Company, LLC, now Constellation Generation Company, LLC ("Licensee"). *Exelon Generation Co.*, 174 FERC ¶ 61,217 (2021), R. 1257, JA __ ("License Order"). The Project spans the lower Susquehanna River in Maryland, approximately 10 miles from the river's confluence with the Chesapeake Bay. *Id.* at P 12, JA __. It sits at the mouth of a nearly 450-mile-long river—the longest on the East Coast of the United States—and its operation substantially affects water quality in both the river and the bay, by altering the movement of sediment downstream and impeding fish passage, among other things.

In 2018, after the Maryland Department of the Environment ("Department") issued a water quality certification for the Project under § 401 of the Clean Water Act, which included a variety of conditions designed to protect water quality, the Licensee initiated multiple legal challenges to the Department's decision, and after months of negotiation, the parties entered into the Conowingo Dam Water Quality Settlement Agreement ("Settlement") to resolve their dispute. Joint Offer of

Settlement and Explanatory Statement of Exelon Generation Company, LLC and Maryland Department of the Environment, Oct. 29, 2019, R. 1055, JA __ ("Offer of Settlement"). In exchange for the Licensee's agreement to carry out certain protective measures, the Department agreed to waive its certification authority under § 401 of the Clean Water Act, conditioned upon the Commission's issuance of a new license that incorporated certain terms of the Settlement. Petitioners challenge the Commission's action in issuing the License Order, as well as the Commission's decision on rehearing, *Exelon Generation Co.*, 176 FERC ¶ 61,029 (2021), R. 1285, JA __ ("Rehearing Order"), and by implication they challenge the Department's conditional waiver in the Settlement.

ISSUE PRESENTED

Did the Commission properly incorporate into a hydropower license certain terms of a settlement agreement between a licensee and state water quality certification agency, after the state conditionally waived its authority to issue a water quality certification under § 401 of the Clean Water Act?

STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in the Addendum to this brief.

STATEMENT OF THE CASE

Statutory and Regulatory Background

Section 401 of the Clean Water Act

The Clean Water Act sets forth a "complex statutory and regulatory scheme that governs our Nation's waters, a scheme that implicates both federal and state administrative responsibilities." *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704 (1994). Congress intended the Act to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a), as well as to protect "water quality which provides for the protection and propagation of fish, shellfish, and wildlife," *id*. § 1251(a)(2). "To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments," *PUD No. 1 of Jefferson County*, 511 U.S. at 704, and in so doing it expressly preserves the "primary" role of States to protect their own water resources, *see* 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . ."); *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991) ("The states remain, under the Clean Water Act, the 'prime bulwark in the effort to abate water pollution'") (quoting *United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir. 1983)).

Section 401 of the Clean Water Act plays an "essential" role in this "scheme to preserve state authority to address the broad range of pollution," *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006), and the certification requirement is "[o]ne of the primary mechanisms through which the states may assert the broad authority reserved to them," *Keating*, 927 F.2d at 622. Section 401 accomplishes this by empowering states to review, and require a certification for, federally licensed projects that may impact the quality of state waters, and upon receipt of a certification request, a state certification agency may issue, deny, or waive certification. 33 U.S.C. § 1341(a)(1). Section 401 provides that no federal "license or permit shall be granted until the certification required by this section has been obtained or has been waived," and that "[n]o license or permit shall be granted if certification has been denied by the State." *Id.* "Through this requirement, Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval." *Keating*, 927 F.2d at 622.

If a state certifying agency issues a certification, it must contain "limitations" and "monitoring requirements" that the state determines are "necessary to assure" compliance with water quality standards and "with any other appropriate requirement of State law." 33 U.S.C. § 1341(d). These certification conditions "shall become a condition on any Federal license or permit subject to the provisions

of this section." *Id*. Other than incorporating conditions of a certification into the federal license or permit, however, a federal agency has a limited role with respect to the state decision. The agency must first determine, of course, whether a valid certification has been issued, or the state has waived that authority. 33 U.S.C. § 1341(a)(1). And when a certification has been issued, the federal agency must also "confirm that the state has facially satisfied the express requirements of section 401"—including the public notice requirements of § 401(a)(1)—but "[t]his obligation does not require [the agency] to inquire into every nuance of the state law proceeding." *City of Tacoma v. FERC*, 460 F.3d 53, 68 (D.C. Cir. 2006).

Nor may federal agencies and federal courts review the substance of the state's action: "a State's decision on a request for Section 401 certification is generally reviewable only in *State* court, because the breadth of State authority under Section 401 results in most challenges to a certification decision implicating only questions of State law." *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 971 (D.C. Cir. 2011) (emphasis added); *see, e.g.*, *Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) ("The courts have consistently agreed with this interpretation, ruling that the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification.") (internal citations omitted); *U.S. v. Marathon Dev. Corp.*, 867

F.2d 96, 102 (1st Cir. 1989) ("Any defect in a state's section 401 water quality certification can be redressed [on appeal]. The proper forum for such a claim is state court, rather than federal court, because a state law determination is involved.").

State Water Quality Certification Process in Maryland

The Department is the state agency in Maryland charged with responsibility for implementing the Maryland laws that protect the water resources of the State. Among its duties, the Department is responsible for the processing, review, and determination of requests for water quality certifications under § 401. Md. Ann. Code, Envir. §§ 9-302, 9-314, 9-319 (LexisNexis 2014); Code of Maryland Regulations ("COMAR") 26.08.02.10.

By regulation, the Department has set forth application procedures for water quality certifications. COMAR 26.08.02.10. This regulation includes provisions for public notice, comment, and, in certain circumstances, public hearing, as required by § 401(a)(1). COMAR 26.08.02.10C., D., F. The regulation also provides for administrative appeal of the Department's decision to issue or deny a certification request, and ultimately for an evidentiary, contested case hearing and judicial review in Maryland state courts. COMAR 26.08.02.10F(4).

Commission Licensing Proceeding for the Conowingo Project

The Department became a party to the underlying relicensing proceeding upon the timely filing with the Commission of a notice of intervention. License

Order at P 5 & n.7, JA __. The relicensing of the Project also presented the state with an opportunity to impose new conditions on the Project's operation and discharges, under the authority of the water quality certification provisions of § 401 of the Clean Water Act.

As required by § 401 and COMAR 26.08.02.10, the Licensee applied to the Department on January 31, 2014, to request certification. License Order at P 42, JA __. On November 14, 2014, the Department issued a public notice of its intent to deny certification because the Licensee had not provided sufficient information about the Project and its impact on water quality. Reply Comments of Maryland Department of Environment, Jan. 31, 2020, at 3-4, R. 1165, JA __ ("Maryland Reply Comments"). To avoid that outcome, the Licensee withdrew its application on December 5, 2014. *Id*. After submitting and withdrawing new applications in 2015 and 2016, the Licensee submitted a final application on May 17, 2017. *Id*. The Department issued public notice of the certification request on July 10, 2017, opened a public comment period and ultimately accepted comments until January 15, 2018, and held a public hearing on December 5, 2017. *Id*.

The Department issued a water quality certification on April 27, 2018. License Order at P 42, JA __; Maryland Reply Comments at 4. The briefs of both Waterkeepers and the Commission, as well as the License Order, describe the conditions the Department included in the certification, such that the Department

need not recite a summary in full here. *See* P. Br. at 16-17; Resp. Br. at 12-13. In short, the certification required the Licensee to develop a plan to reduce the amount of nitrogen and phosphorus in the Project's discharge; improve fish and eel passage; make changes to the Project's flow regime; control trash and debris; provide for monitoring; and undertake other measures for aquatic resource and habitat protection. License Order at PP 42-45, JA ___.

Shortly after issuance of the water quality certification, the Licensee initiated four legal challenges to the certification. First, on May 28, 2018, the Licensee requested an administrative appeal of the certification under COMAR 26.08.02.10F(4) by submitting to the Department a Protective Petition for Reconsideration and Administrative Appeal. Maryland Reply Comments at 4-5, JA __. Two of the Petitioners here—Waterkeepers Chesapeake and the Lower Susquehanna Riverkeeper Association—also filed an administrative appeal of the Department's decision. *Id*.

Also on May 28, 2018, the Licensee filed a complaint in Maryland state court seeking declaratory and injunctive relief, or in the alternative mandamus and judicial review, in part on the theory that the certification decision was not final because the agency had not yet provided the opportunity for a contested case hearing, and in the alternative that the Department's certification decision was a final agency act subject to direct judicial review. *Exelon Generation Co., LLC v. Maryland Dep't of the*

Envir., No. 24-C-18-003410 (Balt. City Cir. Ct.); Maryland Reply Comments at 5-7, JA __.[1] On that same day, the Licensee initiated a third legal action by filing a complaint in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief based on claims that the certification exceeded Maryland's authority under federal law and the Constitution. *Exelon Generation Company, LLC v. Grumbles, et al.*, No. 1:18-cv-01224 (D.D.C., filed May 28, 2018); Maryland Reply Comments at 7-8, JA __.[2]

Finally, on February 28, 2019, the Licensee filed a Petition for Declaratory Order with the Commission, asking the Commission to declare that Maryland had

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[1] On October 9, 2018, the state circuit court granted the Department's motion to dismiss the state complaint; the court found that the Licensee failed to exhaust administrative remedies before seeking judicial relief, and agreed with the Department that the certification represented a final determination on the Licensee's water quality certification application. *See* Lodging of Memorandum Opinion and Order, *Exelon Generation Co., LLC v. Md. Dep't of the Env't*, Case No. 24-C-18-003410 (Md. Cir. Ct. Oct. 9, 2018), at 11, R. 997. The Licensee appealed that decision to the Maryland Court of Special Appeals. Lodging of Filings, including *Exelon v. MDE*, No. 2908, Sept. Term (Md. Ct. Sp. App., filed Nov. 5, 2018), R. 999. The appeal remained pending at the time the parties executed the Settlement, and has since been dismissed.

[2] The Department filed a motion to dismiss the federal litigation. Maryland Reply Comments at 7-8, JA __. Among other defenses raised in the motion, the Department contended that the court lacked jurisdiction because challenges to water quality certifications must be brought in state proceedings, not in federal court. The district court did not rule on that aspect of the Department's motion, but denied in part as to improper venue, to which the Department filed a motion for reconsideration. The court did not rule on the remaining issues raised in the initial motion to dismiss or for reconsideration as to venue before the parties entered into the Settlement and, ultimately, dismissed the case.

waived its right to issue a certification under § 401 of the Clean Water Act, in part based on this Court's decision in *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019).[3] Maryland Reply Comments at 8-10, JA __.

In the state court litigation, the Department and the Licensee were ordered to mediation, and the parties ultimately settled their dispute over the water quality certification, as reflected in the Settlement. Maryland Reply Comments at 17, JA __. Because settlement negotiations took place in the context of mediation, the state court required the parties to execute a mediation agreement with a confidentiality provision. The Department nonetheless conducted public outreach, with the Licensee's consent, and engaged with stakeholders—including Waterkeepers—to apprise them of the settlement process and solicit input on settlement strategy. *Id*.

The Settlement contained a series of "proposed license articles" that the parties agreed to submit to the Commission for incorporation into the Project's new license, as well as contractually-enforceable off-license settlement provisions. License Order at PP 49-60, JA __; Offer of Settlement at 5-22, JA __. The proposed license articles included measures to address flow; fish and eel passage; invasive species; trash and debris; and impacts to aquatic resources and habitat. Settlement

[3] The Department opposed the Licensee's petition, arguing that the Licensee's own decision to voluntarily withdraw its certification requests did not constitute a waiver of § 401 authority on the part of the State under the reasoning of *Hoopa Valley Tribe v. FERC*. The License Order dismissed the petition for declaratory order as moot. License Order at P 77, JA __.

§ 3.1 & Attachment A, JA __. Among other things, the off-license settlement terms required the Licensee to provide financial support to the state for mussel restoration efforts in the river and other resiliency and water quality projects, such as submerged aquatic vegetation restoration, oyster restoration, and marsh creation. Settlement § 2.

The Department concluded that the proposed license articles and off-license settlement terms together provided for sufficient "protection, mitigation, and enhancement measures that address ecological, recreation, and water quality resources affected by the Project." Offer of Settlement at 1, JA __ ; *see also* Offer of Settlement at 17, JA __ (the proposed license articles represent "protection, mitigation, and enhancement measures [that] will provide significant benefits to aquatic, terrestrial, and wildlife resources in the Susquehanna River basin."); Offer of Settlement at 18, JA __ ("In combination with the" proposed license articles, the off-license "settlement commitments will provide significant, self-sustaining ecosystem services in the River and Bay through the restoration of natural aquatic habitat and aquatic species.").

Because the Department determined the Settlement terms provided for water quality protections sufficient to mitigate the Project's impacts, the Department agreed to conditionally waive its § 401 certification authority upon the Commission's incorporation of the proposed license articles, without modification,

into a new Project license. Offer of Settlement at 5, JA __ (stating that conditional waiver is "given for the purposes of securing important environmental benefits pursuant to the Agreement and avoiding protracted litigation"); Settlement § 3.2(a)(1), JA __. The settlement agreement further provided that MDE could terminate the agreement, and the conditional waiver would not become effective, if the Commission failed to incorporate the proposed license articles in full and the Department and the Licensee could not successfully negotiate a curative amendment. Settlement § 3.2(b), JA __.

On October 29, 2019, the Department and the Licensee jointly submitted the Settlement to the Commission, through an Offer of Settlement. Offer of Settlement, JA __. The Commission placed the Offer on public notice and accepted public comments, including those submitted on behalf of the Waterkeepers. License Order at PP 64 & 66, JA __. On March 19, 2021, the Commission issued a new license for the Project, stating that it was "adopting the Proposed License Articles and only making modifications to ensure that the Commission can enforce those articles." *Id.* at P 77, JA __.

Because the Commission adopted the proposed license articles in accordance with the Settlement, it found Maryland's § 401 waiver was effective. *Id.* The Settlement and the Commission's issuance of the new license also resolved the Licensee's litigation against the Department. The parties filed voluntary dismissals

in the state and federal litigation, and because the Department waived its § 401 certification authority as part of the Settlement, the administrative appeals of the original 2018 water quality certification are moot. Similarly, upon issuance of the License Order, the Commission dismissed the Licensee's Petition for Declaratory Order as moot. *Id*.

Since issuance of the License Order, the parties have begun implementing the terms of the Settlement.

SUMMARY OF ARGUMENT

Though empowered to issue or deny a water quality certification for federal projects, a state is not required to use this power in all instances and may waive the authority preserved to it in § 401. Section 401 of the Clean Water Act serves as an essential tool for states, and with the authority it provides states may even block certain projects; states, however, also retain the discretion to determine how best to use that power. Here, Maryland determined that the Settlement it reached with the Licensee to resolve the litigation over the initial water quality certification sufficiently protected the state's interests, such that waiver was warranted.

The Commission properly found Maryland's waiver effective, and appropriately issued a License Order adopting certain terms of the Settlement. The Commission also properly refrained from conducting a review of Maryland's decision and the process through which it declared waiver, including whether the

Department needed to invoke the revocation procedures of § 401(a)(3) or issue public notice of the waiver determination.

ARGUMENT

I. THE DEPARTMENT HAD THE AUTHORITY TO WAIVE THE CERTIFICATION REQUIREMENT UNDER § 401.

The Commission properly concluded that its incorporation of the proposed license articles agreed to by the Department and the Licensee effectuated Maryland's waiver of its § 401 authority in connection with the Settlement. Although empowered to use § 401 to protect its waters through a certification, states also have flexibility to determine when and how to use this authority; as this Court has recognized, "the state, alone, decides whether to certify under section 401(a)(1)." *Keating*, 927 F.2d at 624. Nothing in the text of the Clean Water Act requires a state to review a certification request, or to issue or deny certification. *See Environmental Def. Fund, Inc. v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980) ("'The purpose of the certification mechanism . . . is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.' . . . A state need not avail itself of this protection.") (quoting S.Rep. No. 414, 92nd Cong., 2d Sess., *reprinted in* (1972) U.S.C.C.A.N. 3668, 3735)). In fact, the statute contemplates that a state may take no action at all on a certification request, which

results in an automatic waiver of certification authority if inaction continues beyond a reasonable time, not to exceed one year. 33 U.S.C. § 1341(a).

Waiver may also be explicit. *See City of Olmsted Falls v. U.S. EPA*, 435 F.3d 632, 636 (6th Cir. 2006) (observing that "the federal statute section . . . provides not only for express waivers by a state, but also for waivers by silence"); *Environmental Def. Fund, Inc.*, 501 F. Supp. at 771 ("We do not interpret this to mean that affirmative waivers are not allowed. Such a construction would be illogical and inconsistent with the purpose of this legislation."). Federal regulations implementing § 401 recognize this as well. *See* 40 C.F.R. § 121.9(a)(1) (EPA regulation providing for waiver after "[w]ritten notification from the certifying authority to the project proponent and the Federal agency that the certifying authority expressly waives its authority to act on a certification request"); 33 C.F.R. § 325.2(b)(1)(ii) (Army Corps of Engineers regulation providing, "A waiver may be explicit").

Nothing in the text of the Clean Water Act prohibits an express or affirmative waiver, nor is there any indication in § 401 that waiver must always occur before a certification decision is made. This Court's precedent recognizes that it need not. *Alcoa Power*, 643 F.3d at 969 (recognizing that, as a result of a successful appeal of a certification decision, a state may "decide[] to waive its certification rights rather than revise the certificate to accommodate" any ruling on appeal). Allowing waiver

even after an initial certification decision is consistent with the intent of Congress in § 401 and the scheme created by the Clean Water Act to preserve state authority, as waiving after initially issuing a certification decision may give the state needed flexibility. Such waiver could occur, as it did here, in the context of a settlement with the applicant in order to avoid further litigation over appropriate certification conditions. But put simply, when a state expressly waives, it remains the *state's* decision to do so, and the state remains the ultimate authority on how best to protect its waters. *See, e.g.*, 33 U.S.C. § 1251(b).

Moreover, express waiver promotes, and does not frustrate, Congress's goals in enacting the one-year deadline in the first place, which serves to prevent a state from indefinitely blocking a federal agency from issuing a permit or license. As this Court remarked in *Alcoa Power*, "[i]n imposing a one-year time limit on States to 'act,' Congress plainly intended to limit the amount of time that a State could delay a federal licensing proceeding without making a decision on the certification request." *Alcoa Power*, 643 F.3d at 972. Congress's intent is not only "clear from the plain text" of § 401 as well as its legislative history, as "the Conference Report on Section 401 states that the time limitation was meant to ensure that 'sheer inactivity by the State . . . will not frustrate the Federal application.'" *Id*. (*quoting* H.R. Rep. 91-940, at 56 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2691, 2741)).

Affirmative waiver achieves just the opposite, by allowing the federal permitting process to proceed.

Maryland's waiver did not delay the licensing of the Project or frustrate the Commission's licensing proceeding. To the contrary, waiver facilitated federal action by settling complex litigation that could have led to uncertainty about the conditions the Commission would have to incorporate into its license. That uncertainty would "frustrate the Federal application" and encourage the Commission to delay any final licensing decision, until such time as the litigation had been conclusively resolved. *Cf. Alcoa Power*, 643 F.3d at 974 (observing that it is Commission policy to stay its own licensing proceedings "pending conclusion of the State proceeding" that seeks to challenge or appeal the content of a state certification decision). Giving the Department the flexibility to affirmatively waive its certification authority in the context of a comprehensive settlement with the federal applicant serves the purposes Congress intended to achieve in § 401; it ensures the state retains control over a decision to protect water quality, while also protecting against undue delay and frustration of the licensing process.

II. THE STATE'S WAIVER IS NOT GOVERNED BY THE REVOCATION PROCEDURES OF § 401(a)(3).

The Commission properly found that the Department, in effectuating a waiver of the certification requirement, did not need to revoke its original certification decision pursuant to § 401(a)(3) of the Clean Water Act. Revocation and waiver are

two different mechanisms under § 401. Revocation applies in only limited circumstances and allows a state to overcome the presumption that a water quality certification issued for a federal construction project applies to all subsequent licensing and permitting decisions. By overcoming that presumption, revocation enables a state to revisit a certification that no longer sufficiently protects water quality, deny certification, or issue a second certification with additional conditions that were absent from the initial certification. Waiver, by contrast, cedes a state's authority to require certification at all.

This Court's examination of the mechanics and use of revocation in *Keating* demonstrates the difference between the two. There, a state had already issued a water quality certification for a Clean Water Act § 404 dredge-and-fill permit from the U.S. Army Corps of Engineers that authorized construction of certain hydropower facilities. *Keating,* 927 F.2d at 623. Under the terms of § 401(a)(3), that certification would also serve as a certification for any license issued by the Commission for the subsequent operation of any newly constructed hydropower facility authorized by the first permit. *Id.*; *see* 33 U.S.C. § 1341(a)(3) ("The certification obtained pursuant to paragraph (1) of [§ 401(a)] with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility. . . ."). This Court explained that, in §

401(a)(3), "Congress created a presumption that a state certification issued for purposes of a federal construction permit will be valid for purposes of a second federal license related to the operation of the same facility." *Keating*, 927 F.2d at 623.

"[U]nder limited circumstances expressly defined in the statute," however, the "state may overcome that presumption and revoke certification for purposes of the second federal license." *Id*. That is when:

> there is no longer reasonable assurance that there will be compliance with the applicable provisions of [the Clean Water Act] because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements.

33 U.S.C. § 1341(a)(3). After a state revokes the certification on these grounds, it may either deny certification or impose new conditions that it now deems necessary but were unforeseen at the time it issued the first certification.

It is plain from the text of § 401(a)(3) that revocation must be understood in this context—it is an exemption to the statutory principle that a certification for the construction of a facility also covers its operation. In that limited circumstance, if one of the reasons enumerated in § 401(a)(3) justifies revocation of the first certification, then the state may undertake a specific process for doing so, which

includes, among other things, timely notice to the federal agency issuing the operating license.

Because that is not what happened here, the Department had no reason to invoke the procedures of § 401(a)(3).

III. EXPRESS WAIVER UNDER § 401 DOES NOT REQUIRE PUBLIC NOTICE.

The Commission properly refrained from reviewing the Department's method of waiving through the Settlement, including assessing whether public participation requirements attach to that decision. Decisions to *issue* or *deny* certification require public participation,[4] as may decisions to *modify* certain terms or conditions of a certification after it is issued. *See Sierra Club v. U.S. Army Corps of Engineers*, 909 F.3d 635, 653-54 (4th Cir. 2018) (rejecting a state's attempt to modify, by revoking on a case-by-case basis, certain conditions it had included in a certification for a nationwide permit, because § 401 "specifically contemplates and requires a notice-and-comment process for case-specific *modifications of conditions* imposed as part of a state's Section 401 certification of a nationwide permit") (emphasis added). But Section 401(a) does not require any specific procedures for waiver to be effective.

[4] There is no dispute that the Department met these requirements—it issued public notice of the underlying certification request, provided an opportunity for public comment, and held a public informational hearing in accordance with Maryland's certification regulation. And, during mediation with the Licensee that led to the Settlement—although required by court to keep mediation communications confidential—the Department engaged in public outreach with respect to the Department's settlement position.

33 U.S.C. § 1341(a). Instead, waiver typically occurs automatically, with or without public notice, if a state takes no action on an application. *Id*.

Here, the Commission properly relied on Maryland's decision to waive certification as part of the Settlement. Allowing the Commission to reject a state's determination of how best to use its § 401 authority, and how it may effectuate a waiver, would frustrate Congress's clear intent to preserve state authority. Federal agencies must "rely on the state agency to properly follow its own laws and regulations with respect to issuing waivers," rather than "engage in an analysis of each states' rules and regulations on the issuing of Section 401 waivers." *City of Olmsted Falls*, 435 F.3d at 636. "Such a procedure, in addition to being cumbersome and duplicative of effort, would undermine the role that state environmental agencies play in the Section 401 process." *Id*.

Instead, here "FERC's role is limited to awaiting, and then deferring to, the final decision of the state. Otherwise, the state's power to block the project would be meaningless." *City of Tacoma*, 460 F.3d at 67. The decision to block a specific project, or to waive the ability to do so if it is assured that it has otherwise secured adequate protections against impacts to water quality, "fall[s] within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the States' concerns." *S.D. Warren Co.*, 547 U.S. at 386. If a state expressly waives in this context, there is no danger that it was "confronted with a fait accompli

by an industry that has built a plant without consideration of water quality requirements," which is what the certification requirement of § 401 guards against. *Id*. (quoting 116 Cong. Rec. 8984 (1970)). Thus, the Commission correctly found that the Department waived upon issuance of the License Order adopting the terms of the Settlement.

CONCLUSION

The Court should deny the petition for review.

Respectfully submitted,

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DATED: April 22, 2022

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies:

1. This document complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) and Circuit Rule 32(e)(2)(B). According to the word processing system used in this office, this document, exclusive of the sections excluded by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1), contains 5,491 words.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of April, 2022, I caused the foregoing brief to be electronically served through the Court's CM/ECF system.

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Assistant Attorney General

ADDENDUM

STATUTES AND REGULATIONS

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Editorial Notes

CODIFICATION

The Federal Water Pollution Control Act, comprising this chapter, was originally enacted by act June 30, 1948, ch. 758, 62 Stat. 1155, and amended by acts July 17, 1952, ch. 927, 66 Stat. 755; July 9, 1956, ch. 518, §§1, 2, 70 Stat. 498–507; June 25, 1959, Pub. L. 86–70, 73 Stat. 141; July 12, 1960, Pub. L. 86–624, 74 Stat. 411; July 20, 1961, Pub. L. 87–88, 75 Stat. 204; Oct. 2, 1965, Pub. L. 89–234, 79 Stat. 903; Nov. 3, 1966, Pub. L. 89–753, 80 Stat. 1246; Apr. 3, 1970, Pub. L. 91–224, 84 Stat. 91; Dec. 31, 1970, Pub. L. 91–611, 84 Stat. 1818; July 9, 1971, Pub. L. 92–50, 85 Stat. 124; Oct. 13, 1971, Pub. L. 92–137, 85 Stat. 379; Mar. 1, 1972, Pub. L. 92–240, 86 Stat. 47, and was formerly classified first to section 466 et seq. of this title and later to section 1151 et seq. of this title. The act is shown herein, however, as having been added by Pub. L. 92–500 without reference to such intervening amendments because of the extensive amendment, reorganization, and expansion of the act's provisions by Pub. L. 92–500.

SUBCHAPTER I—RESEARCH AND RELATED PROGRAMS

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called ''Administrator'') shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

(June 30, 1948, ch. 758, title I, § 101, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 816; amended Pub. L. 95–217, §§ 5(a), 26(b), Dec. 27, 1977, 91 Stat. 1567, 1575; Pub. L. 100–4, title III, § 316(b), Feb. 4, 1987, 101 Stat. 60.)

Editorial Notes

AMENDMENTS

1987—Subsec. (a)(7). Pub. L. 100–4 added par. (7).

1977—Subsec. (b). Pub. L. 95–217, § 26(b), inserted provisions expressing Congressional policy that the States manage the construction grant program under this chapter and implement the permit program under sections 1342 and 1344 of this title.

Subsec. (g). Pub. L. 95–217, § 5(a), added subsec. (g).

Statutory Notes and Related Subsidiaries

SHORT TITLE OF 2021 AMENDMENT

Pub. L. 116–337, § 1, Jan. 13, 2021, 134 Stat. 5120, provided that: ''This Act [amending section 1330 of this title] may be cited as the 'Protect and Restore America's Estuaries Act'.''

Pub. L. 116–294, § 1, Jan. 5, 2021, 134 Stat. 4899, provided that: ''This Act [amending section 1268 of this title] may be cited as the 'Great Lakes Restoration Initiative Act of 2019' or the 'GLRI Act of 2019'.''

SHORT TITLE OF 2019 AMENDMENT

Pub. L. 115–436, § 1, Jan. 14, 2019, 132 Stat. 5558, provided that: ''This Act [enacting section 1377a of this title and section 4370j of Title 42, The Public Health and Welfare, amending sections 1319, 1342, and 1362 of this title, enacting provisions set out as a note under section 4370j of Title 42, and renumbering provisions set out as a note under this section] may be cited as the 'Water Infrastructure Improvement Act'.''

SHORT TITLE OF 2018 AMENDMENT

Pub. L. 115–282, title IX, § 901, Dec. 4, 2018, 132 Stat. 4322, provided that: ''This title [enacting sections 4729 and 4730 of Title 16, Conservation, amending sections 1319, 1322, 1365, and 1369 of this title, sections 4712 and 4725 of Title 16, section 42 of Title 18, Crimes and Criminal Procedure, and section 11301 of Title 46, Shipping, repealing section 4711 of Title 16, enacting provisions set out as a note under section 1322 of this title and section 4711 of Title 16, and repealing provisions set out as a note under section 1342 of this title] may be cited as the 'Vessel Incidental Discharge Act of 2018'.''

SHORT TITLE OF 2017 AMENDMENT

Pub. L. 115–91, div. C, title XXXV, §3508(a), Dec. 12, 2017, 131 Stat. 1915, provided that: ''This section [amending sections 1321, 2701, and 2715 of this title] may be cited as the 'Foreign Spill Protection Act of 2017'.''

SHORT TITLE OF 2008 AMENDMENT

Pub. L. 110–365, §1, Oct. 8, 2008, 122 Stat. 4021, provided that: ''This Act [amending sections 1268 and 1271a of this title] may be cited as the 'Great Lakes Legacy Reauthorization Act of 2008'.''

Pub. L. 110–288, §1, July 29, 2008, 122 Stat. 2650, provided that: ''This Act [amending sections 1322, 1342, and 1362 of this title] may be cited as the 'Clean Boating Act of 2008'.''

SHORT TITLE OF 2002 AMENDMENT

Pub. L. 107–303, §1(a), Nov. 27, 2002, 116 Stat. 2355, provided that: ''This Act [enacting section 1271a of this title, amending sections 1254, 1266, 1268, 1270, 1285, 1290, 1324, 1329, 1330, and 1375 of this title, enacting provisions set out as notes under this section, section 1254 of this title, and section 1113 of Title 31, Money and Finance, and repealing provisions set out as a note under section 50 of Title 20, Education] may be cited as the 'Great Lakes and Lake Champlain Act of 2002'.''

Pub. L. 107–303, title I, §101, Nov. 27, 2002, 116 Stat. 2355, provided that: ''This title [enacting section 1271a of this title and amending section 1268 of this title] may be cited as the 'Great Lakes Legacy Act of 2002'.''

Pub. L. 107–303, title II, §201, Nov. 27, 2002, 116 Stat. 2358, provided that: ''This title [amending section 1270 of this title] may be cited as the 'Daniel Patrick Moynihan Lake Champlain Basin Program Act of 2002'.''

SHORT TITLE OF 2000 AMENDMENTS

Pub. L. 106–457, title II, §201, Nov. 7, 2000, 114 Stat. 1967, provided that: ''This title [amending section 1267 of this title and enacting provisions set out as a note under section 1267 of this title] may be cited as the 'Chesapeake Bay Restoration Act of 2000'.''

Pub. L. 106–457, title IV, §401, Nov. 7, 2000, 114 Stat. 1973, provided that: ''This title [amending section 1269 of this title] may be cited as the 'Long Island Sound Restoration Act'.''

Pub. L. 106–457, title V, §501, Nov. 7, 2000, 114 Stat. 1973, provided that: ''This title [enacting section 1273 of this title] may be cited as the 'Lake Pontchartrain Basin Restoration Act of 2000'.''

Pub. L. 106–457, title VI, §601, Nov. 7, 2000, 114 Stat. 1975, provided that: ''This title [enacting section 1300 of this title] may be cited as the 'Alternative Water Sources Act of 2000'.''

Pub. L. 106–284, §1, Oct. 10, 2000, 114 Stat. 870, provided that: ''This Act [enacting sections 1346 and 1375a of this title and amending sections 1254, 1313, 1314, 1362, and 1377 of this title] may be cited as the 'Beaches Environmental Assessment and Coastal Health Act of 2000'.''

SHORT TITLE OF 1994 AMENDMENT

Pub. L. 103–431, §1, Oct. 31, 1994, 108 Stat. 4396, provided that: ''This Act [amending section 1311 of this title] may be cited as the 'Ocean Pollution Reduction Act'.''

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101–596, §1, Nov. 16, 1990, 104 Stat. 3000, provided that: ''This Act [enacting sections 1269 and 1270 of this title, amending sections 1268, 1324, and 1416 of this title, and enacting provisions set out as notes under this section and section 1270 of this title] may be cited as the 'Great Lakes Critical Programs Act of 1990'.''

Pub. L. 101–596, title II, §201, Nov. 16, 1990, 104 Stat. 3004, provided that: ''This part [probably means title, enacting section 1269 of this title and amending section 1416 of this title] may be cited as the 'Long Island Sound Improvement Act of 1990'.''

Pub. L. 101–596, title III, §301, Nov. 16, 1990, 104 Stat. 3006, provided that: ''This title [enacting section 1270 of this title, amending section 1324 of this title, and enacting provisions set out as a note under section 1270 of this title] may be cited as the 'Lake Champlain Special Designation Act of 1990'.''

SHORT TITLE OF 1988 AMENDMENT

Pub. L. 100–653, title X, §1001, Nov. 14, 1988, 102 Stat. 3835, provided that: ''This title [amending section 1330 of this title and enacting provisions set out as notes under section 1330 of this title] may be cited as the 'Massachusetts Bay Protection Act of 1988'.''

SHORT TITLE OF 1987 AMENDMENT

Pub. L. 100–4, §1(a), Feb. 4, 1987, 101 Stat. 7, provided that: ''This Act [enacting sections 1254a, 1267, 1268, 1281b, 1329, 1330, 1377, 1381 to 1387, and 1414a of this title, amending this section and sections 1254, 1256, 1262, 1281, 1282 to 1285, 1287, 1288, 1291, 1311 to 1313, 1314, 1317 to 1322, 1324, 1342, 1344, 1345, 1361, 1362, 1365, 1369, 1375, and 1376 of this title, and enacting provisions set out as notes under this section, sections 1284, 1311, 1317, 1319, 1330, 1342, 1345, 1362, 1375, and 1414a of this title, and section 1962d–20 of Title 42, The Public Health and Welfare] may be cited as the 'Water Quality Act of 1987'.''

SHORT TITLE OF 1981 AMENDMENT

Pub. L. 97–117, §1, Dec. 29, 1981, 95 Stat. 1623, provided that: ''This Act [enacting sections 1298, 1299, and 1313a of this title, amending sections 1281 to 1285, 1287, 1291, 1292, 1296, 1311, and 1314 of this title, and enacting provisions set out as notes under sections 1311 and 1375 of this title] may be cited as the 'Municipal Wastewater Treatment Construction Grant Amendments of 1981'.''

SHORT TITLE OF 1977 AMENDMENT

Pub. L. 95–217, §1, Dec. 27, 1977, 91 Stat. 1566, provided: ''That this Act [enacting sections 1281a, 1294 to 1296, and 1297 of this title, amending this section and sections 1252, 1254 to 1256, 1259, 1262, 1263, 1281, 1282 to 1288, 1291, 1292, 1311, 1314, 1315, 1317 to 1319, 1321 to 1324, 1328, 1341, 1342, 1344, 1345, 1362, 1364, 1375, and 1376 of this title, enacting provisions set out as notes under this section and sections 1284, 1286, 1314, 1321, 1342, 1344, and 1376 of this title, and amending provisions set out as a note under this section] may be cited as the 'Clean Water Act of 1977'.''

SHORT TITLE

Pub. L. 92–500, §1, Oct. 18, 1972, 86 Stat. 816, provided that: ''That this Act [enacting this chapter, amending section 24 of Title 12, Banks and Banking, sections 633 and 636 of Title 15, Commerce and Trade, and section 711 of former Title 31, Money and Finance, and enacting provisions set out as notes under this section and sections 1281 and 1361 of this title] may be cited as the 'Federal Water Pollution Control Act Amendments of 1972'.''

Act June 30, 1948, ch. 758, title V, §520, formerly §518, as added by Pub. L. 92–500, §2, Oct. 18, 1972, 86 Stat. 896, amended Pub. L. 95–217, §2, Dec. 27, 1977, 91 Stat. 1566, renumbered §519, Pub. L. 100–4, title V, §506, Feb. 4, 1987, 101 Stat. 76, renumbered §520, Pub. L. 115–436, §5(b)(1), Jan. 14, 2019, 132 Stat. 5561, provided that: ''This Act [this chapter] may be cited as the 'Federal Water Pollution Control Act' (commonly referred to as the Clean Water Act).''

SAVINGS PROVISION

Pub. L. 92–500, §4, Oct. 18, 1972, 86 Stat. 896, provided that:

''(a) No suit, action, or other proceeding lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall abate by reason of the taking effect of the amendment made by section 2

of this Act [which enacted this chapter]. The court may, on its own motion or that of any party made at any time within twelve months after such taking effect, allow the same to be maintained by or against the Administrator or such officer or employee.

''(b) All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972], and pertaining to any functions, powers, requirements, and duties under the Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall continue in full force and effect after the date of enactment of this Act [Oct. 18, 1972] until modified or rescinded in accordance with the Federal Water Pollution Control Act as amended by this Act [this chapter].

''(c) The Federal Water Pollution Control Act as in effect immediately prior to the date of enactment of this Act [Oct. 18, 1972] shall remain applicable to all grants made from funds authorized for the fiscal year ending June 30, 1972, and prior fiscal years, including any increases in the monetary amount of any such grant which may be paid from authorizations for fiscal years beginning after June 30, 1972, except as specifically otherwise provided in section 202 of the Federal Water Pollution Control Act as amended by this Act [section 1282 of this title] and in subsection (c) of section 3 of this Act.''

SEPARABILITY

Act June 30, 1948, ch. 758, title V, § 512, as added by Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 894, provided that: ''If any provision of this Act [this chapter], or the application of any provision of this Act [this chapter] to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this Act [this chapter], shall not be affected thereby.''

NATIONAL SHELLFISH INDICATOR PROGRAM

Pub. L. 102–567, title III, § 308, Oct. 29, 1992, 106 Stat. 4286; as amended by Pub. L. 105–362, title II, § 201(b), Nov. 10, 1998, 112 Stat. 3282, provided that:

''(a) ESTABLISHMENT OF A RESEARCH PROGRAM.—The Secretary of Commerce, in cooperation with the Secretary of Health and Human Services and the Administrator of the Environmental Protection Agency, shall establish and administer a 5-year national shellfish research program (hereafter in this section referred to as the 'Program') for the purpose of improving existing classification systems for shellfish growing waters using the latest technological advancements in microbiology and epidemiological methods. Within 12 months after the date of enactment of this Act [Oct. 29, 1992], the Secretary of Commerce, in cooperation with the advisory committee established under subsection (b) and the Consortium, shall develop a comprehensive 5-year plan for the Program which shall at a minimum provide for—

''(1) an environmental assessment of commercial shellfish growing areas in the United States, including an evaluation of the relationships between indicators of fecal contamination and human enteric pathogens;

''(2) the evaluation of such relationships with respect to potential health hazards associated with human consumption of shellfish;

''(3) a comparison of the current microbiological methods used for evaluating indicator bacteria and human enteric pathogens in shellfish and shellfish growing waters with new technological methods designed for this purpose;

''(4) the evaluation of current and projected systems for human sewage treatment in eliminating viruses and other human enteric pathogens which accumulate in shellfish;

''(5) the design of epidemiological studies to relate microbiological data, sanitary survey data, and human shellfish consumption data to actual hazards to health associated with such consumption; and

''(6) recommendations for revising Federal shellfish standards and improving the capabilities of Federal and State agencies to effectively manage shellfish and ensure the safety of shellfish intended for human consumption.

''(b) ADVISORY COMMITTEE.—(1) For the purpose of providing oversight of the Program on a continuing basis, an advisory committee (hereafter in this section referred to as the 'Committee') shall be established under a memorandum of understanding between the Interstate Shellfish Sanitation Conference and the National Marine Fisheries Service.

''(2) The Committee shall—

''(A) identify priorities for achieving the purpose of the Program;

''(B) review and recommend approval or disapproval of Program work plans and plans of operation;

''(C) review and comment on all subcontracts and grants to be awarded under the Program;

''(D) receive and review progress reports from the Consortium and program subcontractors and grantees; and

''(E) provide such other advice on the Program as is appropriate.

''(3) The Committee shall consist of at least ten members and shall include—

''(A) three members representing agencies having authority under State law to regulate the shellfish industry, of whom one shall represent each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions;

''(B) three members representing persons engaged in the shellfish industry in the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions (who shall be appointed from among at least six recommendations by the industry members of the Interstate Shellfish Sanitation Conference Executive Board), of whom one shall represent the shellfish industry in each region;

''(C) three members, of whom one shall represent each of the following Federal agencies: the National Oceanic and Atmospheric Administration, the Environmental Protection Agency, and the Food and Drug Administration; and

''(D) one member representing the Shellfish Institute of North America.

''(4) The Chairman of the Committee shall be selected from among the Committee members described in paragraph (3)(A).

''(5) The Committee shall establish and maintain a subcommittee of scientific experts to provide advice, assistance, and information relevant to research funded under the Program, except that no individual who is awarded, or whose application is being considered for, a grant or subcontract under the Program may serve on such subcommittee. The membership of the subcommittee shall, to the extent practicable, be regionally balanced with experts who have scientific knowledge concerning each of the Atlantic, Pacific, and Gulf of Mexico shellfish growing regions. Scientists from the National Academy of Sciences and appropriate Federal agencies (including the National Oceanic and Atmospheric Administration, Food and Drug Administration, Centers for Disease Control, National Institutes of Health, Environmental Protection Agency, and National Science Foundation) shall be considered for membership on the subcommittee.

''(6) Members of the Committee and its scientific subcommittee established under this subsection shall not be paid for serving on the Committee or subcommittee, but shall receive travel expenses as authorized by section 5703 of title 5, United States Code.

''(c) CONTRACT WITH CONSORTIUM.—Within 30 days after the date of enactment of this Act [Oct. 29, 1992], the Secretary of Commerce shall seek to enter into a cooperative agreement or contract with the Consortium under which the Consortium will—

''(1) be the academic administrative organization and fiscal agent for the Program;

''(2) award and administer such grants and subcontracts as are approved by the Committee under subsection (b);

''(3) develop and implement a scientific peer review process for evaluating grant and subcontractor applications prior to review by the Committee;

''(4) in cooperation with the Secretary of Commerce and the Committee, procure the services of a scientific project director;

''(5) develop and submit budgets, progress reports, work plans, and plans of operation for the Program to the Secretary of Commerce and the Committee; and

''(6) make available to the Committee such staff, information, and assistance as the Committee may reasonably require to carry out its activities.

''(d) AUTHORIZATION OF APPROPRIATIONS.—(1) Of the sums authorized under section 4(a) of the National Oceanic and Atmospheric Administration Marine Fisheries Program Authorization Act (Public Law 98–210; 97 Stat. 1409), there are authorized to be appropriated to the Secretary of Commerce $5,200,000 for each of the fiscal years 1993 through 1997 for carrying out the Program. Of the amounts appropriated pursuant to this authorization, not more than 5 percent of such appropriation may be used for administrative purposes by the National Oceanic and Atmospheric Administration. The remaining 95 percent of such appropriation shall be used to meet the administrative and scientific objectives of the Program.

''(2) The Interstate Shellfish Sanitation Conference shall not administer appropriations authorized under this section, but may be reimbursed from such appropriations for its expenses in arranging for travel, meetings, workshops, or conferences necessary to carry out the Program.

''(e) DEFINITIONS.—As used in this section, the term—

''(1) 'Consortium' means the Louisiana Universities Marine Consortium; and

''(2) 'shellfish' means any species of oyster, clam, or mussel that is harvested for human consumption.''

LIMITATION ON PAYMENTS

Pub. L. 100–4, §2, Feb. 4, 1987, 101 Stat. 8, provided that: ''No payments may be made under this Act [see Short Title of 1987 Amendment note above] except to the extent provided in advance in appropriation Acts.''

SEAFOOD PROCESSING STUDY; SUBMITTAL OF RESULTS TO CONGRESS NOT LATER THAN JANUARY 1, 1979

Pub. L. 95–217, §74, Dec. 27, 1977, 91 Stat. 1609, provided that the Administrator of the Environmental Protection Agency conduct a study to examine the geographical, hydrological, and biological characteristics of marine waters to determine the effects of seafood processes which dispose of untreated natural wastes into such waters and to include in this study an examination of technologies which may be used in such processes to facilitate the use of the nutrients in these wastes or to reduce the discharge of such wastes into the marine environment and to submit the result of this study to Congress not later than Jan. 1, 1979.

OVERSIGHT STUDY

Pub. L. 92–500, §5, Oct. 18, 1972, 86 Stat. 897, authorized the Comptroller General of the United States to conduct a study and review of the research, pilot, and demonstration programs related to prevention and control of water pollution conducted, supported, or assisted by any Federal agency pursuant to any Federal law or regulation and assess conflicts between these programs and their coordination and efficacy, and to report to Congress thereon by Oct. 1, 1973.

INTERNATIONAL TRADE STUDY

Pub. L. 92–500, §6, Oct. 18, 1972, 86 Stat. 897, provided that:

''(a) The Secretary of Commerce, in cooperation with other interested Federal agencies and with representatives of industry and the public, shall undertake immediately an investigation and study to determine—

''(1) the extent to which pollution abatement and control programs will be imposed on, or voluntarily undertaken by, United States manufacturers in the near future and the probable short- and long-range effects of the costs of such programs (computed to the greatest extent practicable on an industry-by-industry basis) on (A) the production costs of such domestic manufacturers, and (B) the market prices of the goods produced by them;

''(2) the probable extent to which pollution abatement and control programs will be implemented in foreign industrial nations in the near future and the extent to which the production costs (computed to the greatest extent practicable on an industry-by-industry basis) of foreign manufacturers will be affected by the costs of such programs;

''(3) the probable competitive advantage which any article manufactured in a foreign nation will likely have in relation to a comparable article made in the United States if that foreign nation—

''(A) does not require its manufacturers to implement pollution abatement and control programs.

''(B) requires a lesser degree of pollution abatement and control in its programs, or

''(C) in any way reimburses or otherwise subsidizes its manufacturers for the costs of such program;

''(4) alternative means by which any competitive advantage accruing to the products of any foreign nation as a result of any factor described in paragraph (3) may be (A) accurately and quickly determined, and (B) equalized, for example, by the imposition of a surcharge or duty, on a foreign product in an amount necessary to compensate for such advantage; and

''(5) the impact, if any, which the imposition of a compensating tariff of other equalizing measure may have in encouraging foreign nations to implement pollution and abatement control programs.

''(b) The Secretary shall make an initial report to the President and Congress within six months after the date of enactment of this section [Oct. 18, 1972] of the results of the study and investigation carried out pursuant to this section and shall make additional reports thereafter at such times as he deems appropriate taking into account the development of relevant data, but not less than once every twelve months.''

INTERNATIONAL AGREEMENTS

Pub. L. 92–500, §7, Oct. 18, 1972, 86 Stat. 898, provided that: ''The President shall undertake to enter into international agreement to apply uniform standards of performance for the control of the discharge and emission of pollutants from new sources, uniform controls over the discharge and emission of toxic pollutants, and uniform controls over the discharge of pollutants into the ocean. For this purpose the President shall negotiate multilateral treaties, conventions, resolutions, or other agreements, and formulate, present, or support proposals at the United Nations and other appropriate international forums.''

NATIONAL POLICIES AND GOAL STUDY

Pub. L. 92–500, §10, Oct. 18, 1972, 86 Stat. 899, directed President to make a full and complete investigation and study of all national policies and goals established by law to determine what the relationship should be between these policies and goals, taking into account the resources of the Nation, and to report results of his investigation and study together with his recommendations to Congress not later than two years after Oct. 18, 1972.

EFFICIENCY STUDY

Pub. L. 92–500, §11, Oct. 18, 1972, 86 Stat. 899, directed President, by utilization of the General Accounting Office, to conduct a full and complete investigation and study of ways and means of most effectively using all of the various resources, facilities, and personnel of the

Federal Government in order to most efficiently carry out the provisions of this chapter and to report results of his investigation and study together with his recommendations to Congress not later than two hundred and seventy days after Oct. 18, 1972.

SEX DISCRIMINATION

Pub. L. 92–500, § 13, Oct. 18, 1972, 86 Stat. 903, provided that: ''No person in the United States shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance under this Act [see Short Title note above] the Federal Water Pollution Control Act [this chapter], or the Environmental Financing Act [set out as a note under section 1281 of this title]. This section shall be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination, under title VI of the Civil Rights Act of 1964 [section 2000d et seq. of Title 42, The Public Health and Welfare]. However, this remedy is not exclusive and will not prejudice or cut off any other legal remedies available to a discriminatee.''

DEFINITION OF ''ADMINISTRATOR''

Pub. L. 100–4, § 1(d), Feb. 4, 1987, 101 Stat. 8, provided that: ''For purposes of this Act [see Short Title of 1987 Amendment note above], the term 'Administrator' means the Administrator of the Environmental Protection Agency.''

Executive Documents

STANDARDS

For provisions relating to the responsibility of the head of each Executive agency for compliance with applicable pollution control standards, see Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of Title 42, The Public Health and Welfare.

CONTIGUOUS ZONE OF UNITED STATES

For extension of contiguous zone of United States, see Proc. No. 7219, set out as a note under section 1331 of Title 43, Public Lands.

PREVENTION, CONTROL, AND ABATEMENT OF ENVIRONMENTAL POLLUTION AT FEDERAL FACILITIES

Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of Title 42, The Public Health and Welfare, provides for the prevention, control, and abatement of environmental pollution at federal facilities.

EXECUTIVE ORDER NO. 11548

Ex. Ord. No. 11548, July 20, 1970, 35 F.R. 11677, which related to the delegation of Presidential functions, was superseded by Ex. Ord. No. 11735, Aug. 3, 1973, 38 F.R. 21243, formerly set out as a note under section 1321 of this title.

EX. ORD. NO. 11742. DELEGATION OF FUNCTIONS TO SECRETARY OF STATE RESPECTING THE NEGOTIATION OF INTERNATIONAL AGREEMENTS RELATING TO THE ENHANCEMENT OF THE ENVIRONMENT

Ex. Ord. No. 11742, Oct. 23, 1973, 38 F.R. 29457, provided:

Under and by virtue of the authority vested in me by section 301 of title 3 of the United States Code and as President of the United States, I hereby authorize and empower the Secretary of State, in coordination with the Council on Environmental Quality, the Environmental Protection Agency, and other appropriate Federal agencies, to perform, without the approval, ratification, or other action of the President, the functions vested in the President by Section 7 of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92–500; 86 Stat. 898) with respect to international agreements relating to the enhancement of the environment.

RICHARD NIXON.

§ 1252. Comprehensive programs for water pollution control

(a) Preparation and development

The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes. For the purpose of this section, the Administrator is authorized to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters.

(b) Planning for reservoirs; storage for regulation of streamflow

(1) In the survey or planning of any reservoir by the Corps of Engineers, Bureau of Reclamation, or other Federal agency, consideration shall be given to inclusion of storage for regulation of streamflow, except that any such storage and water releases shall not be provided as a substitute for adequate treatment or other methods of controlling waste at the source.

(2) The need for and the value of storage for regulation of streamflow (other than for water quality) including but not limited to navigation, salt water intrusion, recreation, esthetics, and fish and wildlife, shall be determined by the Corps of Engineers, Bureau of Reclamation, or other Federal agencies.

(3) The need for, the value of, and the impact of, storage for water quality control shall be determined by the Administrator, and his views on these matters shall be set forth in any report or presentation to Congress proposing authorization or construction of any reservoir including such storage.

(4) The value of such storage shall be taken into account in determining the economic value of the entire project of which it is a part, and costs shall be allocated to the purpose of regulation of streamflow in a manner which will insure that all project purposes, share equitably in the benefit of multiple-purpose construction.

(5) Costs of regulation of streamflow features incorporated in any Federal reservoir or other impoundment under the provisions of this chapter shall be determined and the beneficiaries identified and if the benefits are widespread or national in scope, the costs of such features shall be nonreimbursable.

(6) No license granted by the Federal Energy Regulatory Commission for a hydroelectric power project shall include storage for regulation of streamflow for the purpose of water quality control unless the Administrator shall rec-

''(5) Massachusetts Bay also constitutes an important recreational resource, providing fishing, swimming, and boating opportunities to the region;

''(6) rapidly expanding coastal populations and pollution pose increasing threats to the long-term health and integrity of Massachusetts Bay;

''(7) while the cleanup of Boston Harbor will contribute significantly to improving the overall environmental quality of Massachusetts Bay, expanded efforts encompassing the entire ecosystem will be necessary to ensure its long-term health;

''(8) the concerted efforts of all levels of Government, the private sector, and the public at large will be necessary to protect and enhance the environmental integrity of Massachusetts Bay; and

''(9) the designation of Massachusetts Bay as an Estuary of National Significance and the development of a comprehensive plan for protecting and restoring the Bay may contribute significantly to its long-term health and environmental integrity.

''(b) PURPOSE.—The purpose of this title is to protect and enhance the environmental quality of Massachusetts Bay by providing for its designation as an Estuary of National Significance and by providing for the preparation of a comprehensive restoration plan for the Bay.

''SEC. 1005. FUNDING SOURCES.

''Within one year of enactment [Nov. 14, 1988], the Administrator of the United States Environmental Protection Agency and the Governor of Massachusetts shall undertake to identify and make available sources of funding to support activities pertaining to Massachusetts Bay undertaken pursuant to or authorized by section 320 of the Clean Water Act [33 U.S.C. 1330], and shall make every effort to coordinate existing research, monitoring or control efforts with such activities.''

PURPOSES AND POLICIES OF NATIONAL ESTUARY PROGRAM

Pub. L. 100–4, title III, § 317(a), Feb. 4, 1987, 101 Stat. 61, provided that:

''(1) FINDINGS.—Congress finds and declares that—

''(A) the Nation's estuaries are of great importance for fish and wildlife resources and recreation and economic opportunity;

''(B) maintaining the health and ecological integrity of these estuaries is in the national interest;

''(C) increasing coastal population, development, and other direct and indirect uses of these estuaries threaten their health and ecological integrity;

''(D) long-term planning and management will contribute to the continued productivity of these areas, and will maximize their utility to the Nation; and

''(E) better coordination among Federal and State programs affecting estuaries will increase the effectiveness and efficiency of the national effort to protect, preserve, and restore these areas.

''(2) PURPOSES.—The purposes of this section [enacting this section] are to—

''(A) identify nationally significant estuaries that are threatened by pollution, development, or overuse;

''(B) promote comprehensive planning for, and conservation and management of, nationally significant estuaries;

''(C) encourage the preparation of management plans for estuaries of national significance; and

''(D) enhance the coordination of estuarine research.''

SUBCHAPTER IV—PERMITS AND LICENSES

§ 1341. Certification

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the im-

position of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 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 set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(June 30, 1948, ch. 758, title IV, § 401, as added Pub. L. 92–500, § 2, Oct. 18, 1972, 86 Stat. 877;

amended Pub. L. 95–217, §§ 61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

Editorial Notes

AMENDMENTS

1977—Subsec. (a). Pub. L. 95–217 inserted reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which provided that no Federal agency be deemed an applicant for purposes of this subsection, and redesignated par. (7) as (6).

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such rec-

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§9–302.

(a) The purpose of this subtitle is to establish effective programs and to provide additional and cumulative remedies to prevent, abate, and control pollution of the waters of this State.

(b) Because the quality of the waters of this State is vital to the interests of the citizens of this State, because pollution is a menace to public health and welfare, creates public nuisances, harms wildlife, fish, and aquatic life, and impairs domestic, agricultural, industrial, recreational, and other legitimate beneficial uses of water, and because the problem of water pollution in this State is closely related to the problem of water pollution in adjoining states, it is the policy of this State:

(1) To improve, conserve, and manage the quality of the waters of this State;

(2) To protect, maintain, and improve the quality of water for public supplies, propagation of wildlife, fish, and aquatic life, and domestic, agricultural, industrial, recreational, and other legitimate beneficial uses;

(3) To provide that no waste is discharged into any waters of this State without first receiving necessary treatment or other corrective action to protect the legitimate beneficial uses of the waters of this State;

(4) Through innovative and alternative methods of waste and wastewater treatment, to provide and promote prevention, abatement, and control of new or existing water pollution; and

(5) To promote and encourage the use of reclaimed water in order to conserve water supplies, facilitate the indirect recharge of groundwater, and develop an alternative to discharging wastewater effluent to surface waters, thus pursuing the goal of the Clean Water Act to end the discharge of pollutants and meet the nutrient reduction goals of the Chesapeake Bay Agreement.

(c) (1) The Department shall cooperate with local governments, agencies of other states, and the federal government in carrying out the objectives of subsection (b) of this section.

(2) The Department may consult with the State Plumbing Board, as appropriate, on matters relating to the objectives of subsection (b)(5) of this section.

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§9–314.

(a) The Department may adopt rules and regulations that set, for the waters of this State, water quality standards and effluent standards. These standards shall be designed to protect:

(1) The public health, safety, and welfare;

(2) Present and future use of the waters of this State for public water supply;

(3) The propagation of aquatic life and wildlife;

(4) Recreational use of the waters of this State; and

(5) Agricultural, industrial, and other legitimate uses of the waters of this State.

(b) The rules and regulations adopted under this section shall include at least the following:

(1) Water quality standards that specify the maximum permissible short term and long term concentrations of pollutants in the water, the minimum permissible concentrations of dissolved oxygen and other desirable matter in the water, and the temperature range for the water.

(2) Effluent standards that specify the maximum loading or concentrations and the physical, thermal, chemical, biological, and radioactive properties of wastes that may be discharged into the waters of this State.

(3) Definition of technique for filling and sealing abandoned water wells and holes, for disposal wells, for deep mines and surface mines, and for landfills to prevent groundwater contamination, seepage, and drainage into the waters of this State.

(4) Requirements for the sale, offer, use, or storage of pesticides and other substances that the Department finds to constitute water pollution hazards.

(5) Procedures for water pollution incidents or emergencies that constitute an acute danger to health or the environment.

(6) Provisions for equipment and procedures for monitoring pollutants, collecting samples, and logging and reporting of monitoring.

(c) Effluent standards set under this section shall be at least as stringent as those specified by the National Pollutant Discharge Elimination System.

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§9–319.

(a) In addition to the powers and duties set forth elsewhere in this subtitle, the Department has the following powers and duties:

(1) To administer and enforce this subtitle and the rules and regulations adopted under this subtitle;

(2) To develop comprehensive programs and plans for the prevention, control, and abatement of pollution of the waters of this State;

(3) To advise, consult, and cooperate with other units of this State, the federal government, other State and interstate agencies, affected groups, political subdivisions, and industries to carry out the provisions of this subtitle;

(4) To accept and administer loans and grants from the federal government and other sources, public or private, to carry out any of the Department's functions;

(5) To encourage, participate in, finance, or conduct studies, investigations, research, or demonstrations that relate to water pollution or its causes, prevention, control, or abatement;

(6) To collect and give out information about water pollution and its prevention, control, and abatement;

(7) To issue, modify, or revoke orders and permits that prohibit discharges of pollutants into the waters of this State or to adopt any other reasonable remedial measures to prevent, control, or abate pollution or undesirable changes in the quality of the waters of this State;

(8) Through the Secretary or a hearing officer who is designated in writing by the Secretary, to hold hearings, to issue hearing notices and subpoenas that require the attendance of witnesses and production of evidence, to administer oaths, and to take necessary testimony;

(9) To apply and enforce against industrial users of publicly owned treatment works toxic effluent standards and pretreatment requirements for the introduction into treatment works of pollutants that interfere with, pass through, or otherwise are incompatible with the treatment works; and

(10) To exercise every incidental power necessary to carry out the provisions of this subtitle.

(b) To carry out the provisions of this subtitle, the Department of the Environment and the Department of Natural Resources may:

(1) Conduct studies, surveys, investigations, research, and analyses; and

(2) Employ consultants.

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estate and the permit action. An application may include the activity of more than one owner provided the character of the activity of each owner is similar and in the same general area and each owner submits a statement designating the same agent.

(9) If the activity would involve the construction or placement of an artificial reef, as defined in 33 CFR 322.2(g), in the navigable waters of the United States or in the waters overlying the outer continental shelf, the application must include provisions for siting, constructing, monitoring, and managing the artificial reef.

(10) *Complete application.* An application will be determined to be complete when sufficient information is received to issue a public notice (See 33 CFR 325.1(d) and 325.3(a).) The issuance of a public notice will not be delayed to obtain information necessary to evaluate an application.

(e) *Additional information.* In addition to the information indicated in paragraph (d) of this section, the applicant will be required to furnish only such additional information as the district engineer deems essential to make a public interest determination including, where applicable, a determination of compliance with the section 404(b)(1) guidelines or ocean dumping criteria. Such additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.

(f) *Fees.* Fees are required for permits under section 404 of the Clean Water Act, section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, and sections 9 and 10 of the Rivers and Harbors Act of 1899. A fee of $100.00 will be charged when the planned or ultimate purpose of the project is commercial or industrial in nature and is in support of operations that charge for the production, distribution or sale of goods or services. A $10.00 fee will be charged for permit applications when the proposed work is non-commercial in nature and would provide personal benefits that have no connection with a commercial enterprise. The final decision as to the basis for a fee (commercial vs. non-commercial) shall be solely the responsibility of the district engineer. No fee will be charged if the applicant withdraws the application at any time prior to issuance of the permit or if the permit is denied. Collection of the fee will be deferred until the proposed activity has been determined to be not contrary to the public interest. Multiple fees are not to be charged if more than one law is applicable. Any modification significant enough to require publication of a public notice will also require a fee. No fee will be assessed when a permit is transferred from one property owner to another. No fees will be charged for time extensions, general permits or letters of permission. Agencies or instrumentalities of federal, state or local governments will not be required to pay any fee in connection with permits.

[51 FR 41236, Nov. 13, 1986, as amended at 73 FR 19670, Apr. 10, 2008]

§ 325.2 Processing of applications.

(a) *Standard procedures.* (1) When an application for a permit is received the district engineer shall immediately assign it a number for identification, acknowledge receipt thereof, and advise the applicant of the number assigned to it. He shall review the application for completeness, and if the application is incomplete, request from the applicant within 15 days of receipt of the application any additional information necessary for further processing.

(2) Within 15 days of receipt of an application the district engineer will either determine that the application is complete (see 33 CFR 325.1(d)(9) and issue a public notice as described in § 325.3 of this part, unless specifically exempted by other provisions of this regulation or that it is incomplete and notify the applicant of the information necessary for a complete application. The district engineer will issue a supplemental, revised, or corrected public notice if in his view there is a change in the application data that would affect the public's review of the proposal.

(3) The district engineer will consider all comments received in response to the public notice in his subsequent actions on the permit application. Receipt of the comments will be acknowledged, if appropriate, and they will be

made a part of the administrative record of the application. Comments received as form letters or petitions may be acknowledged as a group to the person or organization responsible for the form letter or petition. If comments relate to matters within the special expertise of another federal agency, the district engineer may seek the advice of that agency. If the district engineer determines, based on comments received, that he must have the views of the applicant on a particular issue to make a public interest determination, the applicant will be given the opportunity to furnish his views on such issue to the district engineer (see § 325.2(d)(5)). At the earliest practicable time other substantive comments will be furnished to the applicant for his information and any views he may wish to offer. A summary of the comments, the actual letters or portions thereof, or representative comment letters may be furnished to the applicant. The applicant may voluntarily elect to contact objectors in an attempt to resolve objections but will not be required to do so. District engineers will ensure that all parties are informed that the Corps alone is responsible for reaching a decision on the merits of any application. The district engineer may also offer Corps regulatory staff to be present at meetings between applicants and objectors, where appropriate, to provide information on the process, to mediate differences, or to gather information to aid in the decision process. The district engineer should not delay processing of the application unless the applicant requests a reasonable delay, normally not to exceed 30 days, to provide additional information or comments.

(4) The district engineer will follow Appendix B of 33 CFR part 230 for environmental procedures and documentation required by the National Environmental Policy Act of 1969. A decision on a permit application will require either an environmental assessment or an environmental impact statement unless it is included within a categorical exclusion.

(5) The district engineer will also evaluate the application to determine the need for a public hearing pursuant to 33 CFR part 327.

(6) After all above actions have been completed, the district engineer will determine in accordance with the record and applicable regulations whether or not the permit should be issued. He shall prepare a statement of findings (SOF) or, where an EIS has been prepared, a record of decision (ROD), on all permit decisions. The SOF or ROD shall include the district engineer's views on the probable effect of the proposed work on the public interest including conformity with the guidelines published for the discharge of dredged or fill material into waters of the United States (40 CFR part 230) or with the criteria for dumping of dredged material in ocean waters (40 CFR parts 220 to 229), if applicable, and the conclusions of the district engineer. The SOF or ROD shall be dated, signed, and included in the record prior to final action on the application. Where the district engineer has delegated authority to sign permits for and in his behalf, he may similarly delegate the signing of the SOF or ROD. If a district engineer makes a decision on a permit application which is contrary to state or local decisions (33 CFR 320.4(j) (2) & (4)), the district engineer will include in the decision document the significant national issues and explain how they are overriding in importance. If a permit is warranted, the district engineer will determine the special conditions, if any, and duration which should be incorporated into the permit. In accordance with the authorities specified in § 325.8 of this part, the district engineer will take final action or forward the application with all pertinent comments, records, and studies, including the final EIS or environmental assessment, through channels to the official authorized to make the final decision. The report forwarding the application for decision will be in a format prescribed by the Chief of Engineers. District and division engineers will notify the applicant and interested federal and state agencies that the application has been forwarded to higher headquarters. The district or division engineer may, at his option, disclose his recommendation to the news media and other interested parties, with the

caution that it is only a recommendation and not a final decision. Such disclosure is encouraged in permit cases which have become controversial and have been the subject of stories in the media or have generated strong public interest. In those cases where the application is forwarded for decision in the format prescribed by the Chief of Engineers, the report will serve as the SOF or ROD. District engineers will generally combine the SOF, environmental assessment, and findings of no significant impact (FONSI), 404(b)(1) guideline analysis, and/or the criteria for dumping of dredged material in ocean waters into a single document.

(7) If the final decision is to deny the permit, the applicant will be advised in writing of the reason(s) for denial. If the final decision is to issue the permit and a standard individual permit form will be used, the issuing official will forward the permit to the applicant for signature accepting the conditions of the permit. The permit is not valid until signed by the issuing official. Letters of permission require only the signature of the issuing official. Final action on the permit application is the signature on the letter notifying the applicant of the denial of the permit or signature of the issuing official on the authorizing document.

(8) The district engineer will publish monthly a list of permits issued or denied during the previous month. The list will identify each action by public notice number, name of applicant, and brief description of activity involved. It will also note that relevant environmental documents and the SOF's or ROD's are available upon written request and, where applicable, upon the payment of administrative fees. This list will be distributed to all persons who may have an interest in any of the public notices listed.

(9) Copies of permits will be furnished to other agencies in appropriate cases as follows:

(i) If the activity involves the construction of artificial islands, installations or other devices on the outer continental shelf, to the Director, Defense Mapping Agency, Hydrographic Center, Washington, DC 20390 Attention, Code NS12, and to the National Ocean Service, Office of Coast Survey, N/CS261, 1315 East West Highway, Silver Spring, Maryland 20910–3282.

(ii) If the activity involves the construction of structures to enhance fish propagation (e.g., fishing reefs) along the coasts of the United States, to the Defense Mapping Agency, Hydrographic Center and National Ocean Service as in paragraph (a)(9)(i) of this section and to the Director, Office of Marine Recreational Fisheries, National Marine Fisheries Service, Washington, DC 20235.

(iii) If the activity involves the erection of an aerial transmission line, submerged cable, or submerged pipeline across a navigable water of the United States, to the National Ocean Service, Office of Coast Survey, N/CS261, 1315 East West Highway, Silver Spring, Maryland 20910–3282.

(iv) If the activity is listed in paragraphs (a)(9) (i), (ii), or (iii) of this section, or involves the transportation of dredged material for the purpose of dumping it in ocean waters, to the appropriate District Commander, U.S. Coast Guard.

(b) *Procedures for particular types of permit situations*—(1) *Section 401 Water Quality Certification.* If the district engineer determines that water quality certification for the proposed activity is necessary under the provisions of section 401 of the Clean Water Act, he shall so notify the applicant and obtain from him or the certifying agency a copy of such certification.

(i) The public notice for such activity, which will contain a statement on certification requirements (see §325.3(a)(8)), will serve as the notification to the Administrator of the Environmental Protection Agency (EPA) pursuant to section 401(a)(2) of the Clean Water Act. If EPA determines that the proposed discharge may affect the quality of the waters of any state other than the state in which the discharge will originate, it will so notify such other state, the district engineer, and the applicant. If such notice or a request for supplemental information is not received within 30 days of issuance of the public notice, the district engineer will assume EPA has made a negative determination with respect to section 401(a)(2). If EPA determines another state's waters may be

affected, such state has 60 days from receipt of EPA's notice to determine if the proposed discharge will affect the quality of its waters so as to violate any water quality requirement in such state, to notify EPA and the district engineer in writing of its objection to permit issuance, and to request a public hearing. If such occurs, the district engineer will hold a public hearing in the objecting state. Except as stated below, the hearing will be conducted in accordance with 33 CFR part 327. The issues to be considered at the public hearing will be limited to water quality impacts. EPA will submit its evaluation and recommendations at the hearing with respect to the state's objection to permit issuance. Based upon the recommendations of the objecting state, EPA, and any additional evidence presented at the hearing, the district engineer will condition the permit, if issued, in such a manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot, in the district engineer's opinion, insure such compliance, he will deny the permit.

(ii) No permit will be granted until required certification has been obtained or has been waived. A waiver may be explicit, or will be deemed to occur if the certifying agency fails or refuses to act on a request for certification within sixty days after receipt of such a request unless the district engineer determines a shorter or longer period is reasonable for the state to act. In determining whether or not a waiver period has commenced or waiver has occurred, the district engineer will verify that the certifying agency has received a valid request for certification. If, however, special circumstances identified by the district engineer require that action on an application be taken within a more limited period of time, the district engineer shall determine a reasonable lesser period of time, advise the certifying agency of the need for action by a particular date, and that, if certification is not received by that date, it will be considered that the requirement for certification has been waived. Similarly, if it appears that circumstances may reasonably require a period of time longer than sixty days, the district engineer, based on information provided by the certifying agency, will determine a longer reasonable period of time, not to exceed one year, at which time a waiver will be deemed to occur.

(2) *Coastal Zone Management consistency.* If the proposed activity is to be undertaken in a state operating under a coastal zone management program approved by the Secretary of Commerce pursuant to the Coastal Zone Management (CZM) Act (see 33 CFR 320.3(b)), the district engineer shall proceed as follows:

(i) If the applicant is a federal agency, and the application involves a federal activity in or affecting the coastal zone, the district engineer shall forward a copy of the public notice to the agency of the state responsible for reviewing the consistency of federal activities. The federal agency applicant shall be responsible for complying with the CZM Act's directive for ensuring that federal agency activities are undertaken in a manner which is consistent, to the maximum extent practicable, with approved CZM Programs. (See 15 CFR part 930.) If the state coastal zone agency objects to the proposed federal activity on the basis of its inconsistency with the state's approved CZM Program, the district engineer shall not make a final decision on the application until the disagreeing parties have had an opportunity to utilize the procedures specified by the CZM Act for resolving such disagreements.

(ii) If the applicant is not a federal agency and the application involves an activity affecting the coastal zone, the district engineer shall obtain from the applicant a certification that his proposed activity complies with and will be conducted in a manner that is consistent with the approved state CZM Program. Upon receipt of the certification, the district engineer will forward a copy of the public notice (which will include the applicant's certification statement) to the state coastal zone agency and request its concurrence or objection. If the state agency objects to the certification or issues a decision indicating that the proposed activity requires further review, the district engineer shall not issue the

permit until the state concurs with the certification statement or the Secretary of Commerce determines that the proposed activity is consistent with the purposes of the CZM Act or is necessary in the interest of national security. If the state agency fails to concur or object to a certification statement within six months of the state agency's receipt of the certification statement, state agency concurrence with the certification statement shall be conclusively presumed. District engineers will seek agreements with state CZM agencies that the agency's failure to provide comments during the public notice comment period will be considered as a concurrence with the certification or waiver of the right to concur or non-concur.

(iii) If the applicant is requesting a permit for work on Indian reservation lands which are in the coastal zone, the district engineer shall treat the application in the same manner as prescribed for a Federal applicant in paragraph (b)(2)(i) of this section. However, if the applicant is requesting a permit on non-trust Indian lands, and the state CZM agency has decided to assert jurisdiction over such lands, the district engineer shall treat the application in the same manner as prescribed for a non-Federal applicant in paragraph (b)(2)(ii) of this section.

(3) *Historic properties.* If the proposed activity would involve any property listed or eligible for listing in the National Register of Historic Places, the district engineer will proceed in accordance with Corps National Historic Preservation Act implementing regulations.

(4) *Activities associated with Federal projects.* If the proposed activity would consist of the dredging of an access channel and/or berthing facility associated with an authorized federal navigation project, the activity will be included in the planning and coordination of the construction or maintenance of the federal project to the maximum extent feasible. Separate notice, hearing, and environmental documentation will not be required for activities so included and coordinated, and the public notice issued by the district engineer for these federal and associated non-federal activities will be the notice of intent to issue permits for those included non-federal dredging activities. The decision whether to issue or deny such a permit will be consistent with the decision on the federal project unless special considerations applicable to the proposed activity are identified. (See § 322.5(c).)

(5) *Endangered Species.* Applications will be reviewed for the potential impact on threatened or endangered species pursuant to section 7 of the Endangered Species Act as amended. The district engineer will include a statement in the public notice of his current knowledge of endangered species based on his initial review of the application (see 33 CFR 325.2(a)(2)). If the district engineer determines that the proposed activity would not affect listed species or their critical habitat, he will include a statement to this effect in the public notice. If he finds the proposed activity may affect an endangered or threatened species or their critical habitat, he will initiate formal consultation procedures with the U.S. Fish and Wildlife Service or National Marine Fisheries Service. Public notices forwarded to the U.S. Fish and Wildlife Service or National Marine Fisheries Service will serve as the request for information on whether any listed or proposed to be listed endangered or threatened species may be present in the area which would be affected by the proposed activity, pursuant to section 7(c) of the Act. References, definitions, and consultation procedures are found in 50 CFR part 402.

(c) [Reserved]

(d) *Timing of processing of applications.* The district engineer will be guided by the following time limits for the indicated steps in the evaluation process:

(1) The public notice will be issued within 15 days of receipt of all information required to be submitted by the applicant in accordance with paragraph 325.1.(d) of this part.

(2) The comment period on the public notice should be for a reasonable period of time within which interested parties may express their views concerning the permit. The comment period should not be more than 30 days nor less than 15 days from the date of the notice. Before designating comment periods less than 30 days, the district engineer will

consider: (i) Whether the proposal is routine or noncontroversial,

(ii) Mail time and need for comments from remote areas,

(iii) Comments from similar proposals, and

(iv) The need for a site visit. After considering the length of the original comment period, paragraphs (a)(2) (i) through (iv) of this section, and other pertinent factors, the district engineer may extend the comment period up to an additional 30 days if warranted.

(3) District engineers will decide on all applications not later than 60 days after receipt of a complete application, unless (i) precluded as a matter of law or procedures required by law (see below),

(ii) The case must be referred to higher authority (see §325.8 of this part),

(iii) The comment period is extended,

(iv) A timely submittal of information or comments is not received from the applicant,

(v) The processing is suspended at the request of the applicant, or

(vi) Information needed by the district engineer for a decision on the application cannot reasonably be obtained within the 60-day period. Once the cause for preventing the decision from being made within the normal 60-day period has been satisfied or eliminated, the 60-day clock will start running again from where it was suspended. For example, if the comment period is extended by 30 days, the district engineer will, absent other restraints, decide on the application within 90 days of receipt of a complete application. Certain laws (e.g., the Clean Water Act, the CZM Act, the National Environmental Policy Act, the National Historic Preservation Act, the Preservation of Historical and Archeological Data Act, the Endangered Species Act, the Wild and Scenic Rivers Act, and the Marine Protection, Research and Sanctuaries Act) require procedures such as state or other federal agency certifications, public hearings, environmental impact statements, consultation, special studies, and testing which may prevent district engineers from being able to decide certain applications within 60 days.

(4) Once the district engineer has sufficient information to make his public interest determination, he should decide the permit application even though other agencies which may have regulatory jurisdiction have not yet granted their authorizations, except where such authorizations are, by federal law, a prerequisite to making a decision on the DA permit application. Permits granted prior to other (nonprerequisite) authorizations by other agencies should, where appropriate, be conditioned in such manner as to give those other authorities an opportunity to undertake their review without the applicant biasing such review by making substantial resource commitments on the basis of the DA permit. In unusual cases the district engineer may decide that due to the nature or scope of a specific proposal, it would be prudent to defer taking final action until another agency has acted on its authorization. In such cases, he may advise the other agency of his position on the DA permit while deferring his final decision.

(5) The applicant will be given a reasonable time, not to exceed 30 days, to respond to requests of the district engineer. The district engineer may make such requests by certified letter and clearly inform the applicant that if he does not respond with the requested information or a justification why additional time is necessary, then his application will be considered withdrawn or a final decision will be made, whichever is appropriate. If additional time is requested, the district engineer will either grant the time, make a final decision, or consider the application as withdrawn.

(6) The time requirements in these regulations are in terms of calendar days rather than in terms of working days.

(e) *Alternative procedures.* Division and district engineers are authorized to use alternative procedures as follows:

(1) *Letters of permission.* Letters of permission are a type of permit issued through an abbreviated processing procedure which includes coordination with Federal and state fish and wildlife agencies, as required by the Fish and Wildlife Coordination Act, and a public interest evaluation, but without the

publishing of an individual public notice. The letter of permission will not be used to authorize the transportation of dredged material for the purpose of dumping it in ocean waters. Letters of permission may be used:

(i) In those cases subject to section 10 of the Rivers and Harbors Act of 1899 when, in the opinion of the district engineer, the proposed work would be minor, would not have significant individual or cumulative impacts on environmental values, and should encounter no appreciable opposition.

(ii) In those cases subject to section 404 of the Clean Water Act after:

(A) The district engineer, through consultation with Federal and state fish and wildlife agencies, the Regional Administrator, Environmental Protection Agency, the state water quality certifying agency, and, if appropriate, the state Coastal Zone Management Agency, develops a list of categories of activities proposed for authorization under LOP procedures;

(B) The district engineer issues a public notice advertising the proposed list and the LOP procedures, requesting comments and offering an opportunity for public hearing; and

(C) A 401 certification has been issued or waived and, if appropriate, CZM consistency concurrence obtained or presumed either on a generic or individual basis.

(2) *Regional permits.* Regional permits are a type of general permit as defined in 33 CFR 322.2(f) and 33 CFR 323.2(n). They may be issued by a division or district engineer after compliance with the other procedures of this regulation. After a regional permit has been issued, individual activities falling within those categories that are authorized by such regional permits do not have to be further authorized by the procedures of this regulation. The issuing authority will determine and add appropriate conditions to protect the public interest. When the issuing authority determines on a case-by-case basis that the concerns for the aquatic environment so indicate, he may exercise discretionary authority to override the regional permit and require an individual application and review. A regional permit may be revoked by the issuing authority if it is determined that it is contrary to the public interest provided the procedures of § 325.7 of this part are followed. Following revocation, applications for future activities in areas covered by the regional permit shall be processed as applications for individual permits. No regional permit shall be issued for a period of more than five years.

(3) *Joint procedures.* Division and district engineers are authorized and encouraged to develop joint procedures with states and other Federal agencies with ongoing permit programs for activities also regulated by the Department of the Army. Such procedures may be substituted for the procedures in paragraphs (a)(1) through (a)(5) of this section provided that the substantive requirements of those sections are maintained. Division and district engineers are also encouraged to develop management techniques such as joint agency review meetings to expedite the decision-making process. However, in doing so, the applicant's rights to a full public interest review and independent decision by the district or division engineer must be strictly observed.

(4) *Emergency procedures.* Division engineers are authorized to approve special processing procedures in emergency situations. An ''emergency'' is a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship if corrective action requiring a permit is not undertaken within a time period less than the normal time needed to process the application under standard procedures. In emergency situations, the district engineer will explain the circumstances and recommend special procedures to the division engineer who will instruct the district engineer as to further processing of the application. Even in an emergency situation, reasonable efforts will be made to receive comments from interested Federal, state, and local agencies and the affected public. Also, notice of any special procedures authorized and their rationale is to be appropriately published as soon as practicable.

[51 FR 41236, Nov. 13, 1986, as amended at 62 FR 26230, May 13, 1997]

project will comply with water quality requirements; and

(ii) A citation to federal, state, or tribal law that authorizes the condition.

(2) For certification conditions on issuance of a general license or permit,

(i) A statement explaining why the condition is necessary to assure that any discharge authorized under the general license or permit will comply with water quality requirements; and

(ii) A citation to federal, state, or tribal law that authorizes the condition.

(e) Any denial of certification shall be in writing and shall include:

(1) For denial of certification for an individual license or permit,

(i) The specific water quality requirements with which the discharge will not comply;

(ii) A statement explaining why the discharge will not comply with the identified water quality requirements; and

(iii) If the denial is due to insufficient information, the denial must describe the specific water quality data or information, if any, that would be needed to assure that the discharge from the proposed project will comply with water quality requirements.

(2) For denial of certification for issuance of a general license or permit,

(i) The specific water quality requirements with which discharges that could be authorized by the general license or permit will not comply;

(ii) A statement explaining why discharges that could be authorized by the general license or permit will not comply with the identified water quality requirements; and

(iii) If the denial is due to insufficient information, the denial must describe the types of water quality data or information, if any, that would be needed to assure that the range of discharges from potential projects will comply with water quality requirements.

(f) If the certifying authority determines that no water quality requirements are applicable to the waters receiving the discharge from the proposed project, the certifying authority shall grant certification.

§ 121.8 Effect of denial of certification.

(a) A certification denial shall not preclude a project proponent from submitting a new certification request, in accordance with the substantive and procedural requirements of this part.

(b) Where a Federal agency determines that a certifying authority's denial satisfies the requirements of § 121.7(e), the Federal agency must provide written notice of such determination to the certifying authority and project proponent, and the license or permit shall not be granted.

§ 121.9 Waiver.

(a) The certification requirement for a license or permit shall be waived upon:

(1) Written notification from the certifying authority to the project proponent and the Federal agency that the certifying authority expressly waives its authority to act on a certification request; or

(2) The certifying authority's failure or refusal to act on a certification request, including:

(i) Failure or refusal to act on a certification request within the reasonable period of time;

(ii) Failure or refusal to satisfy the requirements of § 121.7(c);

(iii) Failure or refusal to satisfy the requirements of § 121.7(e); or

(iv) Failure or refusal to comply with other procedural requirements of section 401.

(b) A condition for a license or permit shall be waived upon the certifying authority's failure or refusal to satisfy the requirements of § 121.7(d).

(c) If the certifying authority fails or refuses to act, as provided in this section, the Federal agency shall provide written notice to the Administrator, certifying authority, and project proponent that waiver of the certification requirement or condition has occurred. This notice must be in writing and include the notice that the Federal agency provided to the certifying authority pursuant to § 121.6(b).

(d) A written notice of waiver from the Federal agency shall satisfy the project proponent's requirement to obtain certification.

(e) Upon issuance of a written notice of waiver, the Federal agency may issue the license or permit.

§ 121.10 Incorporation of certification conditions into the license or permit.

(a) All certification conditions that satisfy the requirements of §121.7(d) shall be incorporated into the license or permit.

(b) The license or permit must clearly identify any certification conditions.

§ 121.11 Enforcement of and compliance with certification conditions.

(a) The certifying authority, prior to the initial operation of a certified project, shall be afforded the opportunity to inspect the facility or activity for the purpose of determining whether the discharge from the certified project will violate the certification.

(b) If the certifying authority, after an inspection pursuant to subsection (a), determines that the discharge from the certified project will violate the certification, the certifying authority shall notify the project proponent and the Federal agency in writing, and recommend remedial measures necessary to bring the certified project into compliance with the certification.

(c) The Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit.

Subpart C—Other Jurisdictions

§ 121.12 Determination of effects on neighboring jurisdictions.

(a) A Federal agency shall within 5 days notify the Administrator when it receives a license or permit application and the related certification.

(b) Within 30 days after the Administrator receives notice in accordance with §121.12(a), the Administrator at his or her discretion may determine that the discharge from the certified project may affect water quality in a neighboring jurisdiction. In making this determination and in accordance with applicable law, the Administrator may request copies of the certification and the federal license or permit application.

(c) If the Administrator determines that the discharge from the certified project may affect water quality in a neighboring jurisdiction, the Administrator, within 30 days after receiving notice in accordance with §121.12(a), shall notify that neighboring jurisdiction, the certifying authority, the Federal agency, and the project proponent. The federal license or permit may not be issued pending the conclusion of the processes in this paragraph.

(1) Notification from the Administrator shall: Be in writing, be dated, and identify the materials provided by the Federal agency. The notification shall inform the neighboring jurisdiction that it has 60 days to notify the Administrator and the Federal agency, in writing, whether it has determined that the discharge will violate any of its water quality requirements, to object to the issuance of the federal license or permit, and to request a public hearing from the Federal agency.

(2) Notification of objection and request for a hearing from the neighboring jurisdiction shall: Be in writing; identify the receiving waters it determined will be affected by the discharge; and identify the specific water quality requirements it determines will be violated by the certified project.

(3) If the neighboring jurisdiction requests a hearing in accordance with §121.12(c)(2), the Federal agency shall hold a public hearing on the neighboring jurisdiction's objection to the license or permit.

(i) The Federal agency shall provide the hearing notice to the Administrator at least 30 days before the hearing takes place.

(ii) At the hearing, the Administrator shall submit to the Federal agency his or her evaluation and recommendation(s) concerning the objection.

(iii) The Federal agency shall: Consider recommendations from the neighboring jurisdiction and the Administrator, and any additional evidence presented to the Federal agency at the hearing; and determine whether additional certification conditions are necessary to assure that the discharge

.10 Water Quality Certification.

A. General.

(1) 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. This regulation establishes the procedures under which this certification will be issued.

(2) Discharges permitted by the Department under the National Pollutant Discharge Elimination System are certified by the Department.

B. Application for a Water Quality Certification.

(1) An applicant for certification shall submit to the Department an application which includes:

(a) Name and address of the applicant.

(b) A description of the facility or activity.

(c) A description of any discharge which may result from the conduct of any activity including:

(i) Biological, chemical, thermal or other characteristics of the potential discharge; and

(ii) The location or locations at which any discharge may enter navigable waters.

(d) A description, if applicable, of the function and operation of any equipment or facilities to treat any discharge and the degree of treatment to be attained.

(e) The date on which the activity will begin or end, if known, and the date or dates on which any discharge may occur.

(f) A description, if applicable, of the methods proposed or employed to monitor the quality and characteristics of any discharge.

(g) Any other information the Department determines is necessary for evaluation of the impact of the activity on water quality. This may include quantitative analysis to demonstrate that the proposed activity may not violate State water quality standards.

(2) Discharges to Outstanding National Resource Waters (ONRW) will be certified only if:

(a) There is minimal adverse environmental impact;

(b) The discharges will not impair the water quality necessary to maintain the exceptional biological resource of the ONRW; and

(c) All practical actions have been taken to avoid impacts.

(3) By agreement with either federal or State agencies in order to facilitate the certification process, the Department may develop a joint application for a federal license or permit and State water quality certification.

C. Public Notice.

(1) The Department shall provide public notice of each application for certification.

(2) The public notice shall:

(a) Give a brief description of the proposed activity;

(b) Provide instructions for submission of written comments; and

(c) Specify the expiration date for the opportunity to comment.

(3) The public notice may be given by:

(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.

D. Determination of Need for Public Hearing. The Department may hold a public hearing before issuing any water quality certification if:

(1) The Department determines the activity requiring certification is of broad, general interest; or

(2) The application for certification generated substantial public interest as indicated by written comments concerning water quality issues.

E. Issuance of Certification.

(1) Certification Issuance. 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.

(2) Applicant Responsibilities.

(a) Issuance of water quality certification does not relieve the applicant of his responsibility to comply at all times with federal and State law.

(b) The applicant shall:

(i) Obtain the State water quality certification before the conduct of any activity requiring the federal permit;

(ii) Comply with all conditions of the State water quality certification to assure achievement of State water quality standards.

(3) Emergency Procedures. The Department:

(a) May issue an emergency water quality certification in those cases when the Department determines that an unacceptable threat to human life, water quality, or aquatic resources may occur or in those cases when a severe loss of property may result before a certification can be issued in accordance with procedures specified in §C of this regulation;

(b) Shall issue a notice stating its action and the reasons for the action in accordance with the requirements of §C of this regulation, not later than 10 days following the issuance of the emergency certification;

(c) Shall incorporate in the emergency certification all standards and criteria normally applied to the specific type of project authorized by the emergency certification.

F. Procedures for Public Hearing.

(1) Notice of Public Hearing. The notice of public hearing shall:

(a) Include a brief description of the project;

(b) Include information concerning the date, time, and location of the public hearing;

(c) Include a brief description of the nature of the written comments received; and

(d) Be published in the Maryland Register at least 45 days before the hearing.

(2) Public Hearing.

(a) An interested person shall be given an opportunity to present evidence for or against the granting of water quality certification at the public hearing.

(b) Written comments shall be received by the Department by the date of the public hearing, unless the comment period is specifically extended at the hearing.

(3) Final Determination. After the closing date for receipt of written comments and after any public hearing the Department shall:

(a) Consider the testimony and other information presented;

(b) Prepare a written decision; and

(c) Publish the decision in the Maryland Register.

(4) Appeal of Final Decision.

(a) A person aggrieved by the Department's decision concerning a water quality certification may appeal the decision of the Department. The appeal shall:

(i) Be filed within 30 days of the publication of the final decision with the hearing office; and

(ii) Specify, in writing, the reason why the final determination should be reconsidered.

(b) A further appeal shall be in accordance with the applicable provisions of State Government Article, §10-201 et seq., Annotated Code of Maryland.

G. General Certification.

(1) The Department may issue a general water quality certification for a class of activities requiring any federal license or permit.

(2) A general certification shall authorize all activities that meet the class description.

(3) In unique circumstances not considered in the issuance of the general certification, the Department may require issuance of an individual water quality certification for an activity that could be regulated under a general certification.

H. General Certification Issuance and Renewal.

(1) If the Department determines to adopt a general certification for a specific class of activities, the Department shall prepare a fact sheet:

(a) Describing the class of activities to be included; and

(b) Outlining the proposed conditions and limitations of the general certification.

(2) Notice of Intent to Adopt General Certification.

(a) The Department shall prepare a public notice which includes:

(i) A brief description of the general and special conditions which are proposed to be included in the general certification.

(ii) Provisions for examination by interested parties of the draft permit and other information related to the preliminary determination made by the Department.

(iii) A request for written comments concerning the general permit and a statement that a public hearing may be held if significant written public comment concerning the application is received by the Department.

(iv) Instructions for submission of written comments.

(v) The deadline specified for the submission of written comments. The deadline shall be at least 30 days from the date of publication of notice in the Maryland Register.

(b) The Department shall publish the notice in the Maryland Register. A copy of the notice shall be sent to:

(i) Local health officers;

(ii) Other interested State and local agencies; and

(iii) Any person requesting to be notified.

(3) Public Hearings.

(a) A public hearing shall be held and a notice of the public hearing shall be prepared and distributed if:

(i) There is significant public comment concerning the tentative determination to issue a general certification; or

(ii) The Department determines that a public hearing is necessary.

(b) The notice of public hearing shall be prepared and published in accordance with §F of this regulation.

(c) The public hearing shall be conducted in accordance with the procedure outlined in §F of this regulation.

(4) Appeal of Final Decision. A person aggrieved by the Department's decision concerning a general water quality certification may appeal the decision of the Department. The appeal shall be in accordance with §F(4) of this regulation.

I. Applicant's Responsibility. General certification of any activity does not relieve the applicant of his responsibility to comply at all times with federal and State laws.