



30 Bank Street
PO Box 350
New Britain, CT 06050-0350
06051 for 30 Bank Street
(860)223-4400
fax (860)223-4488

Testimony of Gregory A. Sharp, Esq.
Connecticut Bar Association Environmental Law Section
House Bill 6507, An Act Concerning Water Quality Certification Applications
Environment Committee
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The Environmental Law Section of the Connecticut Bar Association **supports** passage of HB 6507 with a small, but important, change which will be discussed below.

This bill would provide the applicant for a state Water Quality Certification under Section 401 of the federal Water Pollution Control Act the right to a contested case hearing on the application under the Uniform Administrative Procedures Act ("UAPA"), and an appeal of an adverse final decision to the Superior Court. This bill would provide applicants for Water Quality Certifications the same rights that SB 835 would provide for applicants for Structures and Dredging applications on which I testified previously.

Under Section 401 of the federal Water Pollution Control Act, each applicant for a federal license or permit to conduct an activity which may result in a discharge to waters of the United States must submit a certification from the state agency in the state in which the discharge originates that the discharge is consistent with the state's Water Quality Standards. 33 U.S.C. § 1341(a). Significantly, the federal agency may not issue its license unless and until the state issues its water quality certification, so the water quality certification process vests the state agency with virtual veto power over the federal license.

The most common circumstances triggering the requirement for a water quality certification in Connecticut are applications to the Army Corps of Engineers for permits for the discharge of dredged or fill material to federal wetlands under Section 404 of the federal Clean Water Act, 33 U.S.C. §1344, and applications for Federal Energy Regulatory Commission licenses for hydropower facilities under the Federal Power Act, 16 U.S.C. § 791a.

The federal Clean Water Act does not prescribe a process for the issuance of the necessary certification but leaves that task to the states. Connecticut has not adopted a free standing statute spelling out the process but instead has set forth the process for the issuance of water quality certifications in a catch all statute codified at Conn. Gen. Stat. §§ 22a-6g & h.

Section 22a-6g requires notice of an application to be published by the applicant for a water quality certification and several other permits within DEP's jurisdiction. Section 22a-6h requires that, prior to issuance of a water quality certification and the other permits enumerated in the statute, a Notice of Tentative Determination (to Approve or Deny) be issued by the Commissioner providing for a 30 day comment period. The Notice of Tentative Determination is issued following a review of the application by DEP staff.

A hearing is neither required nor referenced in the statute, and the Supreme Court has held that, even if a hearing were in fact held by the agency, the proceeding is not a contested case under the UAPA, because the agency is not "required by statute to provide an opportunity for a hearing to determine a party's legal rights or privileges." Summit Hydropower v. Commissioner. 226 Conn. 792, 811 (1993).

As a result, when the Department issues a Notice of Tentative Determination to deny an application, or to impose onerous conditions on the permit, based upon a staff review of the application, the applicant's only recourse is to write a letter objecting to the denial during the 30 day comment period. If the Commissioner renders a final decision denying the application, or imposing conditions unacceptable to the applicant, following the close of the comment period, the applicant has no right to appeal the decision to court.

Under Summit Hydropower, the applicant's only vehicle for relief following an adverse final decision by the Commissioner is to request a Declaratory Ruling that the decision she has just made is erroneous. Id. at fn 18. The final decision from the Declaratory Ruling could then be appealed to Superior Court under the UAPA.

At the agency level, this remedy would require that the applicant proceed through a second round of administrative proceedings without any likely prospect of relief. Moreover, the Declaratory Ruling process fails to guarantee the applicant the right to a proceeding conducted by an independent hearing officer, the right to present expert testimony, or the right to cross-examine DEP staff concerning the basis for the decision reached.

In summary, under the current statute, the agency can make an arbitrary or erroneous decision on an application, and the applicant has no right to a contested case hearing to correct the error at the agency level, and no direct right of appeal to Superior Court.

Considering the costs to an applicant to perfect an application and the adverse impact to an applicant from the withholding of the federal license resulting from a denial, fundamental fairness requires that the applicant should have the right to 1) a contested case hearing under the UAPA in the event staff recommends a denial or unacceptable conditions, and 2) the right to an appeal to Superior Court in the event the Commissioner issues a final decision adverse to the applicant.

Due to the costs to an applicant of pursuing a hearing, I would expect that the number of hearing requests would be small and would not overly burden DEP staff or the agency's Office of Adjudications.

I have one small but important change to the bill as drafted. Lines 9 through 13 should be revised to allow the applicant a period of 30 days after the publication of the Notice of Tentative Determination to request a hearing, with the hearing to be held afterward, as is provided in many of the other permitting statutes implemented by DEP. The language in the raised bill, as presently drafted, would require the commissioner to hold the hearing within 30 days of the notice of tentative determination.

The language I would suggest to the Committee is as follows: "If the applicant requests a hearing within 30 days of the publication of such notice of tentative determination, the commissioner shall hold a hearing on such application, in accordance with the provisions of chapter 54 of the general statutes."

For all the foregoing reasons, the CBA Environmental Law Section urges the committee to **favorably report** HB 6507 with the changes I have proposed.

Thank you for the opportunity to appear and testify on this matter. I would be pleased to answer any questions that you may have.