



Maryland

Department of the Environment

Larry Hogan
Governor

Boyd Rutherford
Lieutenant Governor

Ben Crumbles
Secretary

August 14, 2017

The Honorable Paul Ryan, Speaker
Congress of the United States
House of Representatives
H-232 The Capitol
Washington, DC 20515

The Honorable Nancy Pelosi, Minority Leader
Congress of the United States
House of Representatives
233 Cannon House Office Building
Washington, DC 20515

Dear Speaker Ryan and Minority Leader Pelosi:

The State of Maryland (“Maryland”) provides the following comments on the House of Representatives Bill 3043 (H.R. 3043) – *Hydropower Policy Modernization Act of 2017*. Although Maryland generally welcomes reforms that streamline the Federal Energy Regulatory Commission (FERC) licensing process, Maryland strenuously opposes any provisions in H.R. 3043 that would have the effect of curtailing State authority under Section 401 of the Clean Water Act to establish license conditions to protect water quality. Several provisions of H.R. 3043 essentially serve to constrain state agencies use of their independent authorities, making it more difficult to protect water quality.

States serve an essential role in the FERC hydropower licensing process when they review applications under Section 401 of the Clean Water Act in order to determine whether the construction and/or operation of the facility will meet state water quality standards and requirements. These reviews often result in applicants conducting additional scientific studies and states putting in place requirements (conditions) to ensure that State water quality standards and requirement are met. These types of conditions are essential for ensuring that existing and new hydropower projects are built and operated in a manner that is consistent with state and federal environmental laws and are protective of the environment. These conditions then become conditions of the FERC license.

H.R. 3043 designates FERC as the lead agency over federal authorizations related to an application for a license, license amendment, or exemption for a hydropower project. This bill requires states to meet deadlines established by FERC in a schedule that FERC develops for the licensing action. Further, this bill places limits on FERC’s ability to easily grant extensions to the deadlines. As the lead agency, FERC would establish and control the timeline for the hydropower licensing process and it appears that H.R. 3043 gives FERC the authority to create a schedule that would reduce the

amount of time a state would have to get necessary scientific studies completed and to assess whether water quality standards and requirements will be met as required under Section 401 of the Clean Water Act. Further, not only does this legislation likely place pressure on states to complete their water quality reviews more quickly using existing information, it also provides applicants with an entitlement to a trial-type hearing before a FERC Administrative Law Judge whenever there is a dispute of material fact. Moreover, this legislation declares the decision of the FERC Administrative Law Judge to be final and not subject to further administrative review. This allowance for a trial-like hearing combined with pressure to use existing science and meet strict deadlines together makes it even more challenging for states to protect water quality.

Finally, applications for amendments to existing licenses which qualify as a project “upgrade” (which is determined by FERC as to whether a proposed amendment qualifies as an upgrade) obtain even more expedited processing by FERC. In these cases, it appears that FERC would be the decision maker, not the state, with regard to whether the desired amendment to project operations would affect water quality.

Decades of federal court decisions interpreting Section 401 have established the states’ authority to require conditions in FERC licenses necessary to protect water quality. These decisions recognize and affirm the basic principle of federalism embodied in the Clean Water Act that states have the primary role and responsibility to ensure state water quality standards are met.

Maryland’s interest in protecting water quality is as important and relevant today as ever, particularly now as FERC considers the relicensing of the Conowingo hydroelectric dam on the Susquehanna River in Maryland. The Susquehanna River provides approximately 50 percent of the fresh water to the Chesapeake Bay and is an important driver of the Bay’s water quality. A joint study funded by Maryland and the Army Corps of Engineers concluded that the Dam’s loss of capacity to trap sediment and associated nitrogen and phosphorus pollution (nutrients) adversely affects the health of the Bay. The precise nature of the Dam’s adverse impacts on the health of the Bay and the circumstances under which they occur are currently the subject of additional study. What is clear, however, is that any new FERC license for the Dam will have to contain appropriate conditions to address sediment and associated nutrient transport and ensure that Maryland’s water quality standards are maintained. Without appropriate conditions Maryland may not be able to meet its commitment to achieve EPA’s Total Maximum Daily Loads (“TMDL”) for the Bay.

In impairing the states’ primary roles and responsibilities under Section 401 to fashion conditions in FERC licenses, H.R. 3043 relegates the states – the entities with the greatest interest and expertise in protecting state water quality – to bystander or second-class status. Maryland strenuously objects to the provisions in H.R. 3043 that would make it more difficult for Maryland to ensure water quality through the Clean Water Act Section 401 water quality certification process.

Maryland’s concerns with the legislation’s impact on the Conowingo hydroelectric dam relicensing process could be addressed by making clear that nothing in the legislation alters Section 401 of the Clean Water Act with regard to State authority, role, responsibilities, process and timeline. Further, the legislation should clearly indicate that state actions associated with Section 401 requirements, including the assessment of water quality standard achievement and resulting conditions, are not

eligible for a trial type hearing by a FERC Administrative Law Judge for purposes of resolving disputes of material fact. Maryland urges that the provisions of H.R. 3043 that would have the effect of curtailing State authority under Section 401 of the Clean Water Act be stricken from the bill.

We thank you for your time and attention to this matter. Please contact us to discuss further at ben.grumbles@maryland.gov (410) 537-4187 or mark.belton@maryland.gov (410) 260-8101.

Respectfully,



Ben Grumbles
Secretary
Maryland Department of the Environment



Mark Belton
Secretary
Maryland Department of Natural Resources

cc: U.S. Senator Benjamin L. Cardin
U.S. Senator Chris Van Hollen
U.S. Representative Andy Harris
U.S. Representative C.A. Dutch Ruppersberger
U.S. Representative John Sarbanes
U.S. Representative Anthony G. Brown
U.S. Representative Steny H. Hoyer
U.S. Representative John Delaney
U.S. Representative Elijah E. Cummings
U.S. Representative Jamie Raskin