



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

Testimony of Gregory A. Sharp, Esq.
Connecticut Bar Association, Environmental Law Section
Raised Bill No. 87, 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 Raised Bill No. 87. The 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 Raised Bill No. 86 would provide to applicants for Structures and Dredging applications.

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 the jurisdiction of the Department of Energy and Environmental Protection (DEEP”). 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 DEEP 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, if, based upon a staff review of the application, the Department issues a Notice of Tentative Determination to deny an application, or to approve it with unacceptable conditions, the applicant's only recourse is to write a letter during the 30 day comment period objecting to the denial or the conditions. If, following the close of the comment period, the Commissioner renders a final decision denying the application, or imposing unacceptable conditions, 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 the Commissioner to issue a Declaratory Ruling that the decision he 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 circuitous 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.

In closing, I should note that the preparation and submission of an application for a water quality certification can be extremely costly to an applicant, and the denial of a state water quality certification blocks the issuance of the federal license necessary to carry out the applicant's project, even if the federal agency is willing to authorize the project. 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 on the Water Quality Certification.

For all the foregoing reasons, the CBA Environmental Law Section urges the committee to **favorably report** Raised Bill 87.

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