

# **Exhibit 7**



1 Appearances continued:

2 Court Reporter: Crystal M. Pilgrim, RPR, FCRR  
3 Official Court Reporter  
4 United States District Court  
5 District of Columbia  
6 333 Constitution Avenue, NW  
7 Washington, DC 20001

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1 P-R-O-C-E-E-D-I-N-G-S

2 THE DEPUTY CLERK: Civil action 18-1224, Exelon  
3 Generation Company, LLC versus Benjamin H. Grumbles, et al.

4 For the plaintiffs, Sam Hirsch and David DeBruin.

5 For the defense, Jonathan May, Peter Hopkins and Scott  
6 Strauss.

7 THE COURT: Good morning everybody.

8 MR. DEBRUIN: Good morning, Your Honor.

9 THE COURT: How are you?

10 MR. STRAUSS: Good morning.

11 MR. DEBRUIN: Good.

12 THE COURT: I hope you got the message that what I  
13 really need to hear about is venue, that seems to me to be the  
14 issue, the first issue anyway. There are a number of issues,  
15 but the others I can see my way through, what I think.

16 So if you, you're for Exelon, right?

17 MR. DEBRUIN: That's correct, Your Honor.

18 THE COURT: If you would come forward, sir.

19 Is it Mr. Hirsch?

20 MR. DEBRUIN: Mr. DeBruin, Your Honor.

21 THE COURT: Mr. DeBruin, thank you. I have both  
22 names here, I promise.

23 MR. DEBRUIN: That's quite all right.

24 THE COURT: Mr. DeBruin, if you would come first and  
25 talk about venue because I'm concerned about it.

1           MR. DEBRUIN: Thank you, Your Honor. I welcome the  
2 opportunity to do that.

3           Of course, the case law is clear and we acknowledge that  
4 if the defendant raises facts and presents a question of venue  
5 it is of course the plaintiff's ultimate burden to establish  
6 that venue is proper in the District of Columbia.

7           With all respect, Your Honor, it is I submit clear if you  
8 focus on the nature of the claims in Exelon's complaint, the  
9 venue is proper in the District of Columbia.

10          Exelon's complaint does not challenge whether Maryland  
11 Department of Department of the Environment complied with state  
12 law requirements.

13          THE COURT: Oh, no, I understand that issue.

14          I don't think it's -- if Maryland will excuse me. I don't  
15 think it's a question of state law versus federal. State court  
16 versus federal court because of the nature of the claims.

17          The question is pure venue, D.C. versus Maryland.

18          MR. DEBRUIN: Correct.

19          THE COURT: Should it go to the District Court.

20          MR. DEBRUIN: And I was going to focus on the nature  
21 of our federal claims.

22          THE COURT: Okay.

23          MR. DEBRUIN: But I just wanted to underscore that  
24 this is not a case for instance where we're challenging the  
25 application of Maryland law, that we're challenging Maryland

1 statutes as in the Leroy case that I'll talk about.

2 THE COURT: Right.

3 MR. DEBRUIN: This is a case where our claims focus  
4 particularly on the exclusive, the nature of the authority of  
5 the Federal Energy Regulatory Commission, FERC; the nature of  
6 the authority of the EPA and on a federal law licensing scheme  
7 in a multi jurisdictional scheme under the Clean Water Act that  
8 is administered by EPA.

9 It is our claims based upon this federal licensing process  
10 in a EPA run multi jurisdictional Bay protection process that  
11 is the basis of our claims. And those two agencies both of  
12 which are located here in D.C. provide the basis for our claims  
13 and the reasons why venue is appropriate here in the District.

14 So I submit that under Section 1391 (B) (2) which as the  
15 Court knows only requires that a substantial part of the events  
16 or omissions giving rise to the claim occurred in the District.

17 In two different respects, one involving FERC that I'll  
18 address first and a second involving EPA, both independently  
19 provide a basis where key operative substantial events giving  
20 rise to the claims in our complaint have their locus, their  
21 focus here in the District of Columbia. And this is a  
22 quintessential case I submit where venue is appropriate in the  
23 District and in these courts which are very familiar with  
24 claims of this type.

25 So first, if I could talk a little bit about the FERC

1 process. The license at issue here is a license that is issued  
2 by FERC to operate a federal hydroelectric plant. That license  
3 is a long term license that can extend essentially for between  
4 40 and 50 years. I believe the license here is a 46 year  
5 license.

6 The licensing process that Exelon engaged in began at FERC  
7 in 2009. FERC engaged in studies and plans with regard to that  
8 licensing process and what is significant is that that process  
9 is exclusive to FERC with a narrow and specific state carve  
10 out. Otherwise, it is a process that is only at FERC.

11 I just want to emphasize at the beginning it is not Your  
12 Honor simply that Maryland at the end of the day mailed the  
13 purported certification at issue here to FERC in D.C.  
14 Certainly that is an indication of the fact that FERC is here  
15 and the federal licensing process is here. But just to be  
16 clear, we're not contending that just because some part of this  
17 case happened to involve a mailing to the District of Columbia  
18 that that's the basis of venue.

19 It is much more that the entire nature of the licensing  
20 process which is centered here at FERC and what FERC's role is  
21 with regard even to this very certification because, Your  
22 Honor, what is significant, it's not Maryland that would  
23 enforce this certification. It is FERC that would enforce the  
24 conditions at issue. They are incorporated into a federal  
25 license. And again, that federal license in process is based

1 here in the district. It is entirely at FERC which is located  
2 here and not in Maryland, not anywhere else.

3 THE COURT: But FERC doesn't really have much  
4 discretion about putting in the conditions that the Maryland  
5 Department of the Environment has declared into Exelon's  
6 license, right, for the Conowingo Dam?

7 MR. DEBRUIN: Yes.

8 THE COURT: Right.

9 MR. DEBRUIN: And that is precisely the problem and  
10 that is precisely why we have a federal claim and a claim that  
11 belongs here.

12 So the basic scheme, if I can just step back very briefly  
13 and underscore exactly what you have identified. First of all,  
14 we have a licensing process for hydroelectric power that is  
15 exclusively a federal process that states have essentially had  
16 no role in at all. So in the cases that we cited in our papers  
17 in general the first Iowa case in 1946, California v. FERC in  
18 1990. Those cases make clear as we quote in our papers that  
19 the Federal Power Act establishes quote, "a complete scheme of  
20 national regulation to promote the comprehensive development of  
21 the water resources of the nation."

22 So Congress has intended in the area of hydroelectric  
23 power to develop the nation's water resources, the Federal  
24 Power Act carves out and says this is federal domain.

25 subsequent to the Federal Power Act, the Clean Water Act



1 is enacted. The Clean Water Act puts a caveat on that federal  
2 licensing process. It is not that the Clean Water Act creates  
3 a separate independent state law mechanism to clean the  
4 nation's waters. It may do that in other aspects of the Clean  
5 Water Act. But as to what we're talking about here, Section  
6 401 of the Clean Water Act creates a carve out for a state to  
7 certify that if the activities of a federal licensee results in  
8 a discharge that the state may evaluate that activity, that  
9 discharge, and impose conditions that are necessary to ensure  
10 that the activity of the federal licensee will not impair the  
11 water quality standards of the state at issue.

12 What is significant, Your Honor, is that apart from that  
13 carve out, the state has no role in hydro power. So the basic  
14 facts in the California v. FERC case that we cite which arose  
15 only under the Federal Power Act, the State of California  
16 sought to impose conditions on the water flow of the  
17 hydroelectric facility to ensure that there would be enough  
18 water flow for fish to survive and to thrive in the river.

19 The Federal Power Commission or FERC at that time sought a  
20 different restriction of water flow related to the power needs  
21 of the facility. The Supreme Court in California v. FERC made  
22 clear that where there was that conflict, the Federal Power Act  
23 says that FERC and the federal licensing power prevails.

24 The Clean Water Act creates an exception to that. But it  
25 is an exception that only exists within the terms of Section

1 401. And our basic complaint in this case, one of two, our  
2 basic claim is that Maryland has exceeded the authority that  
3 Section 401 gives to it. And has imposed restrictions that  
4 have nothing to do with the activity of Exelon, the activity of  
5 the hydroelectric facility, but instead they've imposed  
6 conditions that relate to the activity of upstream polluters  
7 which introduce nutrients.

8 THE COURT: I got all that part.

9 MR. DEBRUIN: So that's our claim.

10 Here's the problem, it's the exact problem that you  
11 identified. 401 says that conditions in a state certification  
12 "shall" quote unquote, "shall" be incorporated into the federal  
13 license. And both FERC and courts have interpreted that  
14 language to say that if the State imposes conditions in a  
15 certification, FERC "shall" incorporate them into a license  
16 even if FERC believes that those conditions exceed 401 and are  
17 unlawful and even if in fact they do exceed Section 401 and are  
18 unlawful. FERC is basically powerless, they're handcuffed.

19 THE COURT: And if FERC were to do that whether in  
20 this case or in any other, the power authority would then be  
21 required to appeal FERC's decision, if it were this case on the  
22 same basis presumably to the D.C. Circuit.

23 MR. DEBRUIN: Well, there's two potential avenues.  
24 One is that a challenge can be taken from FERC's licensing  
25 order to the appropriate Court of Appeals.

1 THE COURT: Right.

2 MR. DEBRUIN: And this case could be the D.C.  
3 Circuit. The difficulty there of course, Your Honor, is  
4 because FERC lacks authority even if they believe that  
5 conditions are unlawful, often times the record that is  
6 typically developed will not necessarily exist in the FERC  
7 licensing process or at least there is a tension in that  
8 statutory scheme because FERC lacks the authority to basically  
9 exclude conditions even if FERC believes that those conditions  
10 are unlawful.

11 Therefore, we submit that a second mechanism that we've  
12 invoked in this case to challenge the lawfulness of what FERC  
13 is being asked essentially mandated to do is to bring this  
14 challenge before this Court before FERC issues the license.

15 Now as you know, this purported certification was issued  
16 back in April of 2018. FERC has not acted. They have not yet  
17 issued the license.

18 THE COURT: Right.

19 MR. DEBRUIN: I would submit that is in some sense  
20 they are --

21 THE COURT: Well, you've asked them not to because  
22 you're litigating it.

23 MR. DEBRUIN: Well exactly, in part because we've  
24 challenged and we've made FERC aware of those challenges.

25 THE COURT: Let me ask you this question. You make

1 an argument at page 29 of your brief that says an action  
2 challenging a Section 401 certifications conditions ordinarily  
3 may be brought in the District of Columbia because that is  
4 where the conditions become legally enforceable by being  
5 incorporated into a federal license by a federal agency such as  
6 FERC.

7       That general rule applies here, but there's no particular  
8 cite to that general rule. That's the serious question. I  
9 mean, you say there's a general rule, but the question is the  
10 way it's sort of things happened in Maryland. Maryland sent  
11 the certification to FERC and as you say, the consequences of  
12 what Maryland did could be visited upon Exelon by FERC here in  
13 Washington D.C.

14       But I am concerned that Leroy essentially says the fact of  
15 the impact being, and that was in Texas I think, the impact is  
16 in Texas doesn't mean that all the activities didn't really  
17 happen in Idaho, see what I mean?

18               MR. DEBRUIN: I do. Let me address both, you've sort  
19 of asked two different questions. Let me try to address both.

20               THE COURT: I'm happy to have you straighten me out.

21               MR. DEBRUIN: The first one was what's the authority  
22 for the basic proposition that we cite.

23               THE COURT: Right.

24               MR. DEBRUIN: I will concede for you that I think  
25 most of the cases cited by both parties if you look at the

1 facts of those cases. I mean, the parties cite propositions,  
2 but the facts are not particularly analogous to this case. So  
3 you have cases where an individual was held and enforced labor  
4 in Virginia and most of the activity was in Virginia. There  
5 was a few isolated times when the plaintiff was required to  
6 work, I mean, there are very different cases.

7       So the basic authority that I'm going to rely upon as to  
8 the sentence that you read from our papers is Section 1391  
9 itself which makes clear that again under the version currently  
10 in effect which is not the version in effect in Leroy. At the  
11 time of Leroy, the claim venue existed only where in the  
12 judicial district quote, "in which the claim arose." That was  
13 the statute. Where did the claim arise?

14       That has been modified and now the statute provides that  
15 venue exists wherever quote, "a substantial part of the events  
16 or admissions giving rise to the claim occurred." So we're no  
17 longer in a world where there is only where the claim arose,  
18 but there needs only be a substantial part of the events.  
19 Cases have talked about that as looking to operative facts,  
20 significant facts, substantial facts.

21       So the things that you read from our paper that this, this  
22 certification is not a stand alone document issued by Maryland  
23 that is enforced by Maryland. It is in fact a submission that  
24 gets incorporated into a federal license here in D.C. and  
25 significantly, Your Honor, is enforced by FERC here in D.C.

1 It's not, the principal enforcement mechanism is not the  
2 Maryland Department of the Environment, it's FERC. And that I  
3 submit is the second reason why Leroy which you highlight is in  
4 apposite.

5 So Leroy is in apposite for two principal reasons. One,  
6 it arose under the old statute where basically the issue is  
7 where did the claim arise. Here we only need to have a  
8 substantial part and cases have made clear it doesn't even have  
9 to be the most substantial.

10 THE COURT: Right.

11 MR. DEBRUIN: You don't have to show that you are the  
12 best venue as opposed to multiple venues. You just need a  
13 substantial part.

14 But second and even more important, if you look at what's  
15 at issue in Leroy and what's at issue here. So in Leroy what  
16 was at issue is the Supreme Court said in the very first  
17 sentence was quote, "An Idaho statute imposes restrictions on  
18 certain purchasers of stock and corporations having substantial  
19 assets in Idaho. The question presented by this appeal are  
20 whether the state agents responsible for enforcing the statute  
21 may be required to defend its constitutionality in a Federal  
22 District Court in Texas."

23 Here two significant differences. Again, we're not  
24 challenging a Maryland statute. We're not challenging Maryland  
25 law in any respect.

1           This is a federal process with a narrow state carve out  
2 and we're saying the state has exceeded its authority from that  
3 federal process. A federal process that has its locus entirely  
4 here in D.C. And the state is given a limited role and they  
5 bulldozed through it using in essence the fact that it's almost  
6 like a gotcha. We can bulldoze through it and you're powerless  
7 to do anything for it. You're handcuffed, you shall  
8 incorporate it.

9           So that's our complaint. And it is an interference with  
10 the federal process that does have its locus here in D.C. It's  
11 not a challenge to an Idaho statute that the Court said is  
12 properly brought in Idaho.

13           And the second point of difference that I think is quite  
14 different is the Supreme Court said whether the state agents  
15 responsible for enforcing the statute. When the Supreme Court  
16 looked at well, where does this claim arise? It identified  
17 that part of the facts of where the claim arose was quote,  
18 "future action that may be taken in the state by its officials  
19 to punish or to remedy any violation of its law."

20           So there you had an Idaho statute that would be enforced  
21 by Idaho officials in Idaho. That's not this case. When  
22 Maryland submits a certification it gets incorporated into our  
23 FERC license. That would be issued by FERC here and  
24 significantly the primary responsible party to enforce that  
25 license including the certification from Maryland is FERC.

1           THE COURT:  Could I ask you it's a question I also  
2 wanted to ask Maryland.  It's not exactly the venue question.  
3 So forgive me if it's from left field.

4           But if I understand the factual predicate, the Conowingo  
5 Dam is an electrical power facility which produces power for  
6 Baltimore and much of the lower State of Maryland, lower area  
7 of Maryland.

8           MR. DEBRUIN:  It's actually not correct.

9           THE COURT:  Okay, so tell me.  No, no, no, what's  
10 correct?

11          MR. DEBRUIN:  Basically this is why we have the  
12 Federal Power Act.  Electricity flows onto a grid and electrons  
13 are --

14          THE COURT:  No, I understand that.

15          MR. DEBRUIN:  Well --

16          THE COURT:  Please, I misunderstood what people  
17 utilize power from the Conowingo Dam.

18          Now what you're saying is when we put it on the grid and  
19 whoever wants to access the grid uses it.

20          MR. DEBRUIN:  Well not quite.

21          THE COURT:  Okay, I'm sorry, I jumped to that.

22          MR. DEBRUIN:  It is not used primarily or necessarily  
23 by people in Maryland.

24          THE COURT:  Okay.

25          MR. DEBRUIN:  It is used principally and primarily in



1 connection with the regional transmission network that Maryland  
2 is a part of. That regional transmission network is called PJM  
3 and it basically connects essentially the Mid-Atlantic region,  
4 westward to Illinois. It doesn't include New York. It doesn't  
5 go much further south than the District of Columbia. So you're  
6 basically talking about Pennsylvania, New Jersey, down to the  
7 District in Maryland and then it continues west and connects  
8 into Illinois.

9 THE COURT: Okay.

10 MR. DEBRUIN: And that's PJM.

11 So this particular facility which is a major producer of  
12 clean renewable hydroelectric power happens to be in Maryland.  
13 There are nuclear plants up river in Pennsylvania, other plants  
14 all across that region and the power flows into that regional  
15 grid and it's pulled out by users on that regional grid.

16 THE COURT: That was very helpful.

17 MR. DEBRUIN: Yes, it certainly does help supply  
18 Maryland, no question about it.

19 THE COURT: But it's not as localized as my image  
20 would have suggested.

21 MR. DEBRUIN: That's correct. And that's just a  
22 matter of how the nation's electricity works.

23 THE COURT: Okay.

24 MR. DEBRUIN: There's another similar grid that  
25 actually serves almost only New York. It is a one state focus.

1 Texas is kind of a one state focus. New England has its own  
2 regional grid that is all of New England except for New York.

3 THE COURT: New York isn't New England, it's okay.

4 MR. DEBRUIN: That's correct, but Your Honor, this is  
5 actually I think is an interesting segue to the second point I  
6 wanted to make. As I said, there were really two independent  
7 reasons why venue is proper in D.C. One was focused on FERC  
8 and the other was focused on EPA.

9 The EPA point is a similar multi jurisdictional point just  
10 like the point we've been talking about what is the facility,  
11 who uses the electricity.

12 As again you know from our complaint, another what I would  
13 call the second or the first how we want to structure them of  
14 our challenges to this certification is that Maryland has  
15 interfered with a multi-state process focused on the Bay which  
16 obviously is a critical resource not just for Maryland, but for  
17 all of the jurisdictions within the Bay watershed.

18 And that what Maryland has done is interfered with that  
19 EPA process in a way that is inconsistent with the Clean Water  
20 Act, that's our Count 1. And in a way that is actually  
21 preempted under the supremacy clause which is our Count 3. And  
22 they've done so in a way that I submit is quite clear and  
23 amazing and I don't want to talk about the merits, but again,  
24 just to briefly set the stage for our claim in facts that I  
25 don't believe are disputed.

1           When the Clean Water Act was enacted its principal goal  
2 was to clean up the nation's water ways. But it does so not by  
3 requiring the removal of pollutants. It's not a clean up  
4 statute like CERCLA and some other environmental statutes. The  
5 Clean Water Act primarily aims to prevent pollutants from  
6 entering the water to begin with. So it is a pollution  
7 prevention statute as opposed to a prevention clean up statute.

8           So the Clean Water Act sets up a structure of how to  
9 protect different waterways. With respect to the Chesapeake  
10 Bay the largest estuary in North America that is a watershed of  
11 six different states and the District of Columbia. And so and  
12 the statute has particular provisions directed specifically to  
13 the Clean Water Act. And that's 33 U.S. Code Section 1267 in  
14 particular 1267(G).

15           This entire process of what we call the Bay TMDL. It's  
16 the multi-jurisdictional document that imposes restrictions on  
17 those six jurisdictions and the District of Columbia. So  
18 there's six states and D.C. Not restrictions on private  
19 parties and individual parties, but on six states and D.C. is  
20 described at length in the American Farm Bureau case that we  
21 cite in our papers, that's a Third Circuit case, 792 F.3d 281.

22           And what's significant, Your Honor, don't worry, I'll be  
23 brief. I'm not going to speechify for a long period of time.

24           In 2010 EPA approved and again, that was a document that  
25 really under the Clean Water Act the administrator of the EPA

1 located right here in D.C. approved a plan called the 2010 TMDL  
2 for achieving goals for the Chesapeake Bay by the target date  
3 of 2025. It was based on modeling of how to prevent pollutants  
4 from New York, Pennsylvania, Maryland, West Virginia, Delaware,  
5 Virginia, and the District.

6 Each of those states were put on, for lack of a better  
7 word, a diet. They were restricted in the amount of nutrients,  
8 fertilizers and other materials that if those nutrients washed  
9 into the waters of the Bay, they interact with the oxygen, take  
10 oxygen out of the water and they result in dead zones.

11 When this was done in 2010 with the goal of achieving  
12 better conditions in the Bay by 2025, they set a midpoint  
13 assessment; let's see how we're doing halfway through. Certain  
14 assumptions had been made in that model.

15 So what occurred in connection with this certification is  
16 it was discovered that EPA's original assumptions needed to be  
17 modified. That there was a shortfall. Basically that  
18 shortfall resulted in amounts of nitrogen and phosphorus  
19 additional amounts that had to be taken out of the waters.

20 What this certification does and what we're challenging is  
21 that Maryland took that shortfall to the pound, exactly the  
22 same numbers, Your Honor, to the pound. And instead of letting  
23 that shortfall be allocated through revisions to the TMDL which  
24 is led by EPA administrator here in D.C. and they imposed all  
25 of that on us, on the hydroelectric facility that basically

1 sits at the bottom of the river. That basically said we as an  
2 operator of a hydroelectric facility have to take out of the  
3 water nutrients that farmers in Pennsylvania, farmers in New  
4 York, and other polluters are introducing into the water.

5 Our first and our third claim is that that is an  
6 interference with a multi-jurisdictional process that because  
7 of its very nature involving states that have competing  
8 interests is run by EPA which is based here in D.C.

9 THE COURT: Has EPA gotten any further than  
10 recognizing that its assumptions were too rosy?

11 MR. DEBRUIN: So we're in the middle of that process.

12 THE COURT: Okay.

13 MR. DEBRUIN: So I've talked about the 2017 midpoint  
14 assessment. The 2017 midpoint assessment recognized the  
15 shortfall. There are different ways you can make out that  
16 shortfall. You can do it across the entire Chesapeake Bay  
17 watershed.

18 THE COURT: Right.

19 MR. DEBRUIN: You can do it by only focusing on the  
20 Susquehanna River which is the largest river, fresh water body  
21 of water flowing into the Chesapeake Bay. You can do it in a  
22 variety of different ways.

23 The expectation is that each state will end up with what's  
24 called phase three of their plans. We are in the process of  
25 that. Maryland is very involved in that process, but that has

1 not yet been finalized. It's still being studied. There are  
2 still contractors who are -- so no, we don't know at the end of  
3 the day what EPA will do resulting out of the 2017 midpoint  
4 assessment.

5 But what Maryland has tried to do, and they have a direct  
6 self-interest in that, is they've taken the entire shortfall  
7 which is essentially a multi-jurisdictional shortfall and  
8 they've imposed it on Exelon. Of course, if it sticks, it  
9 hasn't yet been incorporated into our FERC license. We've  
10 challenged it here. We have still asked Maryland itself to  
11 reconsider, all of that is still open. But if it sticks and is  
12 incorporated into our license and it is upheld, well then that  
13 shortfall doesn't have to be allocated to Maryland,  
14 Pennsylvania, New York or anybody else.

15 And one of the places it doesn't get allocated is  
16 Maryland. And that means that Maryland doesn't have to pay  
17 additional costs, impose restrictions on its farmers. It  
18 nicely shifted any of that on us. That's the legal claim.  
19 We're not here to argue --

20 THE COURT: No, no, no, I appreciate the shift.

21 MR. DEBRUIN: But let's go to venue.

22 THE COURT: But that's okay. But what you can do of  
23 course is just pay for it.

24 MR. DEBRUIN: Exactly. Half million dollars --

25 THE COURT: No, no.

1 MR. DEBRUIN: -- a day.

2 THE COURT: I got that part too. Go to venue.

3 MR. DEBRUIN: All right. So where does that leave us  
4 in terms of venue? Again, I think it's significant just as we  
5 talked about in electricity. When we talk about our TMDL claim  
6 Counts 1 and Counts 3, this really is a multi jurisdictional  
7 problem. It's a multi jurisdictional entity that's at issue,  
8 the TMDL. It's not Maryland only. And in fact, I submit it is  
9 potentially inappropriate to say well, the only place you can  
10 challenge what Maryland is doing to you to benefit itself is go  
11 into Maryland and litigate it there because again, what we're  
12 saying is no, no, this is improper.

13 This is a multi jurisdictional problem. It's run by EPA  
14 and you're Maryland trying to basically interfere and take over  
15 that process.

16 Now whether we win or lose that claim is not decided  
17 today.

18 THE COURT: Right.

19 MR. DEBRUIN: But the point is that's a  
20 quintessential D.C. claim. It focuses on the authority of EPA.  
21 EPA is here. This is where it is headquartered. This is where  
22 the seven jurisdictions ultimately will be relegated to a  
23 document that EPA will impose upon them.

24 And these are the kinds of claims this Court, the D.C.  
25 Circuit, frequently deals with in terms of basically the

1 authority of federal agencies.

2       So again, for two separate reasons but one focusing on the  
3 FERC licensing process that FERC will enforce, the second  
4 focuses on EPA, that's why we're here. That's why I started  
5 off by saying we're not challenging the Maryland statute.

6           THE COURT: Let me ask you a question. And  
7 unfortunately although I have the complaint right here, I  
8 didn't reread it last night.

9       Is your claim as to the interference that you describe  
10 with the EPA multi state process is that couched in any way in  
11 preemption concepts; that is, Maryland is trying, Maryland is  
12 preempted from taking over, if you will, the EPA process which  
13 is trying to sort out which of the states and who gets what  
14 liabilities and instead has decided Exelon gets it all? I'm  
15 just trying to figure out what the legal thesis is.

16           MR. DEBRUIN: There are two and you've just  
17 identified one of them.

18           THE COURT: Okay.

19           MR. DEBRUIN: So Count 3 of our complaint uses the  
20 facts that I've just described and contends that Maryland is  
21 preempted by the supremacy clause.

22           THE COURT: Right.

23           MR. DEBRUIN: Because this is a federal process set  
24 forth in the Clean Water Act with the TMDL process in the Bay  
25 set forth in the provision that I cited Section 1267 (G), and



1 Maryland cannot impose its will by taking what should be  
2 allocated under the TMDL seven jurisdictions and saying let's  
3 just impose it all on Exelon.

4 THE COURT: That's the preemption. And what's the  
5 other piece?

6 MR. DEBRUIN: The first claim is a claim under the  
7 Clean Water Act itself in Section 401.

8 THE COURT: Okay.

9 MR. DEBRUIN: Again, just to provide a brief  
10 description of the claim. Again, the federal licensing process  
11 here is exclusive to FERC with this carve out. The carve out  
12 says a state can impose conditions if those conditions are  
13 necessary to assure compliance with water quality standards.

14 So our claim is these conditions that Maryland is imposing  
15 on to us to take all of these nutrients out of the water are  
16 not necessary under the Clean Water Act because there is a  
17 federal process for allocating these nutrients in the way that  
18 ultimately the jurisdictions working cooperatively with EPA  
19 decide is appropriate.

20 THE COURT: Okay, thank you.

21 MR. DEBRUIN: So there's both of those claims. But  
22 again, my point simply is I think as you focus on the claims,  
23 the nature of authority of EPA and FERC you understand why we  
24 believe that D.C. is the right locus of the case.

25 Certainly we have a substantial basis. Whether we have

1 the exclusive basis to say only D.C., we don't have to prove  
2 that. We just have to prove that there are sufficient  
3 operative facts, substantial operative facts that are here in  
4 D.C.

5 I would just note they don't make a motion to transfer  
6 under 1404 (A). In other words, a traditional form non  
7 convenience motion.

8 THE COURT: No, it's hard. We're terribly close.

9 I know this isn't Baltimore or Annapolis. I'm sorry, it  
10 might be coming from Annapolis, but it's not very far.

11 MR. DEBRUIN: But I think it's significant to have  
12 even made that motion. So the only question is is D.C. a  
13 district where venue lies. I think the answer is clearly yes.

14 THE COURT: Thank you. I very much appreciate it.

15 Who is going to argue for Maryland?

16 MR. STRAUSS: I am, Your Honor. May it please the  
17 Court, Scott Strauss for the State of Maryland.

18 THE COURT: Thank you. Mr. Strauss, please come up.

19 I would appreciate your take on venue too. Again, I've  
20 read the briefs, so don't think that I'm just coming in totally  
21 ignorant. I've read the briefs. I've read some cases and I  
22 have wrestled with this and thought I should really talk to you  
23 all before I decided.

24 MR. STRAUSS: Very well, thank you, Your Honor. I  
25 appreciate the opportunity.

1 THE COURT: Thank you for coming.

2 MR. STRAUSS: The venue statute is clear as has been  
3 discussed. The claim can be brought anywhere where a  
4 substantial part of the events that led to the claim occurred.  
5 Occurred, past tense or a substantial part of the property  
6 that's at issue is located. Now certainly there's no dispute  
7 about the second prong. The property is in Maryland.

8 We would submit that there's no dispute about the first  
9 prong either. Yes, there are a number of counts in this  
10 complaint. But they are all focused on the same single  
11 operative fact.

12 Maryland issued certification, contains a bunch of  
13 conditions. They did so under state law and Exelon objects to  
14 those conditions. And Exelon brings a battery of claims about  
15 what they believe is wrong with the certification.

16 But again, the significant fact that leads to all of this  
17 at the heart of this dispute is not that this certificate  
18 happened to be filed with a federal agency. The significant  
19 point is that Maryland issued the certification and Exelon  
20 objects to it.

21 Now Mr. DeBruin mentions the FERC licensing process or  
22 relicensing as the case would be for the Conowingo Dam.  
23 Obviously there is a substantial process. As Your Honor noted  
24 earlier, if Exelon doesn't like the outcome of that it can file  
25 an appeal of that order, but it won't be in this Court. As you

1 know it will be in the Court of Appeals. FERC is not a  
2 defendant here. The FERC decision making process is not on  
3 trial here.

4 What this case is about instead, very simply, is the  
5 Maryland certification and Exelon's objections to it.  
6 Mr. DeBruin mentions an EPA process. The reason that Mr.  
7 DeBruin's client is concerned about the EPA process is because  
8 they don't like the certification. That's what really is at  
9 issue. It's a very simple and straightforward thing.

10 THE COURT: Let me ask you this. I was curious about  
11 the arguments in your brief which is not, again I'm going a  
12 little bit away from venue but it is actually relevant in my  
13 thinking.

14 At the beginning of your brief you describe with great  
15 energy the beauty of the Susquehanna, the fish, the -- what  
16 would I call it? Is it a lake?

17 MR. STRAUSS: The reservoir.

18 THE COURT: The reservoir, but it's used by people.

19 MR. STRAUSS: Absolutely.

20 THE COURT: It may be a reservoir, but it's not a  
21 drinking water reservoir. It's a reservoir behind the dam and  
22 people use it a lot and it's become a thing of itself.

23 It sounds as if Maryland would prefer that there be no  
24 dam. That it just be removed from the river so that the river  
25 could flow free.

1           MR. STRAUSS: I don't believe, no, I don't believe  
2 that's correct.

3           THE COURT: That struck me as a really strange desire  
4 on the State's part. Really, Maryland wants a dam to be gone?

5           MR. STRAUSS: No, I don't think that's correct, Your  
6 Honor.

7           I think the point of that discussion was to explain that  
8 the ecology of the dam, the region around the dam, Susquehanna,  
9 the lower Susquehanna would have been different if there were  
10 no dam, but the dam --

11          THE COURT: But there's been a dam for 90 years, now  
12 really.

13          MR. STRAUSS: Absolutely.

14          THE COURT: For the State of Maryland to get up, to  
15 write, I'm sorry, I don't know who did the writing, so forgive  
16 me. This is not a personal statement at all.

17          MR. STRAUSS: I'm here and happy to listen, Your  
18 Honor.

19          THE COURT: I mean, I just want to say, okay, if  
20 Maryland wanted to complain about the change to the lower  
21 Susquehanna, it should have done it a long, long time ago. And  
22 you know what, a long time ago people thought it was the cat's  
23 meow to have electrical power coming out of the Conowingo Dam.  
24 And it's now that the State of Maryland suddenly says well fish  
25 are more important. Well, I don't have anything against fish.

1 The eagles like the fish too, but eagles in the Conowingo Dam.

2 Excuse me, I need to correct myself.

3 MR. STRAUSS: I know.

4 THE COURT: You know what I meant, thank you.

5 I read the opening of your brief and I wanted to say oh  
6 come on Maryland. Be serious with me, be serious. This is a  
7 an important facility for lots of reasons. It generates power,  
8 it has the reservoir that people enjoy and have enjoyed for a  
9 long time.

10 And now in the 21st century we suddenly realize well, it  
11 also affects the way the water flows down into the Bay. Well  
12 yeah, but that's been true for 90 years.

13 MR. STRAUSS: I understand your point, Your Honor.

14 Let me say this about what you said. The point of our  
15 argument was not ghee, we would prefer that there would be no  
16 dam and things would have been better.

17 The point is that the dam has been operating for 90 years  
18 and has been operated in a certain way by the licensee during  
19 that time and that has had impacts on the ecology of that  
20 region, that part of Maryland.

21 So you're now at the point of relicensing the dam and  
22 looking at the dam as it sits now. So what we hear in response  
23 is oh, that has nothing to do with us. We just have this dam.  
24 The answer is no, the dam has a great deal to do with it and  
25 the way in which it's been maintained over these 90 years and

1 as we look out into the next 50 years there are concerns that  
2 the dam be operated and maintained in a way that will be  
3 somewhat more responsive to those concerns which have in fact  
4 grown over the 90 years because of the way in which the dam has  
5 been operated.

6 So the point of it is of course is not to say ghee, we  
7 wish the dam would just go away. If that were the case, we  
8 would have denied the certification. We're trying to get to a  
9 point where having the dam there it can be operated in a way  
10 that meets water quality concerns, meets fish concerns.

11 THE COURT: How would you do that? The three ways  
12 that you suggested are either basically impossible, like  
13 cleaning out the bulk behind the dam, the mud and stuff that's  
14 accumulated. That's already been studied. That won't work,  
15 that won't help. It will cost a fortune and it will last a  
16 very short time. Oh, but in the alternative you can pay us  
17 billions of dollars.

18 Now there's no statement from Maryland that that billions  
19 of dollars is even dedicated to this problem. So don't talk to  
20 me about how the dam could be operated in a different way. You  
21 haven't suggested a different way.

22 MR. STRAUSS: Well --

23 THE COURT: I'm into the merits, forgive me.

24 MR. STRAUSS: I apologize. I'm actually not the  
25 person equipped to answer the specifics of how the dam could be

1 operated.

2 THE COURT: And I'm not either, so let's move on and  
3 me forget about that.

4 MR. STRAUSS: What I'll say is that your concern is  
5 the content of the certification is inappropriate. You have  
6 certain concerns about that.

7 THE COURT: My concern is I read the brief of the  
8 State of Maryland which emphasized understandably the interests  
9 of the State of Maryland in how the dam is operated, but didn't  
10 seem to understand that the dam had benefits to the State of  
11 Maryland and to the people who live in the State of Maryland  
12 and to the surrounding people I guess on the grid, et cetera in  
13 the State of Maryland.

14 So I walk away from that thinking who are the people at  
15 the Maryland Department of the Environment. They don't even  
16 care that this -- never mind. That's not between you and me.

17 MR. STRAUSS: I would say that I think that's a  
18 little unfair, Your Honor. I think the State of Maryland is  
19 very concerned about the dam and its operations going forward  
20 and is trying this certification to address that.

21 But as to the questions that we have in front of us today  
22 which is --

23 THE COURT: Yes, let's get back to these and tell the  
24 Judge to be quiet.

25 MR. STRAUSS: -- the question of venue, the



1 complaint, the operative facts, the significant event that gave  
2 rise to those claims in the complaint is the certification and  
3 Exelon's objection to it.

4           THE COURT: So this is my question to you because I  
5 think that you've got, which is why we're having this argument.  
6 I think that you have made a strong venue argument.

7           The question that I have is that whatever Maryland did  
8 with the certification and for whatever reasons that Maryland  
9 did what it did with the certification, it really isn't  
10 effective unless and until it gets to FERC. And it's when it  
11 gets to FERC who can't disagree with the State of Maryland,  
12 that it becomes a live problem.

13           MR. STRAUSS: Well, let me say I understand your  
14 point. Let me say this about that. There is a process for  
15 Exelon to challenge those conditions. It's just not this one.  
16 The process is to go through the State Administrative Appeals  
17 process. And if Exelon is dissatisfied with the outcome to  
18 appeal that in the state court system and if Exelon continues  
19 to be dissatisfied with that, to appeal that to the United  
20 States Supreme Court. That is the route.

21           What's going on here and the difficulty we are having is  
22 that what Exelon has done is tried to forge a different route  
23 and the route doesn't work in this Court, and we submit from  
24 our papers doesn't work at all. Because what they're really  
25 doing is they're collaterally attacking what is a state permit

1 process. And there is a state administrative process to  
2 address it and that's where the case belongs. But we're here  
3 today just about the venue question.

4 THE COURT: Right, right.

5 MR. STRAUSS: On the venue question, it is very  
6 clear. Exelon says, cites cases where it says where it says at  
7 the heart of the case is the filing of a piece of paper. The  
8 heart of this case is the certification and the conditions that  
9 Exelon has made clear that they don't agree with. And that's  
10 why, that's why this case belongs in a Maryland court. It  
11 doesn't belong here.

12 The involvement of FERC in this process at this point is  
13 tangential. As concerns this lawsuit, the only point alleged  
14 by FERC is that Maryland gave the certification to FERC and  
15 some day FERC will incorporate it in their license. Maybe they  
16 will, maybe they won't. Maybe the reconsideration process that  
17 is underway in Maryland will lead to a different result in  
18 terms of what the content of the certification is, maybe it  
19 won't. But those are the processes that will play out.

20 The reason FERC isn't here as a defendant of EPA is that  
21 their orders get appealed to the Court of Appeals, not this  
22 body.

23 THE COURT: Well this process doesn't. What we're  
24 dealing with here doesn't call for much discretion to be  
25 exercised by FERC, right?

1           MR. STRAUSS: Not as to the content of the state  
2 certification at FERC and the relicensing.

3           THE COURT: Right.

4           MR. STRAUSS: But in the state administrative process  
5 and the appeals from that, that is where the substance of the  
6 certification will be addressed.

7           THE COURT: No, no, no, and I think that's --

8           MR. STRAUSS: We didn't want to leave with the idea  
9 that this was simply something we did that could never be  
10 challenged and FERC simply had to take it. That's not the  
11 case.

12           THE COURT: No, no, I understood that there were  
13 things happening at different levels.

14           I thought that and perhaps I was just reading too quickly.  
15 I thought that part of the state administrative process was  
16 completed; is that not so?

17           MR. STRAUSS: Well, there has been a certification.  
18 There is a reconsideration that has been filed by Exelon and by  
19 a group of environmental intervenors. As part of that process  
20 in October, Maryland invited those parties seeking  
21 reconsideration to come in and make oral presentations. They  
22 did so.

23           In November they filed supplemental papers. Exelon filed  
24 some papers claiming that the environmental groups who were  
25 involved in this had no standing. The environmental groups

1 responded in December. And those matters are pending before  
2 MDE. If MDE denies reconsideration, there will be an  
3 administrative hearing in which Exelon will get to bring in  
4 evidence and put on a case about why they think the  
5 certification is unfair.

6 If they're unhappy with the outcome of that, they appeal  
7 to the state court system and so on. But their claim is not as  
8 though they have no route. They have a route.

9 THE COURT: No, no.

10 MR. STRAUSS: And that process is underway.

11 I would say one other thing about that process.

12 THE COURT: Please.

13 MR. STRAUSS: In terms of the pace of it. As you  
14 point out the dam has operated for 90 years. If the relicense  
15 is issued, it will be in place for 50 years. This is an  
16 important facility in Maryland with all kinds of impacts,  
17 environmental impacts on that part of the state.

18 We are trying to do our best to approach this with the  
19 rigor that it deserves and the scrutiny that it deserves in  
20 terms of this reconsideration process.

21 I'd also point out in terms of the pace of the process;  
22 that around Thanksgiving of last year we received from one of  
23 the law firms that represents Exelon in the state process, a  
24 Public Information Act request that asked for an enormous range  
25 of documents from a great number of individuals. Including

1 some of the individuals who work on the reconsideration, but we  
2 are also in the process of dealing with that.

3 I just wanted to speak a little bit to where the process  
4 is and why it is where it is and where it's going from here. I  
5 hope that's helpful.

6 THE COURT: That is helpful. I do appreciate that.

7 What do you say in response to the argument made by Exelon  
8 that what Maryland has put into the certification amounts to  
9 imposing on one commercial entity the full costs that should be  
10 spread out by EPA among six states and the District of Columbia  
11 in order to keep the Bay clean?

12 MR. STRAUSS: We don't believe we've violated the  
13 settlement. We don't believe we violated the TMLD or TMDL, I  
14 got the acronym wrong.

15 THE COURT: I wrote it down, but anyway keep going.  
16 We know what we're talking about.

17 MR. STRAUSS: Our contention, Your Honor, and I  
18 apologize, Your Honor. We're really here to address venue.

19 THE COURT: This is venue.

20 MR. STRAUSS: Well, it is and it isn't because what  
21 really is going on here --

22 THE COURT: It's one of their arguments as to why  
23 venue is here. So you need to respond to it.

24 MR. STRAUSS: I will respond.

25 What they're arguing about is that the certification in

1 some fashion is contrary to the settlement. The TMDL or the  
2 TDML whichever it is. And the point of that again for purposes  
3 of venue, is that the focus is what the State of Maryland  
4 certification is and what it allegedly does. It is not an  
5 operative. The operative fact is that they issued the  
6 certification. And the content of it Exelon finds  
7 objectionable for a number of reasons including one of them  
8 being they believe it is contrary to an EPA directive.

9       Again, that's a claim that belongs in a Maryland Federal  
10 Court if anywhere. We believe of course as we've said that  
11 this case should be dismissed in its entirety, but we're not  
12 here to talk about that today.

13       But in terms of venue, again, if we're talking about where  
14 a substantial part of the events at issue occurred. The  
15 substantial event, and it's true there can be more than one set  
16 of substantial events. But to be clear here, there really is  
17 only one event. It's the certification and it's content.

18       Exelon has spun that out into a variety of impacts. It's  
19 going to impact some FERC relicensing process. It's going to  
20 impact some EPA ongoing process in terms of rejiggering those  
21 allocations. Those are, it may, but again the reason it does  
22 is because of the action Maryland took. That's what's going on  
23 here.

24       The FERC relicensing perhaps there'll be a license with  
25 this certification in it. If that's where this ends up, that

1 can be appealed to the Court of Appeals, the D.C. Circuit and  
2 not the district courts.

3 THE COURT: Do you agree that the complaint doesn't  
4 complain of anything that Maryland did in violation of state  
5 law?

6 MR. STRAUSS: The complaint is focused on federal  
7 arguments.

8 THE COURT: Right.

9 MR. STRAUSS: But again, our point is that the place  
10 to review, the place to review those claims. The questions  
11 that are raised are in a state court proceeding. That's what  
12 we cite as the courts in having said the Alcoa case in the D.C.  
13 Circuit for example.

14 THE COURT: Yes, but that's because I mean I think  
15 that the better argument there is that that's because the state  
16 certification is normally based on state law.

17 MR. STRAUSS: As it was here, Your Honor. As it is  
18 here. It is based on state law.

19 THE COURT: Well, nobody has told me that.

20 MR. STRAUSS: It's a state process. We do it  
21 pursuant to Maryland regulations.

22 THE COURT: Okay, right, right.

23 MR. STRAUSS: But it is, it's a state certification.

24 THE COURT: Yes, I appreciate that it's a state  
25 certification. But there is no objection in this complaint

1 about state law, right?

2 MR. STRAUSS: Correct, because the state claims would  
3 belong in the state process. The federal --

4 THE COURT: And they're there.

5 MR. STRAUSS: I guess what I would say to you is  
6 this. I understand what you're saying.

7 THE COURT: I'm just pushing you a little.

8 MR. STRAUSS: That's fine and I appreciate that.

9 The process for review of these kinds of claims, these are  
10 state decisions, state certifications, is in a state  
11 administrative proceeding. And that's where we are and those  
12 go to state courts.

13 Remember Exelon went to state court in a decision we  
14 provided to you back in October. They raised state claims and  
15 that the state court said they're not ripe yet. You have to go  
16 through the state administrative process and then your claims  
17 can go to the courts.

18 And frankly, the same issue is here. These claims, all of  
19 this belongs in the state administrative process. And when  
20 those arguments have been resolved --

21 THE COURT: Would you have them make a preemption  
22 argument?

23 MR. STRAUSS: If they so desire, they would make  
24 whatever arguments they think is necessary.

25 THE COURT: In the state administrative process?



1           MR. STRAUSS: I don't believe it belongs in this  
2 Court or in the Maryland District Court, Your Honor. I believe  
3 that all of that belongs in the state administrative process.

4           THE COURT: So that's part of your motion to dismiss.  
5 It's not only the wrong venue, it's just the wrong place all  
6 together.

7           MR. STRAUSS: Absolutely, it is the wrong place and  
8 they have not exhausted their administrative remedies. This  
9 doesn't belong here anyway, but certainly they have not  
10 exhausted their administrative remedies.

11          But as to venue, as to what we're here about today there  
12 really is only one thing going on here and it is that Maryland  
13 issued a certification in Maryland after a process that was  
14 conducted in Maryland about a facility in Maryland.

15          You had asked the question previously about where does the  
16 energy go. It's true, it is part of a grid. It goes out on a  
17 grid. But I will also tell you in paragraph 29 of their  
18 complaint, they say the project; the Conowingo project is  
19 Maryland's largest source of renewable energy producing more  
20 than 55 percent of Maryland's renewable energy. Maryland's  
21 renewable energy.

22          So this is a facility that really has a locus and an  
23 importance in Maryland. Their complaint is replete with  
24 statements about the impact of the Conowingo Dam in this  
25 proceeding on Maryland. It's really all focused in Maryland.

1           THE COURT: So the cure that Maryland seeks to impose  
2 for all the pollutants in the Susquehanna River that comes  
3 through the dam either through it's turbines or otherwise  
4 released, the cure is for Exelon to pay a lot of money?

5           MR. STRAUSS: No, we've suggested there may be  
6 management practices that Exelon can employ and there may be  
7 dredging that Exelon can do. We believe there are things that  
8 can be done short of paying money, absolutely. It's not our  
9 position that this is simply an opportunity to get a check from  
10 Exelon.

11          THE COURT: I find that hard to, hard to agree with  
12 because of the question of whether dredging behind the dam  
13 would be of assistance. It seems to me that's been studied and  
14 the answer is it would be horrendously expensive, perhaps less  
15 expensive than paying the state. Horrendously expensive and it  
16 would only last for a short period of time. It wouldn't really  
17 address the problem. But if the pollutants come from  
18 elsewhere, I'm just astonished that Maryland thinks that Exelon  
19 should pay for everybody else's pollution.

20          MR. STRAUSS: The discharge is at the dam and the  
21 discharge is what is jurisdictional under the Clean Water Act.  
22 And Maryland is looking at ways to try to improve the ecology  
23 of the lower Susquehanna and the dam is there.

24          Again, I can't --

25          THE COURT: Okay.

1 MR. STRAUSS: I can't speak to the specifics of the  
2 best management practices. I would not be the one for that.

3 THE COURT: Well, that really goes to the merits  
4 anyway.

5 MR. STRAUSS: And it does.

6 THE COURT: You and I agree on that point.

7 MR. STRAUSS: Very well.

8 THE COURT: So despite my questions to you, I do  
9 think that you have presented your argument both in brief and  
10 here very well.

11 MR. STRAUSS: Thank you, I appreciate that, Your  
12 Honor.

13 THE COURT: Thank you.

14 Did you wish to speak again, sir? Since you bear the  
15 burden of proof here, you get to speak last.

16 MR. DEBRUIN: Thank you, Your Honor. I think I can  
17 be brief, Your Honor. I did want to make just a few points.

18 Again, the sole focus of Maryland's venue argument is that  
19 Maryland issued certification. Clearly they did. We don't  
20 dispute that. But what is critical is that Maryland does not  
21 enforce the certification. It only becomes operative when it  
22 is incorporated by FERC into the license and then FERC has  
23 responsibility to enforce it. And I submit that because of  
24 that, Your Honor, it simply cannot be said that FERC's role is  
25 quote tangential. FERC is critical to this process. And

1 therefore the cases they have cited that where a federal agency  
2 and have received a letter, but is tangential does not apply.

3 Similarly there is no way you can say that EPA is somehow  
4 tangential to the TMDL process. It runs that process. It  
5 approves that process. It sits on top of that process. The  
6 states do not.

7 So in both of those ways, these agencies are not  
8 tangential. That's really what our point comes down to.

9 I wanted to just mention a few facts not because they  
10 matter, but because --

11 THE COURT: They've come up.

12 MR. DEBRUIN: -- the Court raised them.

13 I want you to know the reservoir behind the dam actually  
14 is a drinking water reservoir. It provides drinking water to  
15 the City of Baltimore.

16 THE COURT: I see.

17 MR. DEBRUIN: And to a second community and I just  
18 didn't want you to make a statement that was inaccurate onto  
19 that.

20 THE COURT: Thank you.

21 MR. DEBRUIN: I also just want to state for the  
22 record in a sentence that when counsel for Maryland says that  
23 the dam has impacted the ecology of the lower Susquehanna  
24 River, let's be plain. What the dam has done for 90 years has  
25 trapped pollutants. It's benefited Maryland and everybody else

1 in the Chesapeake watershed by serving as basically a great big  
2 trap. So nutrients that otherwise would have flowed into the  
3 Bay and harmed the Bay have been trapped behind the reservoir.

4 What happens over time is the reservoir fills up and so  
5 it's ability to trap goes down and that is what has produced  
6 the shortfall that I talked about in the TMDL process. It has  
7 filled up a little bit sooner than originally assumed. EPA  
8 assumed in 2010 that it would not stop trapping until 2025. It  
9 now appears that the trapping capacity has been reduced.

10 But to say hey guys, you're not trapping anymore. You're  
11 not benefiting us the way you use to benefit us. So we're  
12 going to make you now the scapegoat to take out the pollutants  
13 in the river, that's what this case is about in the merits.  
14 But again, I believe for the reasons I said were appropriate  
15 here.

16 The last thing I want to say is again Maryland says go  
17 through the state courts. You've got avenues. That's where  
18 you belong. Clearly, Your Honor, federal courts have  
19 jurisdiction over federal claims. That's why we're here.  
20 That's why this case is focused on federal claims. And the  
21 reason that we brought these claims now is, you know, FERC  
22 could, they could have issued the license while I've been  
23 sitting in this courtroom. There is nothing impeding FERC from  
24 issuing the license other than I think they're aware that  
25 there's not just challenges, but substantial challenges to --

1 what Maryland has done here is unprecedented. We have not  
2 found a single instance in any dam across the country where  
3 state has tried to do this. So I think it's gotten FERC's  
4 attention. But the point is, FERC could act today, tomorrow.  
5 We have no control over that. And as soon as FERC incorporates  
6 us in our license there are immediate impacts.

7       There are studies and plans we have to submit to MDE. We  
8 immediately have to stop all trash. Take out all trash from  
9 the river. So anything that floats down, it's now our  
10 responsibility to take it out. And many of those kind of  
11 obligations trigger immediately.

12       So yes, we could go through state court. We are not even  
13 out of the agency process. We filed for reconsideration back  
14 in May. We don't have a decision yet and then there's a  
15 contested case here in trial which of course we'll do. Then  
16 there's an appeal to the state system. There are three levels  
17 of state courts in Maryland. We'll be there for years. We  
18 will be there for years. We're going to fight this as long as  
19 we have to. But if FERC incorporates in the license we needed  
20 to do something and that's why we're here.

21       Thank you.

22               THE COURT: Thank you. Thank you both.

23       I will say that contrary to my belief when I became a  
24 Federal District Court Judge not all lawyers who show up in  
25 Federal District Court are actually good at it. It's

1 astonishing to me.

2           When you get good lawyers you just want to cheer and I  
3 want to thank you all because in this case, I have good lawyers  
4 which makes the case much more interesting and your arguments  
5 much more in both directions compelling.

6           So I don't know what I'm going to do with it, but I do  
7 know that I very much appreciate your time and attention this  
8 morning.

9           Thank you.

10           MR. STRAUSS: You're welcome, Your Honor.

11           (Proceedings adjourned at 11:17 a.m.)

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## CERTIFICATE

1  
2 I certify that the foregoing is a true and correct  
3 transcript, to the best of my ability, of the above pages, of  
4 the stenographic notes provided to me by the United States  
5 District Court, of the proceedings taken on the date and time  
6 previously stated in the above matter.

7 I further certify that I am neither counsel for, related  
8 to, nor employed by any of the parties to the action in which  
9 this hearing was taken, and further that I am not financially  
10 nor otherwise interested in the outcome of the action.

11  
12 \_\_\_\_\_  
13 /s/Crystal M. Pilgrim, RPR, FCRR

\_\_\_\_\_ Date: March 11, 2019

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