

176 FERC ¶ 61,029
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Exelon Generation Company, LLC

Project No. 405-129

ORDER ADDRESSING ARGUMENTS RAISED ON REHEARING

(Issued July 15, 2021)

1. On April 19, 2021, Waterkeepers Chesapeake, the Lower Susquehanna Riverkeeper, ShoreRivers,¹ and the Chesapeake Bay Foundation, Inc. (jointly, Waterkeepers) filed a timely request for rehearing² of the Commission's March 19, 2021 order issuing a new license to Exelon Generation Company, LLC (Exelon) pursuant to sections 4(e) and 15 of the Federal Power Act (FPA)³ for the continued operation and maintenance of the Conowingo Hydroelectric Project No. 405 (Conowingo Project or project).⁴ The 570.15-megawatt (MW) project is located on the Susquehanna River approximately 10 miles above the Chesapeake Bay in Lancaster and York Counties, Pennsylvania, and Cecil and Harford Counties, Maryland.

2. Pursuant to *Allegheny Defense Project v. FERC*,⁵ the rehearing request filed in this proceeding may be deemed denied by operation of law. However, as permitted by

¹ The request for rehearing explains that ShoreRivers includes four Waterkeeper organizations—the Miles-Wye Riverkeeper, the Choptank Riverkeeper, the Chester Riverkeeper, and the Sassafras Riverkeeper—which are all active members of Waterkeepers Chesapeake.

² Waterkeepers April 19, 2021 Request for Rehearing (Rehearing Request).

³ 16 U.S.C. §§ 797(e), 808.

⁴ *Exelon Generation Co., LLC*, 174 FERC ¶ 61,217 (2021) (License Order).

⁵ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

section 313(a) of the FPA,⁶ we are modifying the discussion in the License Order and continue to reach the same result in this proceeding, as discussed below.⁷

I. Background

3. The Susquehanna River Basin drains approximately 27,510 square miles in New York, Pennsylvania, and Maryland. It encompasses 43% of the Chesapeake Bay's drainage area and provides approximately 50% of the total freshwater inflow to the bay. The basin has six subbasins. In the Lower Susquehanna subbasin, seven major tributaries and numerous smaller tributaries flow into the lower Susquehanna River.

4. Five hydroelectric projects are located on the lower Susquehanna River. From upstream to downstream, these are the 19.62-MW York Haven Hydroelectric Project No. 1888 at river mile 55; the 417.5-MW Safe Harbor Hydroelectric Project No. 1025 at river mile 33; the 195.5-MW Holtwood Hydroelectric Project No. 1881 at river mile 25; the 828-MW Muddy Run Pumped Storage Project No. 2355 at river mile 22; and the Conowingo Project at river mile 10. Five miles below Conowingo Dam, the river becomes tidally influenced before entering Chesapeake Bay.

5. On August 31, 2012, Exelon filed an application for a new license for the Conowingo Project.⁸ On July 30, 2014, Commission staff issued a draft multi-project Environmental Impact Statement (EIS)⁹ that analyzed the potential impacts of Exelon's

⁶ 16 U.S.C. § 825l(a) ("Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.").

⁷ *Allegheny Def. Project*, 964 F.3d at 16-17. The Commission is not changing the outcome of the License Order. See *Smith Lake Improvement & Stakeholders Ass'n v. FERC*, 809 F.3d 55, 56-57 (D.C. Cir. 2015).

⁸ The License Order provided a complete procedural history of the Conowingo Project. 174 FERC ¶ 61,217 at PP 3-10. The Commission last issued a license for the Conowingo Project on August 14, 1980, for a period ending August 31, 2014. *Susquehanna Power Co.*, 19 FERC ¶ 61,348, *order on reh'g*, 13 FERC ¶ 61,132 (1980). After the license term expired on August 31, 2014, Exelon operated the project under an annual license pending the disposition of its application for a new license.

⁹ The multi-project EIS also considered the impacts of the Muddy Run Pumped Storage Project No. 2355 and the York Haven Hydroelectric Project No. 1888.

relicensing proposal and several alternatives. On March 11, 2015, Commission staff issued a final EIS.

6. On January 31, 2014, Exelon filed, and the Maryland Department of the Environment (MDE) received, an application for a water quality certification pursuant to section 401¹⁰ of the Clean Water Act for the relicensing of the Conowingo Project. Thereafter, Exelon withdrew and refiled its application on March 3, 2015, April 25, 2016, and May 17, 2017. MDE issued a water quality certification for the Conowingo Project on April 27, 2018.¹¹

7. Exelon challenged the certification before MDE, in state court, in federal court, and before the Commission.¹² On February 28, 2019, Exelon filed a petition for a declaratory order asking the Commission to find that MDE had waived its right to issue a water quality certification in light of the decision from the U.S. Court of Appeals for the District of Columbia Circuit in *Hoopa Valley Tribe v. FERC*.¹³

8. On October 29, 2019, Exelon and MDE filed a settlement agreement that resolved all outstanding matters between them associated with MDE's issuance of the water quality certification (MDE Settlement).¹⁴ The Commission issued public notice of the settlement and solicited comments and reply comments.¹⁵ In the settlement agreement, MDE conditionally waived its section 401 certification authority over the relicensing of the Conowingo Project and Exelon conditionally withdrew its petition for declaratory

¹⁰ 33 U.S.C. § 1341.

¹¹ License Order, 174 FERC ¶ 61,217 at P 42 (citing Letter from Ben Grumbles, Secretary, MDE (May 8, 2018)).

¹² *E.g.*, Exelon February 28, 2019 Petition for Declaratory Order at 12 (filed in Project No. 405-121) (describing Exelon's filings in different venues).

¹³ *Id.* at 13-20 (citing *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019)).

¹⁴ Exelon and MDE October 29, 2019 Joint Offer of Settlement and Explanatory Statement (MDE Settlement).

¹⁵ 84 Fed. Reg. 59,801 (Nov. 6, 2019); *Exelon Generation Co., LLC*, Notice Extending Comment Period (Nov. 13, 2019).

order; the settlement specified that upon Commission approval both MDE's section 401 certification and Exelon's petition for declaratory order would be deemed waived.¹⁶

9. On March 19, 2021, the Commission issued a new license for the project based on the proposed operational and environmental measures set forth in Exelon's license application, as modified by the MDE Settlement and another settlement agreement with the U.S. Department of the Interior.¹⁷ As the settling parties contemplated, the License Order dismissed Exelon's petition for declaratory order as moot.¹⁸

II. Procedural Matters

10. Under section 313(a) of the FPA and Rule 713(b) of the Commission's Rules and Practice and Procedure, only a party to a proceeding may request rehearing of a final Commission decision.¹⁹ Any person seeking to become a party must file a motion to intervene pursuant to Rule 214 of the Commission's Rules of Practice and Procedure.²⁰ ShoreRivers and the four Waterkeeper organizations that it includes—the Miles-Wye Riverkeeper, the Choptank Riverkeeper, the Chester Riverkeeper, and the Sassafras Riverkeeper²¹—did not intervene in this proceeding. Accordingly, they may not join in the rehearing requests filed by Waterkeepers and we reject their requests for rehearing of the License Order.

11. On May 4, 2021, Exelon filed a motion for leave to answer and an answer to Waterkeepers' rehearing request. Rule 713(d) of the Commission's Rules of Practice and Procedure prohibits an answer to a request for rehearing.²² Accordingly, we deny Exelon's motion to answer and reject its answer.

¹⁶ See MDE Settlement at 4-5, 13; see e.g., License Order, 174 FERC ¶ 61,217 at P 48.

¹⁷ License Order, 174 FERC ¶ 61,217 at P 24.

¹⁸ *Id.* P 77 n.99, ordering para. (C).

¹⁹ 16 U.S.C. § 825l(a); 18 C.F.R. § 385.713(b) (2020).

²⁰ 18 C.F.R. § 385.214(a)(3) (2020).

²¹ Rehearing Request at 1 n.1.

²² 18 C.F.R. § 385.713(d).

III. Discussion

12. Waterkeepers argue on rehearing that the Commission violated the Clean Water Act, inadequately considered the environmental impacts of the licensing decision, failed to prepare a required supplemental EIS, and improperly decided not to require dredging at the Conowingo Dam. The Commission is not persuaded by Waterkeepers' arguments and continues to reach the same result in this proceeding, as discussed below.

A. Water Quality Certification

13. Under section 401(a)(1) of the Clean Water Act, the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency has either issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year.²³ Section 401(d) of the Clean Water Act provides that the certification shall become a condition of any federal license that authorizes construction or operation of the project.²⁴

14. Waterkeepers argue that the Commission violated section 401(d) of the Clean Water Act by failing to include the content of MDE's 2018 water quality certification as mandatory conditions of the new license,²⁵ claiming that the MDE Settlement cannot retroactively waive the 2018 certification.²⁶ Further, Waterkeepers state that MDE has not explicitly withdrawn the 2018 certification.²⁷ Waterkeepers assert that the statute provides waiver only when the state "fails or refuses to act on a request for certification" within a reasonable period of time—a state cannot retroactively waive an existing certification.²⁸ Accordingly, Waterkeepers claim that the Commission's decision to issue a license without including the certification is arbitrary and capricious because the

²³ 33 U.S.C. § 1341(a)(1).

²⁴ *Id.* § 1341(d).

²⁵ Rehearing Request at 27.

²⁶ *Id.* at 27-28.

²⁷ *Id.* at 28.

²⁸ *Id.* at 28-30.

Commission did not explain its conclusion that MDE's purported waiver of the 2018 certification was valid.²⁹

15. We are not persuaded by Waterkeepers' arguments. The settlement agreement makes clear that MDE intended to waive its section 401 authority and nullify the 2018 certification if the Commission approved the agreement.³⁰ Nothing in the Clean Water Act prevents a state from affirmatively waiving its authority to issue a water quality certification before the statutory "reasonable period" expires³¹ or during pendency of the certification's appeal.³² On rehearing, Waterkeepers do not cite any authority to suggest that the CWA prohibits a state from waiving certification after granting it.

16. Waterkeepers also attempt to contrast the lack of authority to waive an existing certification with the explicit authority under the CWA to revoke an existing certification under limited circumstances.³³ Waterkeepers liken MDE's waiver of the 2018 certification to a revocation, in substance and effect, without satisfying the statute's conditions.³⁴ This is a flawed comparison. Waiver obviates section 401's certification

²⁹ *Id.* at 34-38.

³⁰ *See* License Order, 174 FERC ¶ 61,217 at PP 73-77; MDE Settlement at 4-5.

³¹ License Order, 174 FERC ¶ 61,217 at P 73 (citing *Env't Def. Fund v. Alexander*, 501 F. Supp. 742, 771 (N.D. Miss. 1980), *aff'd in part, rev'd in part on other grounds, sub nom. Env't Def. Fund v. Marsh*, 651 F.2d 983 (5th Cir. 1981) (a state may make an affirmative decision to waive certification under section 401(a)(1) of the Clean Water Act); EPA, *Basic Information on CWA Section 401 Certification*, <https://www.epa.gov/cwa-401/basic-information-cwa-section-401-certification> (last visited Jan. 7, 2021) ("A state or authorized tribe may waive the certification voluntarily, or by failing or refusing to act within the established reasonable time period.")). *See, e.g., Town of Afton*, 129 FERC ¶ 62,024, at P 16 (2009).

³² License Order, 174 FERC ¶ 61,217 at P 73 (citing *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 969 (D.C. Cir. 2011) (acknowledging that a state could decide to affirmatively waive its certification rights rather than revise the certificate to accommodate a ruling on appeal)).

³³ Rehearing Request at 31-32, 36.

³⁴ *Id.*

requirement and the relevant federal authorization may proceed. In contrast, revocation, in effect, denies the request for certification and the relevant project may not proceed.³⁵

17. Waterkeepers assert that Congress did not intend to allow a state to exercise control over a project's license without conducting public participation, without certifying that the project will comply with water quality standards, and without establishing the requirements necessary to assure such compliance.³⁶ In Waterkeepers' view, MDE impermissibly exercised such control over the project by waiving the 2018 certification and setting the conditions MDE found necessary via the settlement.³⁷

18. We recognize that the Clean Water Act requires certain procedures and substantive requirements when a state exercises its authority to issue a water quality certification; however, when a state waives its authority, the statute does not require it to certify that the project will comply with water quality standards, or establish requirements necessary to assure compliance with those standards. Further, Waterkeepers do not allege any non-compliance with particular public participation requirements relevant to MDE's waiver or participation in the MDE Settlement. We therefore continue to find that MDE waived the 2018 certification for the relicensing of the Conowingo Project.

B. Consideration of Environmental Impacts

19. Waterkeepers argue that the Commission acted arbitrarily and violated the FPA and National Environmental Policy Act of 1969 (NEPA) by failing to give adequate consideration to the potential environmental impacts of its licensing decision, in particular with respect to the selection of the flow regime proposed by the MDE Settlement.³⁸

³⁵ See *Keating v. FERC*, 927 F.2d 616, 623 (D.C. Cir. 1991) (addressing a state's attempted revocation of a certification for a hydroelectric project, the court explained that "the picture changes dramatically once [the initial certification] decision has been made and a federal agency has acted upon it," which is why Congress created a presumption that an existing certification remains valid unless the state revokes it "under limited circumstances expressly defined in the statute").

³⁶ Rehearing Request at 33-34.

³⁷ *Id.*

³⁸ *Id.* at 38-58.

1. Compliance with Water Quality Standards

20. Waterkeepers contend that the Commission erred by omitting the 2018 certification conditions from the License Order without explaining how the project, as licensed, will comply with state water quality standards or, alternatively, why the question of compliance with state water quality standards is irrelevant to the Commission's decision.³⁹ Waterkeepers explain that under sections 4(e) and 10(a) of the FPA,⁴⁰ the Commission must give adequate and equal consideration to a project's environmental impacts and thus cannot treat compliance with state water quality standards as irrelevant.⁴¹ Accordingly, Waterkeepers argue that the Commission failed to take a hard look at the environmental consequences of its decisions, as required by NEPA.⁴²

21. Section 401 of the Clean Water Act is the vehicle for a state water quality certifying agency to ensure compliance with the state's water quality standards. Section 401 does not require the Commission to ensure compliance with state standards when a state waives certification.⁴³ As the License Order explained:

Because MDE is waiving water quality certification in this proceeding, there are no certification conditions required to be included in the license. The Commission has explained that if certification is waived, the licensee is not compelled to construct, operate, or maintain a hydroelectric project in a manner consistent with state water quality standards unless the Commission includes such a requirement in the license. The Commission has conducted its own analysis of the water quality impacts of the project as proposed and is requiring those measures we deem necessary to protect aquatic resources. No more is required.⁴⁴

³⁹ *Id.* at 40-46.

⁴⁰ 16 U.S.C. §§ 797(e), 803(a).

⁴¹ Rehearing Request at 42-43.

⁴² *Id.* at 43-44.

⁴³ *See Gustavus Elec. Co.*, 109 FERC ¶ 61,105, at PP 62-64 (2004).

⁴⁴ License Order, 174 FERC ¶ 61,217 at P 76 (internal citations omitted).

The Commission extensively evaluated the project's potential impacts on water quality in the draft EIS, final EIS, and in the License Order itself.⁴⁵ In some instances, the Commission staff took account of state water quality standards. For example, the final EIS noted that the project's operation generally does not exceed and fall below levels stipulated by the state standards for water temperature and dissolved oxygen, respectively.⁴⁶ However, while the FPA requires the Commission to consider, among other things, impacts on fish and wildlife and other aspects of environmental quality,⁴⁷ neither that statute nor the Clean Water Act (except to the extent embodied in a water quality certification) require adherence to state standards. Thus, the Commission fully analyzed and considered the project's impacts on water quality as required by the FPA and NEPA.

2. Settlement Flow Regime

22. Waterkeepers state that the Commission improperly evaluated the MDE Settlement's flow regime (Settlement Flow Regime) by extrapolating information from the existing NEPA analysis rather than conducting a separate, complete analysis of the flows.⁴⁸ In particular, Waterkeepers point to the six-week period from August 1 through September 14 when the minimum flow under the MDE Settlement (4,000 cubic feet per second (cfs)) is lower than the minimum flow under both the prior license and the staff-recommended alternative (5,000 cfs).⁴⁹

23. The Commission considered three alternative flow regimes in the final EIS to inform its decision to recommend that the Conowingo Project be relicensed: Exelon's

⁴⁵ See, e.g., Draft EIS at 126-27; Final EIS at 136; License Order, 174 FERC ¶ 61,217 at P 76.

⁴⁶ Final EIS at 136.

⁴⁷ See 16 U.S.C. § 797(e).

⁴⁸ Rehearing Request at 49-50.

⁴⁹ *Id.* at 47-48, 50-51, 56. Waterkeepers' claim that the minimum flow of 4,000 cfs for the six-week period is lower than the minimum flow under all the alternatives considered in the EIS is erroneous, in part. The Nature Conservancy Flow Regime from September 1 to September 14 would be lower, at 3,500 cfs, when natural flow at that time is less than the median flow for the same timeframe. License Order, 174 FERC ¶ 61,217 at P 119; Final EIS at 146-47 tbl. 3-19.

proposal as reflected in its application,⁵⁰ a run-of-river mode of operation recommended by The Nature Conservancy (TNC), and a set of operational constraints that TNC identified to meet its proposed goals for habitat availability⁵¹ and other environmental metrics (the TNC Flow Regime).⁵² Commission staff evaluated the potential effects of these flow regimes on submerged aquatic vegetation, fish habitat, fish migration, fish stranding, freshwater mussels, and other aquatic invertebrates,⁵³ and developed an additional (fourth) alternative based on Exelon's proposal and staff-recommended modifications. In the License Order, the Commission considered a fifth flow regime, proposed in the MDE Settlement. The Commission explained that the Settlement Flow Regime generally provides for higher flows than Commission staff's recommendation and adopts elements of the TNC Flow Regime:

As part of the MDE Settlement agreement, Exelon proposes to implement, after a three-year period, a flow regime that ranges from 4,000 cfs (August through February) to 18,200 cfs (March through May) (or inflow, if less), and includes down-ramping rates of up to 12,000 cfs/hour if the discharge is less than 30,000 cfs and up-ramping rates ranging from 0 to 40,000 cfs/hour. Exelon's proposal provides minimum flows that are 500 to 14,700 cfs greater than staff's recommendation, except from August 1 through September 14 when flows would be 1,000 cfs less. Therefore, Exelon's revised flow regime proposal generally provides for higher flows than Commission staff's recommendation, and more closely mimics the TNC Flow Regime by limiting maximum generation and modifying ramping rates.⁵⁴

⁵⁰ Exelon's proposed flow regime matched that of the current license, therefore it also represented the no-action alternative.

⁵¹ In comments filed January 31, 2014, the TNC recommended, in part, that flows released downstream of Conowingo dam provide a minimum of 70% of the maximum weighted usable area across species and life stages of migratory and resident fishes and macroinvertebrates. Final EIS at 145.

⁵² *E.g.*, Final EIS at 145-61 (discussing potential impacts of downstream flow releases from the Conowingo Project).

⁵³ *Id.* at 148-61.

⁵⁴ License Order, 174 FERC ¶ 61,217 at P 121.

The Commission concluded that requiring the Settlement Flow Regime under the new license would be more protective of aquatic resources than Commission staff's recommended flow regime and would result in significantly less lost generation at the Muddy Run Project than would result under the TNC Flow Regime.⁵⁵

24. The Commission appropriately considered the Settlement Flow Regime and found that it is adequately supported by the record. At the outset, the final EIS considered the maximum weighted usable area (MWUA)⁵⁶ available at flows ranging from 3,500 to 35,000 cfs.⁵⁷ The lowest flow under the Settlement Flow Regime is 4,000 cfs. Therefore, contrary to Waterkeepers' claim, the Commission assessed the environmental impacts of a minimum flow as low as the one allowed for in the Settlement Flow Regime.⁵⁸

25. Waterkeepers contend that the Commission approved the Settlement Flow Regime based on flawed conclusions. They dispute that the Settlement Flow Regime is generally higher than flows under the prior license⁵⁹ and under the staff-recommended alternative evaluated in the final EIS,⁶⁰ and they again raise concerns regarding the 4,000-cfs minimum flows from August 1 through September 14. They add that these lower flows coincide with the period "when herring and shad are migrating downstream and need sufficient water to make it past the dam."⁶¹ Waterkeepers state that the Commission failed to explain whether a minimum flow as low as the one allowed in the MDE

⁵⁵ *Id.* PP 125-126.

⁵⁶ Weighted usable area is an index of aquatic habitat that is calculated using the Instream Flow Incremental Methodology. It is meant to be used as a comparative statistic (for comparing alternative flow levels) and is not an absolute measure of habitat.

⁵⁷ Final EIS at 146-47.

⁵⁸ Waterkeepers do not dispute that MWUA is an appropriate tool to evaluate the environmental impacts of different flow regimes.

⁵⁹ Rehearing Request at 46-48 (citing License Order, 174 FERC ¶ 61,217 at P 49 n.37).

⁶⁰ *Id.* at 48-51.

⁶¹ *Id.* at 50.

Settlement is adequately protective of environmental resources and, if not, why this is not an obstacle to the licensing decision.⁶²

26. The Commission's statement that the Settlement Flow Regime "generally provides for higher flows than Commission staff's recommendation" was well-supported. As illustrated in the table below, during 321 days of the year, the MDE Settlement "provides minimum flows that are 500 to 14,700 cfs greater than staff's recommendation." Across all months and life stages of American shad and striped bass, these higher flows yield an increase in MWUA from that of the staff alternative of 65% to 76% and 34% to 42%, respectively for the two species. The Commission concluded that with these increases to the minimum flows during most times of the year, as well as the addition of ramping limits and decreased peaking flows (May 1 through September 30), the Settlement Flow Regime will be more protective of aquatic resources than Commission staff's recommended flow regime.⁶³ Further, to Waterkeepers' point that migrating American shad require sufficient water for downstream passage, we note that the reduced flows between August 1 and September 14 would not be significant, resulting in a decrease in the MWUA during the juvenile life stage from 94% (5,000 cfs) to approximately 90% (4,000 cfs). The MWUA would remain at 90% for the duration of the juvenile life stage (i.e., through November).

⁶² *Id.* at 47 (stating that operation under the prior license was not adequately protective of aquatic resources and noting that minimum flows under the Settlement Flow Regime will be lower); *id.* at 56 (noting that the final EIS concluded that operation under staff's recommended alternative would be adequately protective of environmental resources but stating that minimum flows under the Settlement Flow Regime will be lower).

⁶³ License Order, 174 FERC ¶ 61,217 at PP 125-126.

Period	Staff Alternative	Settlement Flow Regime		TNC Flow Regime	
	Minimum Flow ^a (cfs)	Minimum Flow ^a (cfs)	Minimum Down-ramping/Maximum Up-ramping (cfs)	Minimum Flow (cfs)	Minimum Down-ramping/Maximum Up-ramping (cfs)
Jan.	3,500	4,000	12,000 ^d /None	11,000	20,000/40,000
Feb.	3,500	4,000	12,000 ^d /None	12,500	20,000/40,000
Mar. 1-15	3,500	13,100	12,000 ^d /40,000	30,000/ 24,000 ^{e,f}	20,000/40,000
Mar. 16-31	3,500	18,200	12,000 ^d /40,000	30,000/ 24,000 ^{e,f}	20,000/40,000
Apr.	10,000	18,200	12,000 ^d /40,000	35,000/ 29,000 ^{e,f}	20,000/40,000
May	7,500	18,200 ^b	12,000 ^d /40,000	25,500/ 17,500 ^{e,f}	20,000/40,000
Jun. 1-15	7,500	10,000 ^b	12,000 ^d /40,000	14,000/ 10,000 ^{e,f}	20,000/40,000
Jun. 16-30	5,000	7,500 ^b	12,000 ^d /40,000	14,000/ 10,000 ^{e,f}	20,000/40,000
Jul.	5,000	5,500 ^c	12,000 ^d /40,000	8,500/ 5,500 ^{e,f}	10,000 or 20,000 ^g /20,000
Aug.	5,000	4,000 ^c	12,000 ^d /40,000	6,000/ 4,500 ^{e,f}	10,000 or 20,000 ^g /20,000
Sep. 1-14	5,000	4,000 ^c	12,000 ^d /40,000	5,500/ 3,500 ^{e,f}	10,000 or 20,000 ^g /20,000
Sep. 15-30	3,500	4,000 ^c	12,000 ^d /40,000	5,500/ 3,500 ^{e,f}	10,000/20,000
Oct.	3,500	4,000	12,000 ^d /40,000	6,000	20,000/40,000
Nov.	3,500	4,000	12,000 ^d /None	11,000	20,000/40,000
Dec.	3,500	4,000	12,000 ^d /None	11,000	20,000/40,000

^a Lesser of this value or natural inflow.

^b Peaking flows reduced from the current maximum of 86,000 cfs to a new maximum of 75,000 cfs.

^c Peaking flows reduced from the current maximum of 86,000 cfs to a new maximum of 79,000 cfs.

^d If the project discharge is less than 30,000 cfs.

^e Peaking flows reduced from the current maximum of 86,000 cfs to a new maximum of 65,000 cfs.

^f Higher value if natural flow is greater than the median flow, otherwise the lower value.

^g Lower value if the project discharge less than 30,000 cfs; higher value if discharge less than 86,000 cfs.

27. Waterkeepers disagree with the conclusion in the License Order that the Settlement Flow Regime “would increase habitat availability downstream of the project for one month longer than staff’s recommended flow in the final EIS, meeting or

exceeding the TNC's recommended 70% of the MWUA for key species from April 1 through November 30, excluding June 16 through June 30."⁶⁴ They assert, to the contrary, that the final EIS shows that the minimum flows under the staff-recommended alternative would not maintain at least 70% of habitat for key species' life stages in any month,⁶⁵ and state that the minimum flows under the Settlement Flow would be lower than those evaluated in the final EIS.⁶⁶

28. Waterkeepers' assertion that the Settlement Flow Regime would not increase habitat availability beyond that of Commission staff's alternative and would not maintain at least 70% of habitat for key species' life stages in any month is incorrect.⁶⁷ As described previously, across all months and life stages of American shad and striped bass, the Settlement Flow Regime provides MWUA values that are 11% and 8% higher, respectively, than Commission staff's alternative.⁶⁸ We reiterate that the final EIS considered MWUA at flows from 3,500 cfs through 35,000 cfs, thus accounting for all flows under the MDE Settlement. Further, we note that the Settlement Flow Regime meets or exceeds the TNC's recommended 70% of the MWUA for American shad in all months except June for the adult and spawning and incubation life stages, and during July for the fry life stage. By comparison, Commission staff's alternative would achieve the 70% MWUA recommendation for American shad fry in May and early June, and for juveniles from May through November, but would not achieve 70% for the adult or spawning and incubation life stages beginning in April (i.e., one fewer month than the Settlement Flow Regime).⁶⁹

⁶⁴ Rehearing Request at 52-55.

⁶⁵ *Id.* at 52-55.

⁶⁶ *Id.* at 54-56.

⁶⁷ *Id.*

⁶⁸ The greatest increases in MWUA occur in the adult and spawning and incubation life stages, where American shad habitat increases 19% and striped bass habitat increases 9% over the staff alternative.

⁶⁹ In the final EIS, staff explained that "it is unlikely that adult striped bass occur in the Susquehanna River during the winter months;" that "because April is the highest flow month of the year, Exelon overall maintains higher average releases in April, and minimum releases may on average exceed the required minimum flow;" and that "there would be no need to extend this minimum flow into late June, as spawning and early-fry development [for later spawning American shad and striped bass] would have ended by then." Final EIS at 156-57.

29. Waterkeepers claim that “for spawning shad, a key species present in August and September,” Exelon, in its license application, estimates that decreasing the minimum flow from 5,000 cfs to 3,500 cfs would reduce habitat by 35%—from 26.3% of the MWUA to 17.2%.⁷⁰ For striped bass fry, they state that Exelon, in its license application, estimates that decreasing the minimum flow from 5,000 cfs to 3,500 cfs would reduce habitat by 28%—from 18.4% of the MWUA to 13.2%.⁷¹

30. Waterkeepers mistakenly cite the MWUA values for the spawning and incubation life stage of American shad and the fry stage of striped bass, rather than the juvenile stage of both species that occurs from about June through November. As described previously, the MWUA for American shad juveniles in August and September only decreases from 94% at 5,000 cfs to an estimated 90% at 4,000 cfs, thus the Settlement Flow Regime would still provide sufficient conditions for downstream migration.

31. Waterkeepers argue that the Commission failed to adequately and equally consider environmental impacts when comparing the Settlement Flow Regime and the TNC Flow Regime.⁷² Waterkeepers point to the Commission’s statements that “both flow regimes would provide additional benefits for aquatic resources,” but that the Settlement Flow Regime would have “less of an impact on generation,”⁷³ claiming that the Commission failed to acknowledge that the lower environmental impacts of the TNC Flow Regime represent a significantly greater benefit when compared to the Settlement Flow Regime.⁷⁴ For support, Waterkeepers state that the TNC Flow Regime would maintain 70% habitat for some key species’ life stages in all months and all key species’ life stages in April and May, but the Settlement Flow Regime would not achieve this standard in any month.⁷⁵ Waterkeepers assert that the Commission failed to provide a reasoned basis for its assumption that these greater benefits are outweighed by the Settlement Flow Regime’s lesser impact on generation.⁷⁶

⁷⁰ Rehearing Request at 51 (citing Exelon Application, Instream Flow Habitat Assessment Below Conowingo Dam, Table 5.1-2) (Aug. 31, 2012)

⁷¹ *Id.*

⁷² *Id.* at 56-58.

⁷³ *Id.* at 56-57 (quoting License Order, 174 FERC ¶ 61,217 at P 126).

⁷⁴ *Id.* at 57.

⁷⁵ *Id.*

⁷⁶ *Id.* at 56-57.

32. Waterkeepers' arguments do not take into account the Commission's full evaluation. In comparing alternative flow regimes, Commission staff assessed the effects on submerged aquatic vegetation, fish habitat, fish migration, fish stranding, freshwater mussels, and other aquatic invertebrates,⁷⁷ concluding that the TNC Flow Regime would only provide limited benefits to some species, due to the high variability of species-specific flow preferences downstream of the project.⁷⁸ The Commission found that the Settlement Flow Regime "generally provides for higher flows than Commission staff's recommendation, and more closely mimics the TNC Flow Regime by limiting maximum generation and modifying ramping rates."⁷⁹ Further, the Commission determined that the Settlement Flow Regime "would increase habitat availability downstream of the project for one month longer" than the staff-recommended flow regime, better serving one of TNC's proposed environmental metrics.⁸⁰ Additionally, the MDE Settlement's limits on the project's maximum generation as well as the MDE Settlement's modification of ramping rates "would offer additional protection of aquatic resources, particularly migratory fishes, as reducing flow variability could facilitate upstream passage and reduce fish stranding."⁸¹

33. The License Order explained that project operation under the TNC Flow Regime would eliminate many of the project's peaking and ancillary service benefits to the regional wholesale electricity market under PJM⁸² and would eliminate nine percent of the annual generation at the Muddy Run Project.⁸³ For the Settlement Flow Regime, Exelon committed to coordinate with PJM to ensure that existing protocols for dispatching generation from the Conowingo and Muddy Run projects can be adapted to the Settlement Flow Regime without jeopardizing reliability or causing adverse impacts to the power markets.⁸⁴ The License Order explained that the loss in generation at the

⁷⁷ License Order, 174 FERC ¶ 61,217 at P 119 (citing Final EIS at 148-61).

⁷⁸ *Id.* P 120 (citing Final EIS at 158).

⁷⁹ *Id.* P 121.

⁸⁰ *Id.* P 125.

⁸¹ *Id.*

⁸² *Id.* P 120. PJM is a regional transmission organization that coordinates the movement of wholesale electricity in several states, including Maryland and Pennsylvania.

⁸³ *Id.* P 120.

⁸⁴ *Id.* P 122.

Muddy Run Project under the MDE Settlement Flow Regime would be significantly less than that under the TNC Flow Regime.⁸⁵ Both the Settlement Flow Regime and the TNC Flow Regime would result in increased annual generation at the Conowingo Project and decreased annual generation at the Muddy Run Project, but to significantly different degrees. At the Conowingo Project, the Commission estimated that the Settlement Flow Regime would result in an increase to annual generation of +2,813 megawatt hours (MWh) with a levelized annual value of \$58,867.⁸⁶ The TNC Flow Regime would result in an increase of +13,116 MWh with a levelized annual value of \$274,473.⁸⁷ At the Muddy Run Project, the Commission estimated that the Settlement Flow Regime would result in a decrease to annual generation of -39,049 MWh at a levelized annual cost of -\$194,566.⁸⁸ The TNC Flow Regime would result in a decrease of -146,837 MWh at a levelized annual cost of -\$752,390.⁸⁹ Put another way, the Settlement Flow Regime represents a net loss of -36.236 MWh of renewable energy generation at a net cost of -\$135,699. The TNC Flow Regime represents a net loss of -133,721 MWh of renewable energy generation at a net cost of -\$477,917. We conclude that the Commission adequately compared the potential environmental and economic effects of both flow regimes and fully supported its approval of the MDE Settlement Flow Regime for project operation under the new license.

34. Waterkeepers claim that the Commission effectively admits that it failed to adequately consider the environmental impacts of the MDE Settlement Flow Regime because Article 422 of the License Order requires Exelon to develop and implement a waterfowl nesting protection plan under which Exelon will further examine and mitigate the impacts, if any, to waterfowl nesting.⁹⁰ Waterkeepers interpret the inclusion of such a plan as an indication that the Commission is improperly deferring analysis of the environmental impacts of the MDE Settlement Flow Regime to the post-licensing period.

35. The Commission is not using this requirement as a substitute for an adequate analysis of the environmental effects of the project, as Waterkeepers claim. The final

⁸⁵ *Id.* P 126.

⁸⁶ *Id.* PP 120, 126.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Rehearing Request at 52 (citing License Order, 174 FERC ¶ 61,217 at P 58, n.55, n.95, art. 422).

EIS⁹¹ acknowledges that project operation results in water level fluctuations in the project reservoir, and that varied flows downstream could flood waterfowl nests.⁹² The final EIS concluded that the waterfowl nesting protection plan recommended by Interior under section 10(j) would be a mechanism for verifying actual effects on waterfowl nesting and establishing any necessary protection or mitigation measures.⁹³ Accordingly, the final EIS includes sufficient information about potential impacts to waterfowl, and supports the facts found and the conclusions reached to support the decision to license the project.

3. Supplemental EIS

36. Waterkeepers argue that the Commission is obligated to prepare a supplemental EIS for the Conowingo Project relicensing to address the approval of the MDE Settlement Flow Regime.⁹⁴ They state that, after the 2015 final EIS, MDE decisions in 2018 to issue the water quality certification and to list the river as impaired under section 303(d) of the CWA⁹⁵ demonstrate that project operation under the previous license had been out of compliance with water quality standards and would continue to be out of compliance unless the project met the requirements in the 2018 certification.⁹⁶ Waterkeepers further contend the 2018 certification shows that project operation was inadequate to protect the lower Susquehanna River and Chesapeake Bay.⁹⁷ They argue that the MDE Settlement Flow Regime is “far worse” than the flows required in MDE’s 2018 certification and is worse (i.e., lower) during some months than the staff alternative, any other alternative considered in the final EIS, and prior license requirements.⁹⁸ For

⁹¹ Final EIS at 231.

⁹² *Id.* at 248-49.

⁹³ *Id.* at 422.

⁹⁴ Rehearing Request at 57-58.

⁹⁵ 33 U.S.C. § 1313(d).

⁹⁶ Rehearing Request at 45 (citing 2018 Certification at 7, 19, and MDE *Final 2018 Integrated Report of Surface Water Quality* at 38, 134 (Oct. 23, 2018) (Final Impairment Report)).

⁹⁷ *Id.* at 58 (citing 2018 Certification at 12 and Final Impairment Report at 38).

⁹⁸ *Id.*

this reason, Waterkeepers claim that the Commission must prepare a supplemental EIS to adequately consider the environmental impacts of the new flow regime.

37. An agency must prepare a supplemental EIS only “[i]f there remains ‘major Federal actio[n]’ to occur, and if the new information is sufficient to show that the remaining action will ‘affect the quality of the human environment’ in a significant manner or to a significant extent not already considered”⁹⁹ In other words, a supplemental EIS must be prepared only where new information “provides a *seriously* different picture of the environmental landscape.”¹⁰⁰ The Commission thoroughly examined the Settlement Flow Regime based on the existing record, and has provided additional analysis in this order. As discussed above, Commission staff conducted its own analysis of the water quality impacts of several alternative operating scenarios and required those measures the Commission deemed necessary to protect aquatic resources.¹⁰¹ The Commission appropriately compared the Settlement Flow Regime to others analyzed in the final EIS to inform the decision to approve the MDE Settlement Flow Regime for operation under the new license.¹⁰² There is no new information showing that a supplemental analysis is needed or required to address potential impacts of the Settlement Flow Regime.

38. Waterkeepers also contend that a supplemental EIS is needed to address five additional categories of new circumstances or information arising after the publication of the final EIS in 2015. As discussed below, we conclude that the submitted information is not sufficient to show that the Commission’s licensing decision, and Exelon’s operations thereunder, will affect the quality of the human environment in a significant manner or to a significant extent not already considered. No supplemental EIS is required.

39. First, Waterkeepers state that MDE’s 2018 certification, issued after the final EIS, identified a need for additional analysis as to whether corrective action is required at the Conowingo Dam to address elevated levels of polychlorinated biphenyls (PCBs) in fish

⁹⁹ *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989) (quoting NEPA, 42 U.S.C. § 4332(2)(C)); *see also Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 73 (2004).

¹⁰⁰ *Friends of Cap. Crescent Trail v. Fed. Transit Admin.*, 877 F.3d 1051, 1060 (D.C. Cir. 2017) (quoting *Nat’l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004)) (emphasis added)).

¹⁰¹ Final EIS at 145-61.

¹⁰² License Order, 174 FERC ¶ 61,217 at PP 119-127.

tissue in the reservoir and downstream.¹⁰³ They further state that the 2018 certification found that PCB and chlorophyll-A controls are necessary to ensure compliance with water quality standards.¹⁰⁴ Waterkeepers criticize the Commission for failing to consider how sedimentation and scour at the project contribute to the levels of PCBs and chlorophyll-A in the reservoir and downstream,¹⁰⁵ arguing that a supplemental EIS must adequately consider the effects of relicensing the project on PCB and chlorophyll-A levels.¹⁰⁶

40. We disagree. Regarding PCBs in Conowingo Pond and their effect on surrounding waters, the final EIS explained that:

Much of the mainstem Susquehanna River within Pennsylvania has a fish consumption advisory for PCBs in channel catfish (also for quillback, carp, and walleye in the North Branch Susquehanna River), indicating that this is a basin-wide issue and not specifically related to the Conowingo Project.¹⁰⁷

The final EIS discussed chlorophyll as part of the evaluation of water quality impacts. It noted that the U.S. Army Corps of Engineers (Corps) and MDE had modeled a scouring event in the draft Lower Susquehanna River Watershed Assessment (LSRWA) and had concluded that effects on selected water quality parameters would be small, including an increase in chlorophyll from 0.1 to 0.2 milligrams per cubic meter.¹⁰⁸ The License Order noted that under an off-license provision in the MDE Settlement, Exelon has agreed to implement a plan for monitoring chlorophyll-A levels in the Maryland portion of Conowingo Pond, although this differs from the 2018 certification's proposal to submit a plan to address chlorophyll-A levels that exceed water quality standards.¹⁰⁹

¹⁰³ Rehearing Request at 45.

¹⁰⁴ *Id.* at 63 (citing 2018 Certification at 19).

¹⁰⁵ *Id.* at 63.

¹⁰⁶ *Id.* at 44-46, 58, 63.

¹⁰⁷ Final EIS at H-17 (responding to a comment from the EPA on the draft EIS).

¹⁰⁸ *Id.* at 138.

¹⁰⁹ License Order, 174 FERC ¶ 61,217 at P 60, n.66.

41. Second, Waterkeepers state that information submitted to the Commission while the MDE Settlement was pending shows that dredging is both more effective and less expensive than the Commission assumed and represents a significant change in circumstance and new information that triggers an obligation to supplement the final EIS.¹¹⁰ As discussed in more detail in section B.4 below, the statements from a dredging company that it could accomplish the necessary nutrient reductions for \$41 million do not provide a significantly different picture of the environmental impacts of the project.

42. Third, Waterkeepers criticize the Commission for failing to assess the effects of climate change over the course of the 50-year license term,¹¹¹ claiming that information published by the Chesapeake Bay Program in 2020 shows that climate change impacts have begun and will worsen over the next decades with regard to increased rainfall, flow, and nutrient and sediment loads to the Chesapeake Bay.¹¹² Waterkeepers note that Exelon and MDE have acknowledged that storm events, which can mobilize nutrients and sediment trapped by the project, likely will increase in intensity as a result of climate change.¹¹³ They assert that this information represents significant new circumstances or information that obligates the Commission to prepare a supplemental EIS.¹¹⁴

43. As discussed further below with regard to dredging, the Commission considered the role of storms with regard to sediment transport and acknowledged that sediment transport from storm events, including sediment scoured from Conowingo Pond, affects the lower Susquehanna River and the Chesapeake Bay.¹¹⁵ However, referencing the draft and final LSWRA, the Commission determined that the nutrients associated with scoured sediment are more harmful to aquatic life than the sediment itself – a point that Waterkeepers do not dispute. Recognizing that nearly all the sediment, and sediment-bound nutrients, entering Conowingo Pond come from the upstream watershed

¹¹⁰ Rehearing Request at 59-60.

¹¹¹ *Id.* at 66.

¹¹² *Id.* at 65-66 (citing Chesapeake Bay Program, *Hot, Wet, and Crowded: Phase 6 Climate Change Model Findings* (Apr. 20, 2020), https://www.chesapeakebay.net/channel_files/40432/cc_model_findings_for_crwg_4-20-20.pdf and Chesapeake Bay Program, *Draft Actions/Decisions* (Dec. 17, 2020), https://www.chesapeakebay.net/channel_files/42484/draft_psc_actions-decisions_12-17-20_v5.pdf)

¹¹³ *Id.* at 65.

¹¹⁴ *Id.* at 65-66.

¹¹⁵ License Order, 174 FERC ¶ 61, 217 at PP 140-146.

and not project land, the Commission found that there is “no justification for requiring Exelon to implement measures such as dredging to help control sediment and nutrient loading in the Chesapeake Bay, which would occur in the long term whether or not Conowingo Dam was in place.”¹¹⁶ Given that the Commission’s analysis appropriately focused on the project’s role in storm-related impacts on sediment and nutrients, and that role is unchanged by the number or intensity of storm events, we find the existing analysis adequately addresses Waterkeepers’ concerns. Moreover, the final EIS noted that standard reopener articles are included in licenses and would be the vehicle for making changes to the licenses should a material change in conditions occur that results in unanticipated environmental effects that would justify reconsideration of the license’s conditions.¹¹⁷ No information available at this time shows that a supplemental analysis is needed or required.

44. Fourth, Waterkeepers argue that advances in battery storage technology since the 2015 final EIS could be used to alter peaking demands on flow at the project and alter potential mitigation measures.¹¹⁸ They note that the Commission’s Office of Energy Projects recently recommended a feasibility study for a battery energy storage system at another hydroelectric project.¹¹⁹ Waterkeepers claim that the Commission must take a hard look at whether the changed circumstance and new information on battery storage requires supplementation as the License Order fails to discuss battery storage.¹²⁰

45. As an initial matter, Waterkeepers do not explain why they could not have offered comments on the potential role of energy storage technologies at the project earlier in this proceeding.¹²¹ Further, Waterkeepers offer no specific details about the advances in battery storage technology that would require issuance of a supplemental EIS. In the

¹¹⁶ *Id.* P 146.

¹¹⁷ Final EIS at H-45 to H-46.

¹¹⁸ Rehearing Request at 66-67.

¹¹⁹ *Id.* at 67 (citing *Ala. Power Co.*, Project No. 2628-065, at app. B, B-7 to B-10 (Aug. 10, 2020) (delegated order)).

¹²⁰ *Id.*

¹²¹ The Commission has extensively considered the development of energy storage resources, including in a rulemaking proceeding initiated in 2016. *See Elec. Storage Participation in Mkts. Operated by Reg’l Transmission Orgs. and Indep. Sys. Operators*, Order No. 841, 83 FR 9580 (Mar. 6, 2018), 162 FERC ¶ 61,127 (2018), *order on reh’g and clarification*, Order No. 841-A, 84 FR 23902 (May 23, 2019), 167 FERC ¶ 61,154 (2019), *aff’d sub nom. NARUC*, 964 F.3d 1177 (D.C. Cir. 2020).

proceeding that Waterkeepers cites, for the R.L. Harris Hydroelectric Project, Commission staff approved a request from an environmental organization for a desktop analysis to evaluate the feasibility of a battery energy storage system at a hydroelectric project that is in the early stages of a relicensing proceeding.¹²² Waterkeepers have provided no similar detail about what analysis should be undertaken here. Additionally, the project's operation is already integrated with the Muddy Run Project, which essentially operates like an 828-MW hydroelectric battery.¹²³

46. Fifth, Waterkeepers claim that the Commission recently recognized that its prior licensing practices did not consider whether a licensee possessed adequate financing resources to meet future dam safety requirements and did not consider that inadequate financial resources might threaten public safety and environmental resources.¹²⁴ Waterkeepers cite the Commission's issuance of a notice of inquiry in January 2021 regarding financial assurance measures for hydroelectric projects.¹²⁵ Waterkeepers state that this constitutes a changed circumstance and new information that obligates the Commission to issue a supplemental EIS.¹²⁶

47. The Commission has taken only the preliminary step of soliciting comments about what changes, if any, the Commission should make to its practices for requiring financial assurance measures in licenses and other authorizations for hydroelectric projects.¹²⁷ Waterkeepers offer no evidence that this issue might be relevant to this proceeding, and

¹²² *Ala. Power Co.*, Project No. 2628-065, at app. B, B-7 to B-10 (Aug. 10, 2020) (delegated order).

¹²³ Water is pumped from the lower reservoir (Conowingo Pond) to the upper reservoir during low-load periods when energy costs are low, while generation occurs during high-load periods. *Exelon Generation Co., LLC*, 153 FERC ¶ 62,232, at PP 15-17 (2015).

¹²⁴ *Id.* at 67-68.

¹²⁵ *Financial Assurance Measures for Hydroelectric Projects, Notice of Inquiry*, 86 Fed. Reg. 7081 (Jan. 26, 2021) (Financial Assurance NOI).

¹²⁶ Rehearing Request at 68.

¹²⁷ Financial Assurance NOI, 86 Fed. Reg. 7081.

we know of none.¹²⁸ Further, Waterkeepers present no evidence to suggest that Exelon is not financially prepared to meet its future license obligations.

4. Dredging

48. In the License Order, the Commission found no justification for requiring Exelon to implement measures, such as dredging, to help control sediment and nutrient loading in the Chesapeake Bay.¹²⁹ On rehearing, Waterkeepers dispute the Commission's conclusions that "the benefits [of dredging] are short-lived and not worth the expense"¹³⁰ and that this pollution "is a watershed-wide issue" that "would occur in the long term whether or not Conowingo Dam was in place."¹³¹

49. Waterkeepers assert that the Commission did not adequately consider long-term benefits and so it cannot know what the benefits might be worth.¹³² They provide information from a dredging company as evidence that dredging is "substantially more effective" than the Commission acknowledged and "substantially less expensive."¹³³

50. Waterkeepers also contend that the Commission failed to consider that both watershed-wide reductions of sediment and nutrient loading and reductions from behind the dam are necessary.¹³⁴ They claim that the Commission's assumption that sediment and nutrient loading upstream and downstream of the dam average out over the long term led the Commission to ignore that each storm-related scour event delivers much greater quantities of sediment and nutrients than would occur without the dam.¹³⁵ Waterkeepers contend that avoiding even a single scouring event can have long-term benefits to the

¹²⁸ License Order, 174 FERC ¶ 61,217 at PP 201-202 (finding compliance history satisfactory, project works safe, and no reason to believe Exelon cannot safely manage, operate and maintain the project under a new license).

¹²⁹ *Id.* PP 140-146.

¹³⁰ Rehearing Request at 59 (quoting License Order, 174 FERC ¶ 61,217 at P 146 (internal citations omitted)).

¹³¹ *Id.* at 60 (quoting License Order, 174 FERC ¶ 61,217 at P 146).

¹³² *Id.* at 59.

¹³³ *Id.* at 59-60.

¹³⁴ *Id.* at 60.

¹³⁵ *Id.* at 60-62.

lower Susquehanna River and the Chesapeake Bay.¹³⁶ According to Waterkeepers, the Commission ignored that dredging can restore and improve the trapping capacity of the dam, can lower the average sediment and nutrient loading over time, and can minimize the scouring by reducing trapped sediment and nutrients.¹³⁷

51. We do not dispute that dredging could yield some benefits. Even so, the Commission appropriately found no justification for requiring Exelon to implement measures such as dredging to help control sediment and nutrient loading in the Chesapeake Bay,¹³⁸ which are problems not of Exelon's making. The final EIS evaluated sediment and nutrient loads in great detail.¹³⁹ The Commission acknowledged in the License Order that the lower Susquehanna River and the Chesapeake Bay are affected by sediment and nutrients (i.e., nitrogen and phosphorus) transported from the upper watershed, including sediment and sediment-bound nutrients mobilized past the Conowingo Dam during storm events when the flow reaches or exceeds 400,000 cfs and results in scour.¹⁴⁰ The Commission explained that transported sediment has a relatively short-term impact compared to the more harmful nutrients that are carried downstream by the scoured sediment.¹⁴¹ The Commission appropriately relied on conclusions from the final EIS and from the draft and final versions of the LSRWA conducted by the U.S. Army Corps of Engineers (Corps) and MDE that dredging or other sediment load removal methods at the Conowingo Project would be temporary solutions and would be more costly (estimated at \$48 to \$267 million annually) and less effective than land and water management measures in the Chesapeake Bay watershed to reduce nutrient delivery.¹⁴² For example, the draft LSRWA modeled the effect of dredging 3 million to 28 million cubic yards of sediment from Conowingo Pond. Results indicated minor improvements in selected water quality parameters downstream of the project in the upper Chesapeake Bay, with the highest dredging amounts having only slightly better

¹³⁶ *Id.* at 62.

¹³⁷ *Id.* at 62-63.

¹³⁸ License Order, 174 FERC ¶ 61,217 at PP 140-146.

¹³⁹ Final EIS at 75-81 (discussing sediment transport as a matter of impacts to geology and soils), 137-139 (discussing sediment and nutrient loading as a matter of impacts to water resources).

¹⁴⁰ License Order, 174 FERC ¶ 61,217 at PP 142-143 (citing Final EIS at 71, 79).

¹⁴¹ *Id.* P 144 (citing Final EIS at 78-79).

¹⁴² *Id.* PP 145-146.

Project No. 405-129

- 26 -

improvements.¹⁴³ Accordingly, the statements from the dredging company, offered by Waterkeepers, that it could accomplish necessary nutrient reductions for \$41 million, do not demonstrate any error in the Commission's consideration of dredging.¹⁴⁴

The Commission orders:

(A) The request for rehearing filed by ShoreRivers and the four Waterkeeper organizations that it includes—the Miles-Wye Riverkeeper, the Choptank Riverkeeper, the Chester Riverkeeper, and the Sassafra Riverkeeper, on April 19, 2021, is rejected.

(B) In response to Waterkeepers' request for rehearing, the License Order is hereby modified and the result sustained, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁴³ Final EIS at 138-39.

¹⁴⁴ License Order, 174 FERC ¶ 61,217 at PP 140, 143 (citing Final EIS at 75-81).

Document Content(s)

P-405-129.DOCX.....1