

BEFORE THE
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Exelon Generation Company, LLC)
Conowingo Hydroelectric Project)
) Project No. 405-121
)
_____)

**PROTEST AND ANSWER OF MARYLAND
DEPARTMENT OF THE ENVIRONMENT**

Pursuant to Rules 211 and 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §§ 385.211 and 385.213, and the Commission’s March 13, 2019, “Notice Of Petition For Declaratory Order,” the Maryland Department of the Environment (Maryland or MDE), an intervenor-applicant in the above-captioned proceeding, protests and answers the February 28, 2019, submission by Exelon Generating Company, LLC (Exelon) of a Petition for Declaratory Order (Petition).¹ Exelon seeks a declaration that the State of Maryland has waived its certification rights under Section 401 of the Clean Water Act (CWA), 33 U.S.C. §1341(a)(1). For the reasons explained below, Exelon’s Petition should be denied. Alternatively, if the Commission is disinclined to deny the Petition, Maryland asks that the Commission set the matter for supplemental briefing or an evidentiary hearing.

INTRODUCTION

The State of Maryland acted in April 2018 by issuing a water quality certification² (Certification) for the Conowingo Hydroelectric Project (Conowingo). Exelon is unhappy with substance of the State’s decision, and says the conditions included in the Certification exceed the State’s authority. Exelon has raised objections before every conceivable forum, regardless of

¹ Exelon, Petition for Declaratory Order (Feb. 28, 2019), eLibrary No. 20190228-5371.

² MDE’s Clean Water Act Section 401 Certification for the Conowingo Hydroelectric Project (Apr. 27, 2018), eLibrary No. 20180508-5125 (MDE Certification).

whether its claims belong there. Exelon has (properly) filed with MDE for reconsideration of the State's Certification, exercising rights afforded under applicable Maryland regulations.³ But, while that request remains pending, Exelon simultaneously sought state court review of the Certification. That action was dismissed by the state court on grounds that Exelon had failed to exhaust state administrative remedies.⁴ Exelon has also asked a federal district court to overturn the Certification.⁵ That suit should not proceed given overwhelming case law that Exelon's challenges must be adjudicated through the state administrative process—and not before a federal district court.⁶

³ Acting pursuant to Code of Maryland Regulations (COMAR) 26.08.02.10F(4) and Section 7.S.xviii of the Certification itself, Exelon has requested an administrative appeal by submitting to MDE a Protective Petition for Reconsideration and Administrative Appeal. Exelon's request for reconsideration is pending.

⁴ Memorandum Opinion and Order issued in *Exelon Generation Company, LLC v. Maryland Department of the Environment*, Case No. 24-C-18-003410 (Md. Cir. Ct. Oct. 9, 2018) (Memorandum Opinion and Order). The Opinion and Order states (at 11):

MDE issued a final determination on Exelon's water quality certification application, subject to administrative appeal rights. COMAR § 26.08.02.10F(4). In response to the Department's final determination of the Certification, Exelon filed a request for reconsideration (Complaint Exhibit B). This request is currently pending before the Department. Once the Department makes a decision on the request for reconsideration, Exelon may pursue its further appeal according to [Maryland's Administrative Procedures Act] contested case procedures. § 26.08.02.10F(4)(b). After exhausting all administrative appeal rights, any party aggrieved by the Department's final decision may then seek judicial review. MD. CODE ANN., STATE GOV'T § 10-222.

⁵ Exelon, Complaint, *Exelon Generation Co., LLC v. Grumbles*, Case No. 1:18-cv-01224-RMC (D.D.C. May 25, 2018).

⁶ State—and not federal—law governs the water quality certification process. *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991). A state's exclusive jurisdiction includes procedures for appeal. *U.S. v. Marathon Dev. Corp.*, 867 F.2d 96, 102 (1st Cir. 1989) (“Any defect in a state's section 401 water quality certification can be redressed [on appeal]. The proper forum for such a claim is state court, rather than federal court, because a state law determination is involved.”). “[F]ederal courts have uniformly held that FERC has no power to alter or review § 401 conditions, and that the proper forum for review of those conditions is state court.” *PUD No.1 of Jefferson Cty. v. Wash. Dep't of Ecology*, 511 U.S. 700, 734 (1994) (Thomas, J., dissenting); *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir.

Exelon here tries yet another approach. Seizing on a recent D.C. Circuit ruling⁷ that has nothing to do with the instant facts, Exelon asks the Commission to find that Maryland waived its right to issue the Conowingo water quality certification. The basis for this claim is that the State did not act on Exelon’s certification application until 2018, even though that application was first filed in January 2014. What Exelon ignores is that in late 2014—and on three separate occasions thereafter—Exelon voluntarily withdrew and resubmitted its certification application to MDE.⁸ Through its decision to withdraw, Exelon left Maryland with no certification “request” to address, and, as such, no one-year deadline against which to measure the State’s fealty to its CWA obligation.

Exelon disagrees. In its view, once a request is made, the State must act within a year—apparently even if the request has been withdrawn. If Exelon is right, it means that a licensee that suspects its certification request is going to be denied (on any basis) can preemptively withdraw its application, wait out the one-year clock, and claim that certification has been waived. An applicant could even submit a certification request on one day, withdraw it (on any basis) a day later, wait a year, and then announce that the certifying state has waived its rights. Exelon says this vision of how Section 401 is intended to operate “promotes the public interest,” Petition at

1982) (“[T]he proper forum to review the appropriateness of a state’s certification is the state court, and . . . federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state’s certification.”); *Proffitt v. Rohm & Haas*, 850 F.2d 1007, 1009 (3d Cir. 1988) (“The appeal of the state certification was taken to the Pennsylvania Environmental Hearing Board (EHB), because only the state may review the limits which it sets through the certification process.”); *Mobil Oil Corp. v. Kelley*, 426 F. Supp. 230, 235 (S.D. Ala. 1976) (“[T]he proper forum for judicial review of state certification is in state court[.]”). MDE has filed a motion to dismiss the district court case on this and several other grounds; the motion remains pending.

⁷ *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099 (D.C. Cir. 2019), *reh’g pending* (*Hoopa Valley*).

⁸ Petition at 1 (“Exelon submitted its certification request to [MDE] in January 2014, but MDE issued nothing in response until April 2018.”)

18, but it cannot be the law that a state waives its certification right where, as here, it fails to act on an incomplete and voluntarily withdrawn certification application.

If the Commission concludes that Exelon's reading of *Hoopa Valley* applies here (which Maryland vigorously disputes), the application of that ruling should be equitably tolled in light of Maryland's reasonable reliance upon applicable FERC precedent and policy, and MDE's Certification—which has already been issued—should be deemed timely.

Alternatively, and assuming Exelon's positions are rejected, Exelon offers up an even less well-founded claim. Exelon contends that Maryland's Certification, which is labeled a "Final Decision," is a mere "placeholder" and therefore insufficient to satisfy Section 401(a)(1)—though the law requires only that a state "act" within a year of receipt of a "request." Exelon bases this position on its having filed an administrative appeal of the Certification, and the possibility that if Exelon prevails, the Certification could be modified. If Exelon is correct, then a certification-applicant can effect a waiver simply by appealing any certification decision. If this position is the law, then it will be difficult for any state to "act" within a one-year time period—unless that action is a denial.

Finally, assuming the Commission concludes that Maryland has waived its rights, Exelon argues that the Commission should not itself impose the State's properly-adopted certification conditions. Exelon's contention should be rejected. Even if the Commission finds a waiver, it should promote the purposes of the CWA by adopting the requirements of the Certification as license conditions. Doing so is justified because such action will protect Maryland and its waters in accordance with the State's expert judgment about how best to do so.⁹ This is a matter of critical importance to the State, given that Exelon is seeking a 46-year license, and the

⁹ Assuming no finding of waiver, the Commission is required to "incorporate into its licenses state-imposed water-quality conditions." *Am. Rivers, Inc. v. FERC*, 129 F.3d 99, 111 (2d Cir. 1997).

Certification conditions serve the State's paramount interest in protecting the water quality of the lower Susquehanna River and the Chesapeake Bay, the nation's largest estuary.

SUMMARY

Exelon has not demonstrated a right to any of its requested relief. In brief:

Maryland did not waive its Section 401(a)(1) rights because the issuance of its Conowingo certification was timely. Maryland did not fail to act for more than a year on a pending Conowingo certification application. During each of the four years between the initial submittal (January 2014) and MDE's issuance of the Certification (in April 2018), Exelon voluntarily withdrew and resubmitted its certification requests¹⁰ in response to the State's finding that the application was incomplete, and would be denied absent the provision of additional information. With each voluntary withdrawal, Exelon extinguished MDE's statutory obligation to act, and with each resubmission Exelon triggered a new one-year deadline. Exelon's withdrawals and resubmittals were not undertaken pursuant to an "agreement" between it and the State—Exelon did so on its own, and to ensure continued processing of its Conowingo relicensing application. As a consequence of Exelon's conduct, no Section 401 "request" was ever pending for more than a year, and no waiver of Maryland's rights occurred. In fact, it is the other way around: by knowingly and voluntarily withdrawing and resubmitting its certification application, Exelon forfeited any right to assert a waiver claim.

Even if correctly decided, Hoopa Valley does not dictate the result here. Exelon argues that its withdrawals and resubmittals are irrelevant, asserting that *Hoopa Valley* relieves it of responsibility for its own actions and mandates a waiver finding. But, even if *Hoopa Valley* is

¹⁰ The withdrawals and resubmittals were in (1) December 2014; (2) March 2015; (3) February 2016; (4) April 2016; (5) February 2017; and (6) May 2017.

correctly decided,¹¹ it does not dictate the result here. Exelon’s Conowingo certification request was not delayed pursuant to an “agreement” between Exelon and MDE, let alone one intended to “shelv[e]” the certification request, to engage in “deliberate . . . idleness[.]” or to “indefinitely delay federal licensing proceedings[.]”¹² Even more important, unlike the D.C. Circuit’s characterization of the certification at issue in *Hoopa Valley*, Exelon’s certification request has not been “complete and ready for review for more than a decade.”¹³ Instead, Exelon voluntarily withdrew and resubmitted its application (multiple times) after MDE informed it that the information included in its certification request was “insufficient,” and that the request would be denied absent the receipt of additional information. And, as Exelon acknowledged to the Commission when the withdrawals and resubmittals began, obtaining the information that Maryland found was needed to complete its assessment of the application required a multi-year study. During the pendency of the study, Exelon resubmitted its certification request to ensure the continued processing by the Commission of Exelon’s Conowingo relicensing application. Once the study was completed, and all other necessary information was obtained, the Certification was timely issued.

Maryland did not fail to “act” in response to Exelon’s application. Section 401(a)(1) requires that a recipient state “act” within a year of its receipt of a certification request. Maryland has plainly done so. There is no statutory (or other) basis for Exelon’s contention that Maryland’s Certification—labeled in accordance with state regulations as a “Final

¹¹ Rehearing has been sought in *Hoopa Valley*; proponents have argued that the withdrawal and resubmission of a certification request is the functional equivalent of denial without prejudice, constitutes a practical and well-established method for dealing with incomplete applications, and accords with both court and FERC precedent. Unless the Commission intends simply to reject Exelon’s Petition, Maryland urges that, no action be taken here on the basis of *Hoopa Valley* until the decision becomes final and non-appealable.

¹² *Hoopa Valley* at 1104.

¹³ *Id.* at 1105.

Decision,”¹⁴—is too “inchoate” to meet the “act[ion]” requirement of Section 401(a).¹⁵ While Maryland regulations provide that licensees can appeal a water quality certification decision,¹⁶ filing an appeal does not render the issuance of the certification non-final for purposes of Section 401. The State’s Certification is final; Exelon cannot properly complain that the Certification may be modified when it is contesting the Certification’s terms, and seeks such a modification. Exelon cannot bootstrap the exercise of its administrative appeal right into the basis for a claim that Maryland has failed to “act.” *Alcoa Power Generating Inc.*, 129 FERC ¶ 61,028, P 8 (2009), *reh’g denied*, 130 FERC ¶ 61,037 (2010), *aff’d, sub nom. Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963 (D.C. Cir. 2011).

Even if the Commission agrees with Exelon’s reading of Hoopa Valley, the Commission should still toll the time period under Section 401. If the Commission concludes that Exelon’s reading of *Hoopa Valley* is correct and applicable here, then Maryland asks that the Commission equitably toll the statutory time period and, since Maryland has now acted, find that it did not waive its Section 401 authority. Alternatively, the Commission should at least delay acting on this Petition while *Hoopa Valley* remains on review.

Even if the Commission finds a waiver, it should still include Maryland’s Certification conditions in any new license for Conowingo. Maryland’s conditions are supported by a robust

¹⁴ COMAR 26.08.02.10F(4).

¹⁵ Exelon confuses the federal issue of whether a state has acted within one-year and that a “certification has been obtained, 33 U.S.C. § 1341(a)(1),” *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 974 (D.C. Cir. 2011), with the question of whether the certificate is final for purposes of state law. Multiple courts of appeals have found the finality of a CWA certification is a matter of state law. *Berkshire Envtl. Action Team, Inc. v. Tenn. Gas Pipeline, LLC*, 851 F.3d 105, 112 (1st Cir. 2017) (rejecting claim that Natural Gas Act preempts state internal administrative review process for Clean Water Act certification); *Township of Bordentown v. FERC*, 903 F.3d 234, 268 (3d Cir. 2018). *Contra Del. Riverkeeper Network v. Secretary, Pa. Dep’t of Envtl. Protection*, 903 F.3d 65 (3d Cir. 2018), *petition for cert. filed*, No. 18-1106 (Jan. 9, 2019).

¹⁶ COMAR 26.08.02.10.

administrative process and should be respected, as they reflect the expert judgment of MDE—the state agency charged with assessing water quality impacts to Maryland’s waters. The Commission should at least wait to review the substance of the conditions until after the conclusion of the on-going state administrative review process. If, following the completion of that process, the Commission remains disinclined to include the State’s conditions, then MDE requests that the Commission permit Maryland a further opportunity to create a record in support of its proposed conditions, either through supplemental briefing or an evidentiary hearing.

FACTUAL BACKGROUND

A. Maryland Law Regarding Water Quality Certifications

Maryland regulation establishes the procedures governing the issuance of water quality certifications, and includes provisions for public notice and the opportunity to comment.¹⁷ The regulation directs MDE, after the close of the comment period and any hearing, to make a “final” certification determination based on of the testimony and other information presented to MDE or otherwise considered during the application review.¹⁸ MDE must issue a certification if it “determines the proposed activities will not cause a violation of applicable State water quality standards,” but the applicant must comply with any conditions included in the certification that

¹⁷ See COMAR 26.08.02.10. After receipt of a complete application, MDE must place the application on public notice and specify a deadline for the submission of comments. *Id.* 26.08.02.10C. A public hearing is not required; rather, MDE may in its discretion schedule a hearing if the activity subject to the application is of “broad, general interest” or if written comments demonstrate that the application has “generated substantial public interest.” *Id.* 26.08.02.10D. If a hearing is held, MDE must publish notice of the hearing in the *Maryland Register* at least 45 days before the date of the hearing. *Id.* 26.08.02.10F. At the hearing, MDE must give interested persons who attend “an opportunity to present evidence for or against” issuance of the certification, and MDE may reopen or extend the date for accepting written comments after the public hearing. *Id.* 26.08.02.10F(2). Generally for permits and licenses MDE issues the public notice requirement is only triggered by receipt of a substantially complete application. See Md. Code Ann., Env’t § 5-204(b)(4); 5-906(e).

¹⁸ *Id.* 26.08.02.10F(3).

are meant “to assure achievement of State water quality standards.”¹⁹ MDE may also, of course, deny a certification request. Either way, MDE must prepare a written, final decision, and must publish its determination in the *Maryland Register*.²⁰

MDE’s final decision is subject to administrative appeal.²¹ An applicant and any other party aggrieved by MDE’s decision first has the opportunity to ask that MDE reconsider its decision.²² After MDE rules on a reconsideration request, the aggrieved party may then request a contested case hearing, at which the parties may offer exhibits, testimony, and expert opinion.²³ Any party aggrieved by MDE’s decision in the contested case hearing may seek review of that determination in the Maryland circuit courts.²⁴

B. Exelon’s Requests for a State Water Quality Certification

From as early as 2009, Maryland repeatedly and consistently made known its concerns about water quality impacts associated with the relicensing of Conowingo. Exelon’s Petition includes only a selective portion of the documents and correspondence relevant to its water quality certification request. MDE here provides a more complete and accurate description of this information and interactions.

1. Pre-application Filings

Exelon refers in the Petition to pre-licensing studies and materials submitted to the Commission before Exelon first applied to the State for a water quality certification. Petition at 4-6. Those events are immaterial to the primary issue raised in its Petition—whether Maryland

¹⁹ *Id.* 26.08.02.10E(1)-(2).

²⁰ *Id.* 26.08.02.10F(3).

²¹ *See id.* 26.08.02.10F(4).

²² *Id.* 26.08.02.10F(4)(a).

²³ *Id.* 26.08.02.10F(4)(b); *see* Md. Code. Ann., State Gov’t § 10-201 et seq.

²⁴ Md. Code. Ann., State Gov’t § 10-222. An aggrieved party may also seek reconsideration of the Department’s post-hearing final decision in the contested case, COMAR 26.01.02.38, but is not obligated to do so before seeking judicial review, COMAR 26.01.02.38D.

acted within a reasonable time under Section 401 *after* receipt of that request. Nevertheless, it is worth mentioning that the record before the Commission demonstrates that Maryland articulated as early as 2009 that additional studies were needed in order for MDE to understand fully—and to develop appropriate conditions to mitigate—impacts relating to fish passage, flow, and sediment and nutrient transport.²⁵ The State also made clear from the outset why the specific studies it was requesting were needed in conjunction with Maryland’s review of the certification request.²⁶ The State even initiated a formal dispute resolution process²⁷ with respect to the Commission’s Study Plan Determination, though ultimately MDE and Exelon settled that dispute; by the terms of the settlement, however, MDE explicitly preserved its rights to address the issues underlying that dispute through the water quality certification process itself.²⁸

Despite the State’s unresolved concerns, on August 31, 2012, Exelon notified MDE that its “Final License Application” had been filed with the Commission.²⁹ Three months later, on November 20, 2012, MDE met with Exelon to discuss the sediment issue and Exelon’s participation in a sediment study being conducted by the U.S. Army Corps of Engineers—the

²⁵ See Md. Dep’t of Nat. Res. (MDNR), Comments on the Pre-Application Document (PAD), Scoping Document 1 (SD1), and Study Requests (July 10, 2009), eLibrary No. 20090710-5127; MDNR, Comments on the Applicant’s Proposed Study Plan (PSP) (Nov. 23, 2009), eLibrary No. 20091123-5260; MDNR, Comments on the Applicant’s Revised Study Plan (RSP) (Jan. 20, 2010), eLibrary No. 20100120-5084; MDNR, Comments on the Applicant’s Initial Study Reports (Apr. 27, 2011), eLibrary No. 20110427-5277; MDNR, Comments on the Applicant’s Study Reports (Mar. 21, 2012), eLibrary No. 20120321-5126.

²⁶ MDE, Explanation of How the Contested Studies Relate to the Maryland Department of the Environment’s Water Quality Certification Authority Under § 401 of the Clean Water Act (June 3, 2010), eLibrary No. 20100603-5106.

²⁷ MDNR, Notice to Initiate Formal Study Dispute Resolution Process (Feb. 24, 2010), eLibrary No. 20100225-5005.

²⁸ “DNR-PPRP and MDE are not indicating that they necessarily agree with the findings of the Dispute Resolution Panel *or are waiving any rights they may have to continue to address such issues by other applicable means, such as in the State of Maryland 401 water quality certification process.*” MDNR, Notice of Settlement and Request to Withdraw Study Dispute (Sept. 30, 2010), eLibrary No. 20100930-5261 (emphasis added).

²⁹ Letter from Exelon to MDE (Aug. 31, 2012) (included as Attachment 1 to this pleading).

Lower Susquehanna River Watershed Assessment (LSRWA). Shortly thereafter, MDE again expressed its concerns about the Project's water quality impacts, and that the license application did not adequately address these concerns:

As you know, a major concern of the State of Maryland is the accumulation of sediment and nutrient loads behind the dam and potential impacts to the Susquehanna River and Chesapeake Bay related to the release of such sediments and nutrients. Maryland is also concerned about migratory fish and eel passage, minimum flows, and other factors related to Conowingo Dam that impact Maryland's coastal resources. The State has been working with Exelon to determine the most appropriate means of addressing sediment, fish passage, and other issues with the relicensing process that Exelon has initiated at FERC . . . ³⁰

2. *First Request for a Water Quality Certification*

On January 30, 2014, Exelon filed its first water quality certification application with Maryland. Exelon, however, emphasized that its application might not be final or complete, stating that it “reserves the right to supplement this application and the record with additional relevant information to support Exelon’s WQC Application,” and “looks forward to *continuing its dialogue* with Maryland regarding the environmental, recreation, and socioeconomic benefits of the Conowingo Project and the appropriate conditions for the Project in the new FERC license.”³¹ Exelon specifically referenced the on-going Section 401 certification process concerning the Muddy Run Pumped Storage Project in Pennsylvania, located upstream from Conowingo, and information on sediment and nutrients from studies such as the LSRWA as additional issues that may be addressed. The following day, January 31, 2014, Maryland submitted to the Commission its comments on the Final License Application, explaining that it was the “State’s position . . . that the Final License Application in this matter does not adequately

³⁰ Letter from MDE to Exelon (Dec. 6, 2012) (included as Attachment 2 to this pleading).

³¹ Petition Exh. K at 12 (emphasis added).

identify and address the environmental concerns of the State of Maryland and its citizens, and that is not Ready for Environmental Analysis.”³² Among other concerns, Maryland stated:

The Project’s location across the lower Susquehanna River makes it an integral part of the flow into, and health of, the Chesapeake Bay. The Dam spans the full width of the Susquehanna River, thereby preventing migratory fish and eels from passing up or down river, as well as imposing several other detrimental impacts on important living resources. The 14 mile long reservoir created by the Dam has acted as a repository for millions of tons of sediments and nutrients. This repository will have effectively reached capacity within the new license term, if not already. The potential implication of this on Maryland’s water quality and living resources needs to be fully explored and carefully considered before a new license is issued for the Project. Unfortunately, the Applicant’s [Final License Application] is deficient with respect to this issue, and at this point, the record before FERC fails to provide a sufficient basis upon which to draw reasonable conclusions about the Project’s impacts or appropriate Protection, Mitigation and Enhancement (PM&E) measures.³³

In light of these concerns, MDE stated its intention to deny the request for certification.

On November 14, 2014, MDE issued public notice of Exelon’s application, announcing a public hearing for January 7, 2015. The notice was unequivocal: “*the Department intends to deny the application due to insufficient information provided by the applicant regarding the impacts of the activity on State water quality standards and limitations.*”³⁴ MDE explained:

The insufficiency of information is reflected in the draft Lower Susquehanna River Watershed Assessment [released for public comment on November 13, 2014]. The draft report found that the loss of long-term sediment trapping capacity at the Conowingo Dam is causing impacts to the health of the Chesapeake Bay ecosystem. It also found that additional nutrient pollution associated with these changed conditions in the lower Susquehanna River system could result in Maryland not being able to meet Chesapeake Bay water quality standards³⁵

³² MDNR, Comments on Final License Application 1 (Jan. 31, 2014), eLibrary No. 20140131-5458 (MDNR January 31, 2014 Comments).

³³ *Id.* at 2.

³⁴ Public Notice, *Proposed Relicensing of the Conowingo Hydroelectric Project, Exelon Application for Water Quality Certification Withdrawn*, Md. Dep’t of the Env’t (Nov. 14, 2014) (included as Attachment 3 to this pleading).

³⁵ Press Release, *Department of the Environment solicits comment, schedules public hearing on Water Quality Certification application for proposed Conowingo Dam relicensing*, Md. Dep’t of the Env’t (Nov. 18, 2014) (included as Attachment 4 to this pleading).

To avoid a denial, Exelon withdrew its certification request on December 4, 2014, explaining its understanding that “MDE believes it currently has insufficient information to process Exelon’s water quality certification.”³⁶ Furthermore, Exelon agreed to fund a multi-year sediment study (Sediment Study) to provide the required information. A letter agreement between Exelon and MDE documented the parties’ funding expectation, while specifying that the funding agreement “in no way, however, inhibits MDE’s ability to determine whether or not Exelon’s [certification] application is complete and sufficient to certify the Conowingo Project.”³⁷ An additional MDE public notice issued on December 15, 2014, stated: “Recognizing MDE’s position that more information is needed for the State to determine whether discharges from Conowingo Dam comply with State water quality standards, Exelon has withdrawn its application for the [certification].”³⁸ The notice went on to acknowledge Exelon’s provision of “up to \$3.5 million to study the effects of sediment and associated nutrients on the water quality of the downstream Susquehanna River and Chesapeake Bay,” and that “[u]ntil this additional information is available, it is possible that a refiled application or applications might also be withdrawn.”³⁹

On December 18, 2014, the Commission asked Exelon to confirm its withdrawal of the certification application and requested an anticipated timeline from Exelon, stating “[a]s the study is described as multi-year, and section 401 applications must be acted upon within one year of a request by the applicant, please clarify whether it is Exelon’s intention to continue to

³⁶ Letter from Exelon to MDE (Dec. 4, 2014) (included as Attachment 5 to this pleading).

³⁷ Petition Exh. A at 2.

³⁸ Public Notice, *Proposed Relicensing of the Conowingo Hydroelectric Project, Exelon Application for Water Quality Certification Withdrawn*, Md. Dep’t of the Env’t (Dec. 15, 2014) (included as Attachment 6 to this pleading).

³⁹ *Id.*; see Press Release, *Water Quality Certification application for proposed Conowingo Dam relicensing withdrawn, January 7 Water Quality Certification public hearing canceled, Exelon agrees to fund additional study*, Md. Dep’t of the Env’t (Dec. 8, 2014) (emphasis added) (included as Attachment 7 to this pleading).

withdraw and refile the section 401 application for the Conowingo Project.”⁴⁰ Exelon responded to the Commission on December 22, 2014:

Based on the study plan agreed upon by Exelon and MDE, Exelon estimates that the sediment study will be completed in 2016 or 2017 *depending on the number of storm events that occur annually*. As discussed with MDE, *Exelon intends to continue to withdraw and refile the Conowingo Hydroelectric Project 401 application every year until the study is complete.*⁴¹

3. *Second Request for a Water Quality Certification*

On March 3, 2015, Exelon filed its second water quality certification application. The application announced Exelon’s agreement to participate in and fund the Sediment Study. Exelon stated that it had

entered into an agreement with MDE to work with state agencies in Maryland, the US Army Corps of Engineers, the U.S. Geological Survey, the University of Maryland Center for Environmental Science, and the U.S. Environmental Protection Agency to design and conduct a multi-year sediment study (“Sediment Study”) that will provide additional information to MDE. The goals of the Sediment Study are to quantify the amount of suspended sediment concentration, associated nutrients, suspended sediment load, and nutrient load present in the majority entry points to the Lower Susquehanna River Reservoir System and the upper Chesapeake Bay.⁴²

A few weeks later, on May 15, 2015, the Sediment Study was also made a condition of the Exelon Corporation merger with PEPCO Holdings, Inc.⁴³ Condition 42, entitled, “Sediment Study and Consultation,” provides:

Exelon shall affirm its previous commitment to fund up to \$3,500,000 for a multi-year study (“Sediment Study”) that will quantify, among other things, the amount

⁴⁰ Letter from FERC to Exelon (Dec. 18, 2014), eLibrary No. 20141218-3065 (December 18, 2014 Letter to Exelon).

⁴¹ Letter from Exelon’s Counsel to FERC (Dec. 22, 2014), eLibrary No. 20141222-5138 (emphasis added) (December 22, 2014 Letter to FERC).

⁴² Copy of Application for WQC Final, Cover Letter (Mar. 3, 2015), eLibrary No. 20150304-5096.

⁴³ Order No. 86990, *In re the Merger of Exelon Corp. & Pepco Holdings, Inc.*, Case No. 9361 (Md. Pub. Serv. Comm’n May 15, 2015), https://webapp.psc.state.md.us/newIntranet/Casenum/NewIndex3_VOpenFile.cfm?FilePath=C:\Casenum\9300-9399\9361\271.pdf.

of suspended sediment concentration, associated nutrients, suspended sediment load, and nutrient load present in the major entry points to the Lower Susquehanna River Reservoir System and the upper Chesapeake Bay. The Sediment Study was jointly prepared by the Maryland Department of the Environment, the Maryland Department of Natural Resources, the University of Maryland Center for Environmental Science, the U.S. Environmental Protection Agency Chesapeake Bay Program, the U.S. Geological Survey, the U.S. Army Corps of Engineers, and Exelon (“Study Partners”). *The Study Partners anticipate that the information from the Sediment Study will supplement the Lower Susquehanna River Watershed Assessment, and enhance the suite of Chesapeake Bay Watershed and Water Quality models that will inform the 2017 Chesapeake Bay TMDL Midpoint Assessment. In recognition of the Clean Chesapeake Coalition’s shared interest in restoring the health of the Chesapeake Bay, Exelon will consult with the Clean Chesapeake Coalition on an ongoing basis regarding Sediment Study field data collection and analysis, data management and reporting, modeling, and study results. At the conclusion of the Sediment Study, Exelon will present the study report’s findings to the members of the Clean Chesapeake Coalition. In addition, Exelon shall continue its discussions with the Maryland Department of the Environment, the Maryland Department of Natural Resources, and other stakeholders on other issues relating to the licensing of Conowingo Dam.*⁴⁴

In addition to the newly announced Sediment Study, during this same time, but more than one year from Exelon’s initial 2014 certification request, the Commission issued its final Environment Impact Statement (EIS) for the Project.⁴⁵

On February 5, 2016, one month before expiration of the one-year period for MDE to act on the March 3, 2015 application, Exelon withdrew its certification application, explaining that the Sediment Study would not be complete prior to March 3, 2016.⁴⁶

4. Third Request for a Water Quality Certification

On April 25, 2016 Exelon submitted its third certification request. In the cover letter, Exelon states that in 2016 the Sediment Study had entered its second planned year, but that it was not complete and still evolving because there had been an insufficient number of high flow

⁴⁴ *Id.* at A-43-44 (emphasis added).

⁴⁵ FERC, Final Multi-Project Environment Impact Statement for Hydropower Licenses (Mar. 11, 2015), eLibrary No. 20150311-4005.

⁴⁶ Letter from Exelon to MDE (Feb. 5, 2016) (included as Attachment 8 to this pleading).

sampling events (only 2 of the anticipated 6 events occurred). Rather than await more events, Exelon reported that the focus of the study effort had shifted from field-based sampling to a modeling-based approach that would utilize the field sampling data that was collected to date.

The cover letter accompanying its third application explains:

In 2016, the Sediment Study entered its second planned year. To date, two official high flow sampling events have occurred (out of a planned six events). In addition, some ad hoc supplemental data collection has occurred as well. Due to the lack of storm events since the commencement of the study, focus has recently shifted from a field-based sampling approach to a modeling-based approach that will utilize the field sampling data collected to date

Exelon previously filed an application for a water quality certification on March 3, 2015. Because states must act on applications under Section 401 of the Clean Water Act within one year, and the Sediment Study would not be completed prior to March 3, 2016, Exelon withdrew its application for a water quality certification on February 5, 2016. In its withdrawal letter, Exelon indicated its intent to refile its application for a water quality certification within 90 days, as required by FERC policy[.]⁴⁷

Exelon went on to state it had been working closely with the EPA Chesapeake Bay Program modeling workgroup to develop enhancements to a suite of models anticipated to be used for the 2017 Bay Total Maximum Daily Load (TMDL) midpoint assessment. Exelon was to provide input data for the modeling effort of the Sediment Study by the end of April 2016.

The 2016 water quality certification request also addressed two new developments separate from the Sediment Study. First, in May 2016, significant new developments also occurred with respect to fish passage, as Exelon and the Department of the Interior, Fish and Wildlife Service signed the “Fish Passage Settlement Agreement for the Conowingo Project,” in which Exelon agreed to undertake new efforts to improve fish passage. Next, the application also included reference to the March 10, 2016 Lower Susquehanna River Watershed Assessment Final Report.

⁴⁷ Exelon, Copy of Request for Section 401 Water Quality Certification (Apr. 25, 2016), eLibrary No. 20160426-5207.

By February 2017, as the one-year deadline for action was approaching, Exelon withdrew its application—on February 17, 2017.⁴⁸ Growing impatient, MDE wrote to Exelon on March 13, 2017, stating the State’s expectation that Exelon’s resubmission would be forthcoming no later than May 18, 2017, and that:

*This action is not intended to delay re-licensing by the Federal Energy Regulatory Commission, but rather to ensure that MDE’s certification relies on the most current information. As indicated in your letter, Exelon is withdrawing this application because the multi-year sediment study and related water quality modeling work, funded by Exelon, to quantify discharges of sediment and nutrients from the Conowingo facility to the Lower Susquehanna River and upper Chesapeake Bay, will not be completed before April 25, 2017.*⁴⁹

MDE went on to state:

The Department expects to receive your resubmission for the 401 Certification by May 18, 2017, and will, upon receipt of your resubmission, initiate its review of the water quality impacts associated with the operation of the Conowingo Dam. It is important that MDE move forward and complete its review and, where needed, put in place conditions to ensure that the Conowingo facility meets applicable State water quality standards and requirements. Accordingly, we intend to use the best available data and information, and we are committed to completing this review in coordination with other departments and agencies within 12 months of the receipt of your resubmission.⁵⁰

In April 2017, Exelon and MDE continued to discuss the application and the Project. On April 19, 2017, MDE wrote to Exelon confirming discussions over the previous few weeks regarding the construction and operation of a new eel passage facility at Conowingo, and the pending relicensing application for the dam. The letter confirms:

Exelon has agreed to *supplement* its FERC re-licensing application for Conowingo, to include provisions for the eel passage facility required as a condition of Exelon’s FERC license and Clean Water Act Section 401 Water Quality Certification for the Muddy Run Pumped Storage Facility, located upriver in Pennsylvania. *Exelon will also include operation of the eel passage facility in the application for the 401 water quality certification for Conowingo, which was*

⁴⁸ Letter from Exelon to MDE (Feb. 17, 2017) (included as Attachment 9 to this pleading).

⁴⁹ Petition Exh. G (emphasis added).

⁵⁰ *Id.*

withdrawn by Exelon on February 17, 2017 and will be re-submitted on or before May 18, 2017.⁵¹

The letter also states:

Exelon has acknowledged that MDE will address eel passage as part of the 401 certification process for the overall re-licensing of the Conowingo dam, and Exelon has agreed that it will not challenge MDE's authority to do so. Exelon has not waived, however, any right to appeal the 401 certification once it is issued, as may be appropriate at that time. In the meantime, it is the parties' expectation that the eel passage facility will be constructed and operational on or about May 1, 2017, in satisfaction of Exelon's existing obligations under the FERC license and the water quality certification for the Muddy Run facility.⁵²

In other words, as late as April 2017 Exelon's license application was still evolving, and the parties understood that any new certification request would need to address additional issues—including eel passage—that had not been sufficiently addressed in prior requests. On April 20, 2017, Exelon confirmed this understanding.⁵³

5. *Exelon's Most Recent Application for a Certification*

On May 17, 2017, following completion of the Sediment Study, Exelon submitted to MDE its most recent certification application,⁵⁴ which MDE deemed to be the first application that was complete. The application contained four additions to the original 2014 application: the proposal to conduct the Sediment Study, the Commission's Final EIS (dated March 2015), the settlement with the U.S. Department of the Interior regarding fish passage (dated April 21, 2016), and a supplemental filing concerning eel passage at Muddy Run (dated April 21, 2017).

⁵¹ Letter from MDE to Exelon (Apr. 19, 2017) (included as Attachment 10 to this pleading) (emphasis added).

⁵² *Id.* (emphasis added).

⁵³ Letter from Exelon to MDE (Apr. 20, 2017) (included as Attachment 11 to this pleading); see Exelon, Supplemental Information Regarding Application for New License (Apr. 21, 2017), eLibrary No. 20170421-5232.

⁵⁴ Documents relating to the application, including the application itself, the public notices, written comments received, the public informational hearing transcript, the Certification, and the administrative appeals that have been filed, are publicly available on MDE's website, at <http://mde.maryland.gov/programs/Water/WetlandsandWaterways/Pages/index.aspx>.

Exelon also included a proposal for increasing its minimum flows and making them continuous year-round.

MDE issued public notice of the application on July 10, 2017,⁵⁵ and opened an initial public comment period until August 9, 2017, which was subsequently extended at the request of several commenters to August 23, 2017.⁵⁶ During this extended comment period, MDE received significant public input. On October 13, 2017, MDE issued notice of a public hearing on the application.⁵⁷ The hearing was scheduled for December 5, 2017 (at 6 pm), at the Harford Community College in Bel Air, Maryland. In addition, MDE re-opened the public comment period. MDE received oral comments at the December hearing, and extended the date for submission of written comments until January 15, 2018.⁵⁸ Exelon then submitted a detailed written response to the public comments received on January 16, 2018. On April 20, 2018, MDE informed Exelon it had sufficient information to make a decision on the application.⁵⁹

On April 27, 2018, MDE issued its Certification⁶⁰ for the Project. Its cover letter stated:

After thorough consideration, the Maryland Department of the Environment (“MDE”) has determined that the above-referenced application meets the

⁵⁵ Public Notice, *Proposed Relicensing of the Conowingo Hydroelectric, Project Application for Water Quality Certification*, Md. Dep’t of the Env’t (July 10, 2017) (included as Attachment 12 to this pleading).

⁵⁶ Public Notice, *Proposed Relicensing of the Conowingo Hydroelectric Project, Exelon Application for Water Quality Certification Public Comment Period Extended*, Md. Dep’t of the Env’t (Aug. 8, 2017) (included as Attachment 13 to this pleading). Initial written comments MDE received are available at MDE’s website, note 54, *supra*. See Press Release, *Department of the Environment extends public comment period on Water Quality Certification application for proposed Conowingo Dam relicensing*, Md. Dep’t of the Env’t (Aug. 8, 2017) (included as Attachment 14 to this pleading).

⁵⁷ Public Hearing Announcement, *Proposed Relicensing of the Conowingo Hydroelectric Project, Exelon Application for Water Quality Certification*, Md. Dep’t of the Env’t (Oct. 13, 2017) (included as Attachment 15 to this pleading).

⁵⁸ The hearing transcript and additional written comments MDE received are available at MDE’s website, note 54, *supra*.

⁵⁹ Letter from MDE to Exelon (Apr. 20, 2018) (included as Attachment 16 to this pleading).

⁶⁰ See MDE Certification.

statutory and regulatory criteria for issuance of the enclosed Water Quality Certification (“WQC”), *which is MDE’s final decision on the application.*⁶¹

In response to a request from the Commission’s Office of Energy Policy, MDE e-filed the Certification in the relevant FERC docket on May 8, 2018,⁶² and published the Certification in the *Maryland Register* on May 11, 2018, in accordance with applicable regulation.⁶³

As a final agency action, the MDE Certification (at 27) also set forth Exelon’s appeal rights, in accordance with COMAR 26.08.02.10F. Section 7.S.xviii. states in full:

xviii. Final Decision; Appeal Rights: This is a final decision on the Application. Any person aggrieved by the Department’s decision to issue this Certification may appeal such decision in accordance with COMAR 26.08.02.10F(4). A request for appeal shall be filed with the Department within 30 days of publication of the final decision, and specify in writing (a) the reason why the final decision should be reconsidered; and (b) a detailed description of the requestor’s specific legal right, duty, privilege, or interest which may be adversely affected by the Department’s final decision. A request for appeal shall be submitted to: Secretary of the Environment, Maryland Department of the Environment, 1800 Washington Boulevard, Baltimore, MD 21230. After issuance of notice of the Department’s decision on the request for reconsideration, a contested case hearing shall be available in accordance with the applicable provisions of State Government Article, § 10-201, et seq., Annotated Code of Maryland. Any request for an appeal does not stay the effectiveness of this Certification.

Exelon requested an administrative appeal by submitting to MDE a Protective Petition for Reconsideration and Administrative Appeal on May 25, 2018.⁶⁴

Two environmental organizations—the Stewards of the Lower Susquehanna, d/b/a Lower Susquehanna Riverkeeper Association, and Waterkeepers Chesapeake (Riverkeepers)—also filed an administrative appeal of MDE’s decision, contending that MDE should have included

⁶¹ Letter from MDE to Exelon (Apr. 27, 2018) (emphasis added) (included as Attachment 17 to this pleading).

⁶² eLibrary No. 20180508-5125.

⁶³ See 145 Md. Reg. 521; COMAR 26.08.02.10F(3)(c).

⁶⁴ The document is available at MDE’s website, note 54, *supra*.

additional conditions in the Certification.⁶⁵ On October 19, 2018, MDE held a meeting before the agency to allow the parties to present additional argument in support of their request for reconsideration, and set a November 1, 2018, deadline for the parties to submit supplemental information or briefing. Exelon did so, submitting both a supplement to its initial reconsideration petition, and a separate motion challenging the Riverkeepers' standing as an aggrieved party. Riverkeepers submitted a response to that motion on December 6, 2018. The requests for reconsideration remain pending. When MDE resolves them, the parties will have the further opportunity to request a contested case hearing, as outlined by COMAR 26.08.02.10F(4) and stated in Section 7.S.xviii of the Certification.

C. Exelon's Additional Challenges to the Water Quality Certification

Separate from its administrative appeal, Exelon has initiated two challenges to the Certification. First, Exelon filed an action in the U.S. District Court for the District of Columbia seeking declaratory and injunctive relief, based on claims that the Certification exceeds Maryland's authority under federal and constitutional law.⁶⁶ Exelon also filed a complaint for declaratory and injunctive relief, or in the alternative a petition for judicial review and complaint for mandamus, in the Maryland Circuit Court for Baltimore City.⁶⁷ MDE has sought dismissal of both lawsuits.⁶⁸ The pendency of the administrative appeals renders Exelon's court challenges

⁶⁵ The document is available at MDE's website, note 54, *supra*.

⁶⁶ *Exelon Generation Co., LLC v. Grumbles*, No. 1:18-cv-01224-RMC (D.D.C.). See notes 5 & 6, *supra*.

⁶⁷ *Exelon Generation Co., LLC v. Md. Dep't of the Env't.*, Case No. 24-C-18-003410 (Md. Cir. Ct.).

⁶⁸ The state litigation is discussed in more detail below. In the federal case, MDE's motion to dismiss included defenses based on sovereign immunity, improper venue, lack of subject matter jurisdiction, abstention, and failure to state a claim upon which relief may be granted. While Exelon has characterized its complaint as "raising certain threshold federal-law challenges" to the Certification, the action is nothing more than an impermissible collateral-attack on the merits of the State's decision. As the applicable case law overwhelmingly holds, challenges to water quality certifications are properly brought through state administrative

premature and Exelon's district court action is an improper collateral attack on the Certification. As Exelon notes in its Petition, the state court granted MDE's motion to dismiss on October 9, 2018. MDE's motion to dismiss the federal district court action remains pending.⁶⁹

ARGUMENT

I. MARYLAND'S CONOWINGO WATER QUALITY CERTIFICATION WAS TIMELY ISSUED, AND EXELON HAS WAIVED ANY CONTRARY CLAIM

Section 401(a)(1) requires applicants for a federal license who are planning to conduct activities "which may result in any discharge into the navigable waters" to provide to the "licensing or permitting agency" (*i.e.*, FERC) a "certification from the State in which the discharge originates[.]" The provision bounds the period during which the State may consider whether to issue a certification once a request has been made:

If the State . . . fails or refuses to act on a request for certification within a reasonable period (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.

The consequences for the would-be licensee of the failure to obtain the certification are severe: "No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence." *Id.*

Exelon contends that there was an unbroken four-year interval between its submission to MDE of a certification application and MDE's issuance of the Certification, and that this "four-year delay far exceeds the one year that Section 401 allows." Petition at 1. While Exelon is

appeals and judicial review, not in federal court. *See, e.g., Roosevelt Campobello Int'l Park Comm'n v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982) ("The courts have consistently agreed with this interpretation, ruling that the proper forum to review the appropriateness of a state's certification is the state court, and that federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification.") (internal citations omitted).

⁶⁹ The court held oral argument on the issue of venue on February 28, 2019.

correct that four years elapsed between its initial application and the issuance of the Certification, its claim as to the legal significance of that delay is off-base. Exelon ignores its own central role in how and why the Certification was not issued earlier.

During the years between when the application was first submitted and the Certification was issued, Exelon voluntarily engaged in annual withdrawals and subsequent resubmittals of its certification request. The unambiguous text of Section 401 provides that the state certification requirement is waived only if a state fails or refuses to “act” on “a request” for certification within the relevant time period after receipt. But once a certification request is withdrawn, there is nothing for the state to act upon.⁷⁰

Exelon posits that its choice to withdraw and resubmit its application somehow constitutes a failure to act on the part of Maryland. Yet the statutory language “clearly expresses a congressional intent to place the burden of requesting a state water quality certification on the license applicant. Only after a request has been made can a state waive its certification right, and then only by refusing to respond to the request within a reasonable period of time.” *North Carolina v. FERC*, 112 F.3d 1175, 1184 (D.C. Cir. 1997). The burden to request a water quality certification request, and to diligently pursue relicensing, was on Exelon. It submitted a request, but then withdrew and resubmitted it—several times. Having done so, Exelon cannot reasonably claim here that Maryland was locked into responding within a year of the first withdrawn request. Phrased differently, once Exelon’s request was withdrawn, there was nothing for

⁷⁰ Exelon asserts that “Section 401’s one-year deadline begins to run when a 401 certification is requested, rather than when it is deemed complete.” Petition at 21. But Exelon withdrew its request, thereby turning off the clock on the State’s obligation to act. Undaunted, Exelon argues that its “bright line” approach provides clarity and certainty. *Id.* Even if worthy goals, clarity or certainty cannot override the words or logic of the statute. Exelon offers no reasonable basis on which to conclude that Maryland had an obligation to process a voluntarily withdrawn and incomplete certification application.

Maryland to act upon, and no basis on which to claim that the State had waived its decisional right.

Commission precedent is to the same effect. As the Commission explained last year in its “Order on Petition For Declaratory Order” in *Constitution Pipeline Company, LLC*, 162 FERC ¶ 61,014, *reh’g denied*, 164 FERC ¶ 61,029 (2018):

Since 1987 the Commission has consistently determined, both by regulation and in our orders on proposed projects, that the reasonable period of time for action under section 401 is one year *after the date the certifying agency receives a request for certification*. We see no reason to alter that determination.

Id. P 16 (footnote omitted, emphasis added).⁷¹ The Commission’s order denying rehearing touted the benefits of this rule, “noting that this holding yields substantial benefits to the applicant, the certifying agency, and the Commission.” *Constitution Pipeline Co., LLC*, 164 FERC ¶ 61,029, P 10 (2018) (footnote omitted).⁷²

The Commission’s *Constitution Pipeline* orders also addressed whether that applicant’s multiple withdrawals and resubmissions of identical certification requests constituted a waiver. The Commission rejected the concern, concluding:

once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under section 401(a)(1).

⁷¹ The Commission’s decision is on appeal before the D.C. Circuit. *Constitution Pipeline Co., LLC v. FERC*, Case No. 18-1251 (D.C. Circuit). On February 25, 2019, the Commission filed an unopposed motion for voluntary remand of the appeal to allow for further briefing to the Commission addressing the significance of the *Hoopa Valley* decision.

⁷² The Commission’s finding in *Constitution Pipeline* was no bolt out of the blue. See *Millennium Pipeline Co., LLC*, 160 FERC ¶ 61,065, P 13, *order denying reh’g*, 161 FERC ¶ 61,186, PP 1, 9, 40-41 (2017), *review denied sub nom. N.Y. State Dep’t of Env’tl. Conservation*, 884 F.3d 450 (2018); *Ga. Strait Crossing Pipeline LP*, 107 FERC ¶ 61,065, P 7 (holding that the certifying state agency was required to act “within one year” of receiving the 401 application), *clarified*, 108 FERC ¶ 61,053 (2004); *AES Sparrows Point LNG*, 129 FERC ¶ 61,245, P 63 (2009) (holding that state agency had one year to act on a section 401 application); *see also* 18 C.F.R. § 4.34(b)(5)(iii) (2017) (regulation governing section 401 certification requirements for hydropower license applicants).

162 FERC ¶ 61,014, P 23. While expressing concern that the practice of repeated withdrawals and resubmissions was “contrary to the public interest and to the spirit of the Clean Water Act by failing to provide reasonably expeditious state decisions,” the Commission found that the practice does not violate the “letter of the statute”:

Section 401 provides that a state waives certification when it does not act on an application within one year. The statute speaks solely to a state’s action or inaction, not to the repeated withdrawal and resubmission of applications. By withdrawing its applications before a year had passed, and by presenting New York DEC with new applications, Constitution gave New York DEC new deadlines.

Id.

And the Second Circuit reached the same conclusion in its decision in *New York State Department of Environmental Conservation v. FERC*, 884 F.3d 450 (2d Cir. 2018) (*NYSDEC*).

The Court there addressed the concern that requiring states to act within a year “will force [them] to render premature decisions.” *Id.* at 456. The Court rejected the concern, noting that

These concerns are misplaced. If a state deems an application incomplete, it can simply deny the application without prejudice—which would constitute “acting” on the request under the language of Section 401. It could also request that the applicant withdraw and resubmit the application. Such a denial does not preclude a state from assisting applicants with revising their submissions. Nor does it harm the process of public notice and comment, which would simply begin once a state decided that it did not need to deny an application for incompleteness.

Id. (footnotes omitted).

While Exelon intimates that its withdrawal and resubmission of the Conowingo application was the result of an “agreement” with MDE, Petition at 1, there was no such agreement.⁷³ The record shows that Exelon acted on its own, and resubmitted its application to protect its relicensing application.

⁷³ Alternatively, Exelon argues that the presence or absence of an agreement is irrelevant because parties cannot by agreement extend a statutory deadline. Petition at 20. The statutory deadline was not extended in this case. When Exelon withdrew its “request,”

MDE informed Exelon in November 2014, well within a year after the submission of its initial water quality certification request, that Exelon's application was incomplete, that additional information was needed to complete it, and that absent the provision of that information the State's intention was to deny the application. MDE's November 18, 2014, press release soliciting comments on, and notifying the public concerning, the certification application states:

The Federal Energy Regulatory Commission (FERC) has issued a one-year extension of the current license for the operation of the Conowingo Dam. Under federal law and as part of FERC's relicensing process, Exelon is required to obtain a Clean Water Act, Section 401 Water Quality Certification from MDE for the continued operation of the facility. Issuance of a Water Quality Certification is contingent upon the applicant demonstrating to MDE that the project will comply with State water quality standards. *At this time, although no final determination has been made MDE intends to deny the application due to insufficient information provided by the applicant regarding the impacts of the activity on State water quality standards.*⁷⁴

Exelon well understood the State's position. Its ensuing December 2, 2014, letter to then-MDE Secretary Robert Summers stated:

After review of both Exelon's application for a water quality certification, and the draft LSRWA Report, MDE communicated to Exelon that an additional study to understand the impacts of sediment transport on water quality in the Susquehanna River and Chesapeake Bay ("Sediment Study") is required to properly evaluate Exelon's application for a water quality certification.⁷⁵

While Exelon did not agree with MDE's conclusion that an additional study was needed, Exelon also did not challenge it.⁷⁶ Instead of doing so, Exelon's letter to Secretary Summers states its

Maryland's obligation to act on that "request" was extinguished. When Exelon resubmitted its application, that action started a new statutory obligation to act, and a new time by which to do so. There was no extension of the one-year deadline.

⁷⁴ Attachment 4 (emphasis added).

⁷⁵ Petition Exh. A at 1.

⁷⁶ Exelon asserts that where a state believes that an application is "genuinely incomplete," then Section 401 permits the state to deny the certification application without prejudice. Petition at 18. Exelon's backhand effort to impugn the integrity of the Maryland process is regrettable, but its assertion is instructive. As Exelon would have it, it is permissible

agreement to pay \$3.5 million to “fund certain agreed-upon elements” of a study “to understand the impacts of sediment transport on water quality in the Susquehanna River and Chesapeake Bay[.]”⁷⁷ In the same letter, Exelon made clear that its funding of the Sediment Study “in no way, however, inhibits MDE’s ability to determine whether or not Exelon’s WQC application is complete and sufficient to certify the Conowingo Project.”⁷⁸ The letter does not mention, constitute, or reflect an agreement between the State and Exelon concerning the withdrawal and resubmission of Exelon’s then-pending water quality certification request.

Two days later, on December 4, 2014, Exelon wrote a second letter to Secretary Summers, in which it addressed the status of its certification request:

Based on conversations with representatives from the State of Maryland, it is our understanding that MDE believes it currently has insufficient information to process Exelon’s application at this time. As a result, Exelon is hereby withdrawing its pending application for a water quality certification. Federal Energy Regulatory Commission policy requires that an applicant resubmit its request for a water quality certification within 90 days of the date of withdrawal. Accordingly, Exelon will work with MDE to coordinate the refiling of its application for certification within the next 90 days.⁷⁹

This passage makes clear that MDE had informed Exelon that its application lacked the requisite information, and Exelon responded by withdrawing and resubmitting its application. That is not an “agreement” between the State and Exelon to the withdrawal and resubmission. Instead, the

for a state to deny an application subject to its resubmission whenever missing data becomes available, but a violation of the same provision for the applicant to accomplish exactly the same objective by withdrawing and resubmitting its application. Exelon’s admission defeats its position.

⁷⁷ Petition Exh. A at 1-2. A copy of the plan for the Sediment Study was attached as an Appendix to the letter. Exelon noted that the plan “has been prepared with input by MDE, Exelon, the Maryland Department of Natural Resources, the U.S. Geological Survey, the University of Maryland Center for Environmental Science, the U.S. Environmental Protection Agency Chesapeake Bay Program, and the [U.S. Army Corps of Engineers.]” *Id.* at 1.

⁷⁸ *Id.* at 2.

⁷⁹ Attachment 5 (footnote omitted).

letter evidences a voluntary action by Exelon. And the footnote to the passage in the letter explains why Exelon chose to take this action:

See Letter from Federal Energy Regulatory Commission Staff to Skykomish River Hydro, Inc., Project No. I 0942-001 (Jan. 3, 2003) (“Consistent with Commission policy, a request for section 401 certification must be on file with the Commission within 90 days of the date of . . . withdrawal to allow continued processing of [the] application.”).⁸⁰

In other words, Exelon’s withdrawals and resubmittals of its application were not at the behest of Maryland, but were done by Exelon to ensure that the Commission would continue processing Exelon’s Conowingo relicensing application. But nothing prevented Exelon from acting otherwise and leaving its January 2014 application before MDE for a determination within the one-year statutory time period.

That Exelon unilaterally undertook a practice of withdraw and resubmittal was reiterated five days later, when Exelon’s counsel wrote to the Commission Secretary and provided a copy of the December 4 letter. Exelon’s December 9, 2014, transmittal to FERC recites MDE’s determination that the Conowingo certification application “has insufficient information.”⁸¹ In response:

Exelon has entered into an agreement with MDE to work with state agencies in Maryland, the U.S. Army Corps of Engineers, the U.S. Geological Survey, the University of Maryland Center for Environmental Science, and the U.S. Environmental Protection Agency Chesapeake Bay Program to design and conduct a multi-year sediment study that will provide additional information to MDE. Exelon will contribute \$3.5 million to this study effort.⁸²

Exelon goes on to state: “In accordance with Commission policy, Exelon will resubmit its application to MDE and file a copy of the resubmission with the Commission within 90 days of

⁸⁰ *Id.* n.1.

⁸¹ Exelon, Copy of Withdrawal of Application 1 (Dec. 9, 2014), eLibrary No. 20141209-5113.

⁸² *Id.*

the date of withdrawal.”⁸³ There is likewise no reference here to any “agreement” with Maryland as to the processing of Exelon’s application.

In response to this submission, on December 18, 2014, John B. Smith, Chief of the Mid-Atlantic Branch of FERC’s Division of Hydropower Licensing, wrote to Exelon seeking additional information:

You state that MDE believes it has insufficient information to process Exelon's section 401 application at this time. As a result, Exelon has entered into an agreement with MDE to work with state and federal agencies to design and conduct a multi-year sediment study that will provide the additional information MDE needs to process the section 401 application. You did not, however, provide a timeline for completion of that study. As the study is described as multi-year, and section 401 applications must be acted upon within one year of a request by the applicant, please clarify whether it is Exelon’s intention to continue to withdraw and refile the section 401 application for the Conowingo Project every year until the study is complete.⁸⁴

Again, there is no mention of any agreement between Exelon and MDE with respect to withdrawals and resubmittals. Mr. Smith asks only what “Exelon’s intention” is with respect to that subject.

Mr. Smith did not have long to wait for an answer. Four days later, on December 22, 2014, Exelon counsel responded to the letter and answered these questions:

Based on the study plan agreed upon by Exelon and MDE, Exelon estimates that the sediment study will be completed in 2016 or 2017 depending on the number of storm events that occur annually. As discussed with MDE, Exelon intends to continue to withdraw and refile the Conowingo Hydroelectric Project section 401 application every year until the study is complete.⁸⁵

Unilateral intent does not a contract make.

And while Exelon says here that its withdrawals and resubmittals were part of an agreement between the Company and MDE, Exelon’s statement in a subsequent, January 13,

⁸³ *Id.*

⁸⁴ December 18, 2014 Letter to Exelon at 1.

⁸⁵ December 22, 2014 Letter to FERC at 1.

2015 letter to the Commission is further evidence that Exelon voluntarily chose a course of withdrawal and resubmission in order to extinguish the one-year statutory shot clock and afford the State more time to decide what conditions to include in the Certification to ensure against adverse water quality impacts:

With regard to Exelon's withdrawal of its WQC application, Section 401 of the Clean Water Act[] provides that states must act on an application for a water quality certificate within one year, otherwise the certification is deemed waived. Exelon's withdrawal and refiling of its WQC provides MDE with additional time to evaluate Exelon's application. These procedural filings are not a representation by Exelon that it believes its studies are deficient.⁸⁶

None of these events justify a finding that Maryland waived its right to issue a water quality certification for Conowingo. And there is no dispute that once the requisite study had been completed, and together with all other information any insufficiency was removed, Maryland moved promptly and timely to issue the Certification.⁸⁷

Maryland did not fail to act within the statutory one-year deadline because each time that Exelon voluntarily withdrew a pending application the associated action deadline was extinguished. To find otherwise is impermissibly to read Section 401 as requiring Maryland to act upon applications not before it. But the law does not intend anything impossible,⁸⁸ and to

⁸⁶ Letter from Exelon to FERC 2 (Jan. 13, 2015), eLibrary No. 20150113-5050 (internal citations omitted).

⁸⁷ Exelon states that "MDE had directed a study designed to take three years[,] Petition at 9, apparently to link its completion to the 2017 Midpoint Assessment. It also claims that "[d]elaying the issuance of MDE's placeholder document until April 2018 did, however, allow MDE to use the 2017 Midpoint Assessment (though in an unlawful and unscientific manner)." Petition at 11. This attempted connection is not supported by anything in the record. Among other things, it was no certainty that the Sediment Study would take three years. In fact, Exelon's December 22, 2014 Letter to FERC (at 1) states that, "[b]ased on the study plan agreed upon by Exelon and MDE, Exelon estimates that the sediment study will be completed in 2016 or 2017 depending on the number of storm events that occur annually." The Study, which MDE repeatedly indicated was necessary, was predicated on a certain number of storm events occurring, not a pre-determined time period.

⁸⁸ *Lex non intendit aliquid impossibile*. Black's Law Dictionary, App. B, 1929 (10th ed. 2014).

construe the statute in such fashion is “patently absurd,” *United States v. Brown*, 333 U.S. 18, 27 (1948), and thus a construction that Congress could not have intended. The State acted in full accord with the plain language of the statute and issued within one-year a water quality certification concerning the only application Exelon pursued and did not withdraw.

“Waiver is the ‘intentional relinquishment or abandonment of a known right.’” *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). As the above-quoted correspondence shows, Exelon knew that Section 401 contained a one-year deadline for state action. It could have years ago pressed the statutory argument it now seeks to raise, but instead repeatedly withdrew and submitted renewed applications. Given Exelon’s repeated representations and actions, the Commission should find that Exelon has knowingly and voluntarily waived whatever rights it may have had to assert now that Maryland’s actions constitute a waiver. It is likewise inequitable for Exelon to seek to bootstrap its own voluntary withdrawals into an evasion of the state water quality regulation and certification process that lies at the heart of Section 401. Exelon’s Petition should also be dismissed on grounds of unclean hands, or for having slept on (if not waived) its rights.

II. HOOPA VALLEY DOES NOT SUPPORT GRANTING EXELON’S PETITION

Against the weight of precedent and in defiance of its own actions, Exelon serves up the idea that, post-*Hoopa Valley*, states no longer have the right to defer action on incomplete applications, even where they have been withdrawn. And Exelon claims that the instant situation “falls squarely within the fact pattern that *Hoopa Valley* said its holding covered: ‘the set of facts in which a licensee entered a written agreement with the reviewing state[] to delay water quality certification.’” Petition at 20 (citing *Hoopa Valley* at 1104). Even if that is an accurate description of what was going on in *Hoopa Valley*, it is not what happened here.

The result in *Hoopa Valley* seems to rest on two key considerations—neither of which is present here. First, as described by the panel, the decision relies heavily on the terms of a written agreement among certain States and the licensee (PacifiCorp). The *Hoopa Valley* panel described and quoted from the agreement, under which the parties were obligated to:

request to the California State Water Resources Control Board and the Oregon Department of Environmental Quality that permitting and environmental review for PacifiCorp’s FERC Project No. 2082 [Klamath Hydroelectric Project] licensing activities, including but not limited to water quality certifications under Section 401 of the CWA and review under CEQA [California Environmental Quality Act], will be held in abeyance during the Interim Period under this Settlement. PacifiCorp shall withdraw and re-file its applications for Section 401 certifications as necessary to avoid the certifications being deemed waived under the CWA during the Interim Period.

Hoopa Valley at 1101-1102 (quoting a provision of the Klamath Hydroelectric Settlement Agreement). By contrast, here there was no “written agreement” concerning the timing of the certification request, let alone one the purpose of which was to delay a water quality certification.⁸⁹

The second key consideration was the panel’s description in *Hoopa Valley* that the certification application “has been complete and ready for review for more than a decade.” *Hoopa Valley* at 1105. Again that is not the case here. Exelon’s withdrawals and resubmittals were undertaken because Exelon’s application was neither “complete” nor “ready for review.” Maryland made clear that it viewed the certification application as lacking the information needed to make an informed decision on impacts to water quality, and, absent the receipt of that information, that Exelon’s request would be denied. The information was not produced until the completion of the Sediment Study—funded and participated in by Exelon—along with other information in the 2017 application, following which MDE timely issued the Certification. But if

⁸⁹ *Id.* at 1104. Separately, Exelon does not mention an agreement, claiming instead that the State was the mastermind behind Exelon’s actions and referring without citation to “MDE’s withdraw-and-resubmit scheme.” Petition at 23. That claim is equally baseless.

Exelon thought otherwise, and believed any of the applications it withdrew were in fact “complete” and “ready for review,” *nothing* prevented Exelon from advancing that position before MDE and pursuing the application(s) to an agency determination—*i.e.*, denial, which Exelon could then have challenged.

The D.C. Circuit panel’s characterization of the facts in *Hoopa Valley* likewise demonstrates how this case is different. First, the panel found that the parties to the Klamath agreement had “defie[d]” the statutory requirements by engaging in “deliberate and contractual idleness” and had “usurp[ed] FERC’s control over whether and when a federal license will issue” by “shelving water quality certifications.” *Hoopa Valley* at 1104. Nothing of the sort occurred here. Far from being “idle[],” Maryland actively pursued additional information needed to process the Conowingo application, and timely acted on the certification application that included all necessary information.⁹⁰

Second, the panel noted more generally the uniqueness of that situation:

this Court has never addressed the specific factual scenario presented in this case, *i.e.*, an applicant agreeing with the reviewing states to exploit the withdrawal-and-resubmission of water quality certification requests over a lengthy period of time.

Id. at 1105. Again, the instant case does not involve the conduct that animated the outcome in *Hoopa Valley*.

Finally, the panel in *Hoopa Valley* focused on the lack of any intent on the part of the licensee (PacifiCorp) to submit a “new request.” As the court explains:

The KHSA makes clear that PacifiCorp never intended to submit a “new request.” Indeed, as agreed, before each calendar year had passed, PacifiCorp sent a letter indicating withdrawal of its water quality certification request and resubmission

⁹⁰ The *Hoopa Valley* panel noted that petitioner’s allegation that the applicant had failed to diligently pursue its application was “connected” to its claim of waiver. Exelon neither does—nor reasonably could—assert that it failed to diligently pursue its application. Among other things, Exelon provided millions of dollars to fund the Sediment Study MDE deemed necessary to complete its application.

of the very same . . . *in the same one-page letter . . . for more than a decade*. Such an arrangement does not exploit a statutory loophole; it serves to circumvent a congressionally granted authority over the licensing, conditioning, and developing of a hydropower project.

Id. at 1104 (emphasis added). The court underscored this point, stating that

[w]e likewise need not determine how different a request must be to constitute a “new request” such that it restarts the one-year clock. This case presents the set of facts in which a licensee entered a written agreement with the reviewing states to delay water quality certification. PacifiCorp’s withdrawals-and-resubmissions were not just similar requests, they were not new requests at all.

*Id.*⁹¹

Again, what occurred in this case is nothing like *Hoopa Valley*. Exelon’s three submissions of its water quality certification applications were plainly “new requests” because they were supplemented by the needed Sediment Study and by other, additional new information, including with respect to fish and eel passage. Exelon’s second submission of its application was by letter dated March 3, 2015,⁹² and a review of Exelon’s letter demonstrates that this request is different from the one submitted on January 31, 2014. Specifically:

Because states must act on applications under Section 401 of the Clean Water Act within one year, and the Sediment Study would not be completed prior to January 31, 2015, Exelon withdrew its application for a water quality certification on December 4, 2014. In its withdrawal letter, Exelon indicated its intent to refile its application for a water quality certification within 90 days, as required by FERC policy.

Accordingly, Exelon hereby resubmits its application for certification that the Conowingo Project meets applicable Maryland water quality standards in accordance with Section 401 of the Clean Water Act (33 U.S.C. § 1341) and Title 26 of the Code of Maryland Regulations. The application consists of the materials submitted previously to MDE on January 31, 2014, *as supplemented by the Sediment Study referenced above.*⁹³

⁹¹ Maryland explains immediately below that, unlike the situation in *Hoopa Valley*, Exelon’s resubmitted applications each included new information—*i.e.*, they were each “new requests.”

⁹² Petition Exh. C.

⁹³ *Id.* at 1 (emphasis added).

In addition, it was shortly thereafter on March 11, 2015, that the Commission released the final EIS.

Following withdrawal of the 2015 request Exelon resubmitted another application to MDE on April 25, 2016 (Petition Exh. D). This request likewise is substantively different from the 2015 certification application. The 2016 letter contains new information, both with respect to the Sediment Study and otherwise. As concerns the Study, Exelon's 2016 application states:

In 2016, the Sediment Study entered its second planned year. To date, two official high flow sampling events have occurred (out of a planned six events). In addition, some *ad hoc* supplemental data collection has occurred as well. Due to the lack of storm events since the commencement of the study, focus has recently shifted from a field-based sampling approach to a modeling-based approach that will utilize the field sampling data collected to date. Therefore, Exelon has been working closely with the EPA Chesapeake Bay Program modeling workgroup to develop enhancements to the current suite of models, which are anticipated to be used for the 2017 Chesapeake Bay Total Maximum Daily Load Midpoint Assessment.⁹⁴

But that was not all. Exelon went on to report:

The application consists of the materials submitted previously to MDE on March 3, 2015, as supplemented by the Sediment Study referenced above. In addition, Exelon recently reached an agreement with the U.S. Department of the Interior ("Interior") that resolves all issues between Exelon and Interior relating to fish passage at the Conowingo Project. Exelon has included a copy of the Settlement Agreement, which also contains Interior's modified prescription for fishways at the Conowingo Project. Finally, Exelon notes that the Lower Susquehanna River Watershed Assessment ("LSRWA") Final Report was released on March 10, 2016, and can be accessed at <http://dnr.maryland.gov/bay/lswa/report.htm>. Exelon will provide a hard copy of the LSRWA Final Report upon request.⁹⁵

Exelon provided MDE with its final resubmission on May 17, 2017. There are at least two items in this submission (Petition Exh. E) worth highlighting. First, Exelon's letter reflects MDE's efforts to move this process along. Exelon reports:

On March 13, 2017, MDE indicated that it expected to receive Exelon's resubmission by no later than May 18, 2017 and would, upon receipt of the

⁹⁴ Petition Exh. D at 1.

⁹⁵ *Id.* at 2.

resubmission, initiate its review of the water quality impacts associated with the operation of the Conowingo Project.⁹⁶

The March 13, 2017, letter to which Exelon refers is a communication from the MDE Secretary to Exelon's Vice President, Operations Support. In that letter (Petition Exh. G), the Secretary refers to Exelon's February 17, 2017, withdrawal of its water quality certification application for Conowingo, noting that

[t]his action is not intended to delay re-licensing by the Federal Energy Regulatory Commission, but rather to ensure that MDE's certification relies on the most current information. As indicated in your letter, Exelon is withdrawing this application because the multi-year sediment study and related water quality modeling work, funded by Exelon, to quantify discharges of sediment and nutrients from the Conowingo facility to the Lower Susquehanna River and upper Chesapeake Bay, will not be completed before April 25, 2017.⁹⁷

The Secretary then goes on to emphasize the State's interest in moving the Certification forward:

The Department expects to receive your resubmission for the 401 Certification by May 18, 2017, and will, upon receipt of your resubmission, initiate its review of the water quality impacts associated with the operation of the Conowingo facility. It is important that MDE move forward and complete its review and, where needed, put in place conditions to ensure that the Conowingo facility meets applicable State water quality standards and requirements. Accordingly, we intend to use the best available data and information, and we are committed to completing this review in coordination with other departments and agencies within 12 month of the receipt of your resubmission.⁹⁸

MDE's actions and perspective are in sharp contrast to what the panel in *Hoopa Valley* (at 1104) referred to as "deliberate and contractual idleness" on the part of the parties to the settlement at issue there.

Second, this resubmission once again supplements prior submissions with several pages of additional supporting information. For example, the Company explained:

Exelon recently submitted a filing with FERC ("Supplemental Filing") requesting that FERC incorporate certain eel passage requirements from the water quality

⁹⁶ Petition Exh. E at 1 (footnote omitted).

⁹⁷ Petition Exh. G.

⁹⁸ *Id.*

certification for the Muddy Run Pumped Storage Project into the [Final License Application] for the Conowingo Project.

Specifically, Exelon committed to design, install and operate an eel trapping facility and eel holding facility along the western shore of the Conowingo Dam near the location of the current United States Fish and Wildlife Service trapping location and facility. Those facilities began operation on May 1, 2017 and will be operated by Exelon annually until 2030, at which point Exelon will construct and operate a volitional upstream eel facility at Conowingo Dam, for operation starting in 2031 through the term of the new FERC license, as described in the Settlement Agreement.⁹⁹

Not only did both parties realize this was new, substantive information, but both explicitly agreed that it represented a new issue to be addressed in any water quality certification. That understanding was documented in a series of letters exchanged in April 2017, shortly before submission of the new request.¹⁰⁰

In short, the instant situation is not *Hoopa Valley*, and there is no reasonable basis on which to apply that decision to the facts at issue here. To the extent *Hoopa Valley* is read to reach this case, it is bad law. Nothing in the CWA precluded MDE from “deem[ing] [Exelon’s] application incomplete.” *NYSDEC* at 456. And, once the State informed Exelon of the State’s position, nothing in the statute prevented Exelon from “withdraw[ing] and resubmit[ting] [its] application” (*id.*) until it cured the deficiency, thereby affording MDE the opportunity to act upon a sound application and to issue the requisite Certification.

III. EXELON’S CLAIM THAT MARYLAND’S CERTIFICATION DECISION WAS NOT AN “ACT” UNDER SECTION 401 SHOULD BE REJECTED

Exelon urges that there is a “second independent reason” for finding that Maryland has waived its certification authority: Maryland’s Certification, says Exelon, is too “inchoate” to constitute an “act” under Section 401. Petition at 23. There is nothing to this claim, and the Commission should reject it.

⁹⁹ Petition Exh. E at 5-6.

¹⁰⁰ Attachments 10 & 11.

Maryland has plainly “act[ed,]” and thereby satisfied the Section 401 requirement to do so. On April 27, 2018, MDE issued its “Clean Water Act Section 401 Certification For the Conowingo Hydroelectric Project FERC Project No. P-405 / MDE WSA Application No. 17-WQC-02.”¹⁰¹ This “act[ion]” was within a year of Exelon’s May 17, 2017, submission of its certification application for Conowingo. Section xix of the Certification, entitled “Final Decision; Appeal Rights[,]” states in part:

This is a final decision on the Application. Any person aggrieved by the Department’s decision to issue this Certification may appeal such decision in accordance with COMAR 26.08.02.10F(4).

* * *

After issuance of notice of the Department’s decision on the request for reconsideration, a contested case hearing shall be available in accordance with the applicable provisions of State Government Article, § 10-201, et seq., Annotated Code of Maryland. Any request for appeal does not stay the effectiveness of this Certification.¹⁰²

Maryland has thus satisfied the statutory requirement, which “requires only that a State ‘act’ within one year of an application and that a certification be ‘obtained.’ 33 U.S.C. § 1341(a)(1).” *Alcoa Power Generating Inc.*, 643 F.3d at 974. There is no basis to claim that what Maryland has done is insufficient “act[ion].” The Certification is signed by the Director of MDE’s Water and Science Administration, is labeled “Final,” and is—by its very terms—a “Final Decision.” In other words, as of the time of issuance, from Maryland’s perspective, there was nothing further to be done.

That the Certification may change in the future is only because Exelon is continuing to challenge it.¹⁰³ The possibility that additional action on a state certification may be taken because

¹⁰¹ The Certification was provided to the Commission on May 8, 2018.

¹⁰² MDE Certification at 27.

¹⁰³ As explained in *Alcoa Power Generating Inc.*, 129 FERC ¶ 61,028, P 8 (emphasis added):

of an appellate process should not invalidate Maryland’s “act[ion].” In *FPL Energy Maine Hydro LLC*, 108 FERC ¶ 61,261 (2004), *on reh’g*, 111 FERC ¶ 61,104 (2005), *aff’d on other grounds sub nom. FPL Energy Maine Hydro LLC v. FERC*, 551 F.3d 58 (1st Cir. 2008), the Commission addressed the following situation. The Maine Department of Environmental Protection (Maine DEP) had issued a water quality certification, which was appealed to the Maine Board of Environmental Protection, which, in turn, granted the appeals and denied the certification without prejudice. FPL Energy asserted that Maine had waived its Section 401 rights because “the state failed to take *final* action—presumably referring to the Maine Board’s certification reversal/denial—within the one-year waiver period.” *Id.* P 6. The Commission rejected the claim:

Section 401 requires a State certifying agency to act on a certification request within one year. In this case, the Maine DEP satisfied this requirement by granting certification within the statutory time period. There is nothing in the language of section 401 to suggest that a State must not only act on the certification request but also take action on any appeals that might subsequently be filed within one year. Accordingly, we cannot find that certification was waived.

Id. P 7 (footnote omitted). The footnote to this passage notes that a “State may alter a water quality certification if it has reserved authority to do so in the certification. *See American Rivers*,

Section 401(a)(1) requires that, in order to avoid waiver, a state must “act” on a request for certification within one year. Here, North Carolina acted by issuing its “APPROVAL of 401 Water Quality Certification with Additional Conditions” within the one-year period. The certification states that unless Alcoa requests an adjudicatory hearing “this Certification shall be final and binding.” As Alcoa notes, the certification does contain a condition providing that it will not become effective unless Alcoa provides the required bond within 90 days. However, we cannot conclude that such a requirement vitiates the issuance of the water quality certification. *When the certification was issued, the state had completed its action. If Alcoa elected to satisfy the bond condition (and had the certification not been appealed), the certification would have been fully effective. Whether or not that occurred was solely up to Alcoa. We find that North Carolina did act within the one-year certification period, and therefore has not waived its Clean Water Act authority.*

Inc. v. FERC, 129 F.3d 99 (2nd Cir. 1997).” *Id.* n.8. The Commission expanded on this ruling on rehearing:

FPL Energy argues that, in order to effectuate the one-year time limit in Section 401, states must issue a final certification decision within one year of receiving a certification request. Otherwise, by issuing a non-final certification, states can toll the one-year deadline and then freely amend or even revoke the certification, thus acting in a manner that is inconsistent with the language and intent of the one-year deadline in Section 401. While this argument has some appeal, we see nothing in Section 401 that gives the Commission any authority to determine the finality of state-issued certification decisions. Issues concerning the validity of state actions under Section 401 are for state courts to decide, and federal courts and agencies are without authority to review these matters.

FPL Energy Maine Hydro LLC, 111 FERC ¶ 61,104, P 8 (2005), *aff’d sub nom. FPL Energy Maine Hydro LLC v. FERC*, 551 F.3d 58 (1st Cir. 2008) (footnote citations omitted). The Commission’s determination accorded with the Maine Supreme Court’s ruling that the state had “act[ed]” in one-year within the meaning of Section 401 by issuing a water quality certification and “[t]here [was] no indication . . . that Congress intended for all in-state appeals to be completed within the same one-year deadline. If Congress intended to impose such extreme time pressure, it would have used specific language to that effect.” *FPL Energy Maine Hydro, LLC v. Dep’t of Env’tl. Protection*, 926 A.2d 1197, P 23 (Me. 2007).

Here, a Maryland state circuit court has already concluded that Maryland’s regulation establishing a process for reconsideration, appeal, and possible modification of the certification did not render the Conowingo Certification non-final. Because Exelon repeatedly mischaracterizes the court’s holding, and because its claims there are remarkably similar to those raised in this Petition, full discussion of that case is warranted here. In its complaint, Exelon alleged that MDE could not lawfully issue the Certification as a “final decision” before a contested case hearing occurred, and—as it argues here—that the Certification was not sufficiently final at the time of issuance because it “contain[s] conditions that provide for

planning, additional studies, reopening, and modification by MDE and would allow MDE to impose as-yet-unknown additional requirements on the Conowingo Project.”¹⁰⁴ Thus Exelon invited the state court to declare that the Certification is not a final decision for purposes of Maryland law, and that it is “void, invalid, and without effect.”¹⁰⁵

The court rejected that invitation. The court’s opinion states repeatedly that the Certification was sufficiently final for the purposes of Maryland law at the time it was issued.¹⁰⁶ As to the relevance of a pending appeal, the court found that under Maryland law the Certification nonetheless remained “final,” even if was subject to further review. The court stated: “MDE issued a final determination on Exelon’s water quality certification application, subject to administrative appeal rights.”¹⁰⁷ The court further concluded that, because “Exelon failed to exhaust its administrative remedies under COMAR § 26.08.02F.10 before seeking relief from this Court, Exelon is not yet eligible for judicial review.”¹⁰⁸ Thus the court recognized the distinction that the Certification’s issuance was final for the purposes of making a determination on Exelon’s request for a certification, and for triggering the availability of an *administrative* appeal, but that *judicial* review would not be available until the administrative process—here, reconsideration and then a contested case hearing—had concluded.

The court also examined but found no fault with the application review and administrative appeal procedures established by MDE for water quality certification decisions, and specifically rejected Exelon’s claim that a contested case hearing must occur *before* MDE

¹⁰⁴ Exelon, Complaint for Declaratory and Injunctive Relief, PP 67-69, 73, *Exelon Generation Co., LLC v. Md. Dep’t of the Env’t*, Case No. 24-C-18-003410 (Md. Cir. Ct. May 25, 2018).

¹⁰⁵ *Id.* P 78.

¹⁰⁶ Memorandum Opinion and Order at 11.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 12.

issued a final decision on the certification request.¹⁰⁹ The court summarized MDE's action in reviewing the application and issuing the Certification:

MDE is the State agency authorized, by statute, to implement water quality standards in Maryland. Thus, with the terms and conditions contained in its Certification, MDE *has acted* to ensure compliance with the Clean Water Act while regulating discharges of pollution and quality standards of state waters.

MDE followed the procedural process for certification pursuant to applicable regulations. MDE exercised proper authority to request information from Exelon, sought written comments, and elected to conduct a public hearing; *MDE relied upon its findings to determine the requirements and conditions that Exelon must follow to secure the Certification and licensure by FERC.* During the Certification process, MDE followed procedural process established by COMAR, including providing public notice with opportunity and instruction for written comments, and exercising its discretion as to whether Exelon's Certification application warranted public hearing, conducting a public hearing with adequate notice, and extending a second post-hearing comment period. With its Certification, MDE advised Exelon of reevaluation and modification procedures.¹¹⁰

As is clear, and contrary to Exelon's suggestion, the court did not chide MDE for failing to develop or present it with an administrative record. Rather, the court expressly acknowledged that in making its final decision "MDE relied upon its findings" based on the agency record developed during the application review process. Although the court stated that it found "no important issue this Court can resolve absent the administrative record," the court did so in the context of rejecting Exelon's claim that, despite its own failure to exhaust administrative remedies, the case nonetheless presented a justiciable controversy under the collateral order doctrine.¹¹¹ The court did not state that MDE had no record before it—only that that record had not yet been transferred to the court pursuant to Rule 7-206 of the Maryland Rules because Exelon had improperly bypassed the normal administrative process. And the court simply disagreed that there was any exigent reason that it should condone such a departure and hear

¹⁰⁹ *Id.* at 13-16.

¹¹⁰ *Id.* at 21 (emphasis added).

¹¹¹ *Id.* at 20-21.

Exelon's suit, prior to a final decision in the contested case hearing.¹¹² Exelon is instead bound to exhaust those administrative remedies, and pursue a contested case hearing, before resorting to state judicial review. Aside from that being an unbending requirement of Maryland law, it also serves the practical purpose of allowing full development of the record upon which the court would ultimately conduct its review.

The Commission's decision in *Duke Energy Carolinas, LLC*, 147 FERC ¶ 61,037 (2014), supports Maryland's position that the Certification here is a sufficient "act[ion]" under Section 401. The Commission there considered an *FPL Energy Maine*-style claim by Duke, who contended that South Carolina had waived its Section 401 authority by issuing a certification that was "clearly not a final decision with legal effect, since it was clearly labeled (repeatedly) as a 'proposed' decision and clearly indicated that a 'final' decision would not occur until later."¹¹³

The Commission rejected Duke's position:

Even if South Carolina's notice were deemed not to be a "final action," this would not help Duke Energy. Section 401 of the Clean Water Act does not mandate "final action" by a state, but rather provides that a state must "*act* on a certification request within one year" (emphasis added). While we might agree that the issuance of a draft certification (which some states elect to provide) with no provision for it becoming final would not satisfy the requirement to act, we conclude that where, as here, a state timely issues a certification that will by its terms become final within 15 days if not appealed, the state action is sufficient to avoid waiver.

Id. P 18. The Certification issued by Maryland would likewise be non-appealable if no reconsideration had been requested—by Exelon—within 30 days. MDE Certification Section xix.¹¹⁴

¹¹² *Id.*

¹¹³ *Id.* P 16, quoting Duke, Petition for Declaratory Order 8-9, *Duke Energy Carolinas, LLC*, Project No. 2232-522 (Aug. 11, 2009), eLibrary No. 20090811-5132.

¹¹⁴ Similarly, in *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963 (D.C. Cir. 2011), the applicant contended that the State had waived its certification authority by issuing a certification on the final day of the one-year period that included a "number of terms and

Undaunted, Exelon offers newly-invented criteria for what constitutes an “act” by a State under Section 401. Exelon posits that a state’s certification must be a “genuine administrative decision[]” and that any appellate process adopted in connection with that decision must involve “real appeals.” Petition at 24. No supporting citations are offered for these criteria, nor an explanation of how the Commission is supposed to apply them. Exelon likewise fails to demonstrate that the Commission has either the authority, or, contrary to its rehearing order in *FPL Energy Maine*, the intention to assess the sufficiency of state water quality administrative procedures or resolve disputes over the finality of state-issued decisions.

And, outside the boundaries of this Petition, Exelon has offered a different view on whether the Certification is “inchoate.” Exelon here implies that MDE’s Certification is not “genuine” (Petition at 24), is merely a “placeholder” certification, *id.* at 23, and is a “draft document” that does not qualify as “act[ion]” under Section 401. *Id.* at 26. But Exelon is singing a very different tune in its federal district court challenge to the Certification. There it contends that Maryland’s Certification “imposes imminent deadlines” on Exelon, “many of which require advance study and planning to enable compliance[.]”¹¹⁵ Exelon should not be able to argue out of both sides of its mouth. It cannot fairly argue in federal district court that it is subject to imminent and burdensome Certification deadlines, while contending here that the same document is no more than a “placeholder” or a “draft.”

conditions,” including a requirement that the applicant post a surety bond. *Id.* at 966. The certification further provided that it would not become effective until the bond was in place. *Id.* The applicant argued that the State had waived its certification authority because the certification was not *effective* prior to the statutory deadline. This Court rejected that argument, holding that accepting the applicant’s interpretation of Section 401 “would require adding terms to the statute that Congress has not included.” *Id.* at 974.

¹¹⁵ Exelon, Lodging of Oppositions to Motions to Dismiss 21 (Aug. 8, 2018), eLibrary No. 20180808-5074.

Exelon also offers its ideas for the “essential elements of a real appeal,” and generally challenges the integrity of the State’s review process. Petition at 25. But the Certification is not a placeholder; it is not a draft document subject to unilateral revision at the whim of the agency. It is a final decision, it is supported by a robust administrative process undertaken by the expert agency of the State. This point must be emphasized—Exelon’s claim that MDE acted without any basis or without any record evidence before it is simply incorrect. To the contrary, at the time the Certification was issued, MDE had before it a substantial and well-developed basis for its action. MDE has publicly explained the scope of its review of Exelon’s application stating: “As part of its review, MDE, in close coordination with the Maryland Department of Natural Resources and other agencies, identified all applicable water quality standards and requirements and utilized data, modeling and further scientific analysis, along with materials provided by Exelon and information provided in public comments” to determine whether the operation of and discharge from the Project complied with all applicable Maryland water quality standards and other requirements.¹¹⁶

Exelon’s real complaint seems to be that MDE did not *publish* a record at the time of Certification issuance, or physically attach a record to the Certification document. But under Maryland law MDE is obligated only to make its decision in writing, and to publish that

¹¹⁶ Press Release, *Hogan Administration issues comprehensive environmental plan for Conowingo Dam, Susquehanna River and Chesapeake Bay*, Md. Dep’t of the Env’t (Apr, 27, 2018) (included as Attachment 18 to this pleading). MDE’s water quality certification regulation does not limit the evidence that MDE may consider in reviewing an application or restrict what can be included in the record. In general, however, the administrative record before MDE consists of all that information submitted to or considered by the Department at the time of the agency’s action, including any application, data submitted with the application, public comments, and similar material. *Cf.* Md. Code Ann., Env’t § 1-606 (explaining the materials consisting of the record for purposes of judicial review of those permits or licenses (not including water quality certifications) subject to judicial review where a contested case hearing is not available).

decision. MDE did so here. Exelon's reference to agency statements about the record being developed during the administrative appeal process are fundamentally misleading.

Moreover, contrary to Exelon's claim, the contested case hearing does not serve as the vehicle through which MDE will "issue the ultimate certification decision," nor is there any basis to assert that MDE has deferred until then "the work" of locating a record and finally basing its decision on "evidence of record."¹¹⁷ Rather, MDE rendered its decision on Exelon's request for a certification on April 27, 2018, and did so based not only on its own expertise but after an extensive administrative process. The contested case hearing serves only as the applicable method of *challenging* MDE's final action on the certification request. Nothing in the CWA or state law requires MDE to hold a full adjudicatory hearing prior to making a decision on a certification application. Parties to a contested case hearing have the opportunity to introduce additional evidence or present expert testimony in support of or in opposition to a certification, and the record in that proceeding will ultimately be subject to judicial review in state courts. But this opportunity does not render the Certification issued by MDE for Conowingo in any way "non-final," nor does availability of the opportunity to appeal mean that MDE somehow *lacked* an evidentiary basis to support the Certification in the first place.

It also does not mean that the agency has the ability to generate new evidence out of whole cloth, or revise its decision at will. The question before the Maryland Office of Administrative Hearings, a separate body currently delegated the authority to conduct contested case hearings of this type, is whether the record supports the agency's decision—here, issuance of the Certification with the challenged conditions—at the time it was rendered.¹¹⁸ Exelon's

¹¹⁷ Petition at 10-11.

¹¹⁸ In a contested case, the Administrative Procedures Act sets the standard of proof as the preponderance of evidence. Md. Code Ann., State Gov't § 10-217. MDE's procedural regulations for contested case hearings also establish the burdens of going forward and the

complaint that the Certification is subject to *de novo* review similarly cuts against its claim that MDE exercises plenary authority to revise at will. And even though MDE retains final decision making authority over those contested case hearing delegated to OAH, that decision is subject to judicial review in state court, and it must be supported by evidence in the record. Judicial review of the contested case hearing—including MDE’s final decision—would be limited to the record,¹¹⁹ and on review the court may remand the decision to MDE for further proceedings; affirm; or reverse if MDE’s decision:

- (i) is unconstitutional;
- (ii) exceeds the statutory authority or jurisdiction of the final decision maker;
- (iii) results from an unlawful procedure;
- (iv) is affected by any other error of law;
- (v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted;
- ...; or
- (vii) is arbitrary or capricious.¹²⁰

On review MDE’s decision is entitled to substantial deference.¹²¹ That is the process provided under state law, and Exelon cannot collaterally attack its sufficiency in this forum. *Alcoa Power Generating, Inc.*, 643 F.3d at 971 (“most challenges to a certification decision implicat[e] only questions of State law”).

burdens of persuasion. COMAR 26.01.02.28B. A party challenging MDE’s intent to deny a certification “bears the burden of going forward to establish a prima facie case of entitlement” to the certification as well as the burden of persuasion that the certification should be issued; a party challenging MDE’s issuance of a certification “bears the burden of going forward to establish a prima facie case that grounds exist for denying” the certification as well as the burden of persuasion that the certification should be denied. *Id.*

¹¹⁹ Md. Code Ann., State Gov’t § 10-222(f).

¹²⁰ Md. Code Ann., State Gov’t § 10-222.

¹²¹ *Assateague Coastkeeper v. Md. Dep’t of Env’t*, 200 Md. App. 665, 690-91 (Md. Ct. Spec. App. 2011).

IV. IF THE COMMISSION ADOPTS EXELON'S READING OF *HOOPA VALLEY*, IT SHOULD TOLL THE ONE-YEAR WAIVER PERIOD SUCH THAT MARYLAND'S CERTIFICATION IS TIMELY

If the Commission nonetheless elects to adopt Exelon's reading of *Hoopa Valley*, then the Commission's prior, clear, and consistent interpretation of permissible practices under CWA Section 401—and the justifiable reliance by the States on that interpretation—requires that the Commission toll *Hoopa Valley*'s application to this proceeding. In other words, the Commission should still provide Maryland the opportunity to conform to a new interpretation of state rights under Section 401(a)(1) by equitably tolling the one-year waiver requirement. By doing so, the one-year period would be deemed to have commenced when (and if) the D.C. Circuit issues the mandate in *Hoopa Valley*, thereby making Maryland's issuance of the certification timely.

Doing so would be consistent with precedent. Courts have found that equitable tolling is appropriate where a statutory deadline is missed because of “justifiable reliance on the advice of another government officer.” *Jarrell v. U.S. Postal Serv.*, 753 F.2d 1088, 1092 (D.C. Cir. 1985). *See also, Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424 (1965) (finding that equitable tolling applied where a party diligently pursued its remedies only to miss a statutory deadline); *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231 (1959) (holding that equitable tolling was appropriate where a party was induced into missing a statutory deadline due to another party's misleading advice).

Equitable tolling applies against the government unless Congress affirmatively indicates otherwise, generally by making a statutory time limit jurisdictional. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1638 (2015). “Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.” *Id.* at 1632. Congress made no indication that the one-year time limit on states' water quality certification authority was jurisdictional and courts have interpreted similar

statutory deadlines as being non-jurisdictional. *See e.g., Millennium Pipeline Co., L.P. v. Gutierrez*, 424 F. Supp. 2d 168, 176 (D.D.C. 2006) (finding states' six month presumptive concurrence deadline contained in Coastal Zone Management Act was non-jurisdictional and subject to equitable tolling).

In *Bull S.A. v. Comer*, a trademark applicant received a certificate from the Commissioner of Patents and Trademarks stating that his trademark registration would stay in effect for twenty years from May 15, 1972. 55 F.3d 678, 679 (D.C. Cir. 1995). However, the Trademark Act required that the trademark be renewed within twenty years from the trademark registration date, which was in 1971. *Id.* When the applicant went to renew his trademark registration in 1992, he was informed that his registration had expired and that he should have applied to renew his trademark in 1991. *Id.* The D.C. Circuit overturned the Commissioner's decision and held that the applicant's 1991 statutory deadline for renewing his trademark application should be equitably tolled because he had justifiably relied on the validity of an official government statement. *Id.* at 682.

Similarly, Maryland relied on the Commission's consistent pronouncement that the state's Section 401(a)(1) authority would not be waived by Exelon's decision to withdraw and resubmit its water quality certification application. Prior to *Hoopa Valley*, the Commission's interpretation of the CWA was clear: Section 401(a)(1) only required that a state "make a clear decision within one year," which could include a denial "issued without prejudice to the applicant's refiling of an application that complies with the agency's requirements." *Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters*, Order No. 553, 56 FERC ¶ 30,921, *order on reh'g*, Order No. 533-A, 56 FERC 30,932 (1991). The Commission confirmed that withdrawal and resubmittal—the functional equivalent of dismissal

without prejudice—was entirely appropriate. *Constitution Pipeline Co. LLC*, 162 FERC ¶ 61,014, P 23 (2018) (“once an application is withdrawn, no matter how formulaic or perfunctory the process of withdrawal and resubmission is, the refiling of an application restarts the one-year waiver period under section 401(a)(1).”). The Second Circuit also explicitly approved of the withdrawal and resubmittal process. *NYSDEC* at 456 (“[A state] could also request that the applicant withdraw and resubmit the application.”).

If the Commission decides to apply here Exelon’s reading of *Hoopa Valley*, and does not equitably toll the one-year time to act, then Maryland will be deprived of its right to protect the water quality of the lower Susquehanna River and the Chesapeake Bay for its citizens for decades to come. Doing so would both be inconsistent with prior Commission practice and strike directly at the co-operative federalism that is at the heart of the CWA. The Commission has previously recognized that states should not be held to have waived their Section 401 authority based on a new interpretation of the CWA. *Wyo. Valley Hydro Partners*, 58 FERC ¶ 61,219, at 61,694 (1992) (“[O]ur intent was to apply Order No. 533 prospectively, without the result of deeming a certification request to be waived before the effective date of the final rule.”). If the Commission is going to follow Exelon’s reading of *Hoopa Valley*, then FERC should provide Maryland the opportunity to conform to this radically new interpretation of Section 401(a)(1) by equitably tolling the one-year waiver requirement such that Maryland has timely issued the Certification.

The fact that the State *has acted* here, and had already issued the Certification before the decision in *Hoopa Valley*, is all the more reason why the Commission should toll its application. Indeed as Exelon has stated repeatedly in its filings in the other litigation it has instituted to challenge the Certification, upon issuance of the Certification the Commission could have acted

at any time to incorporate its conditions into a new license. It was Exelon, not MDE, who has asked the Commission to defer such action pending administrative review and resolution of the various challenges it has filed. Having acted in accordance with Commission precedent and policy, Maryland should not face the retroactive application of *Hoopa Valley* to a Certification it issued almost nine months before that case was ever decided.

Finally, as noted above, the intervenors in *Hoopa Valley* itself have requested rehearing of that decision, and the mandate in that case has not yet issued. While, as stated above, Maryland believes *Hoopa Valley* should not apply here, if the Commission is not inclined to agree, then at the very least it should delay action on this Petition while *Hoopa Valley* remains on review.

V. THE COMMISSION SHOULD INCORPORATE THE CERTIFICATION CONDITIONS INTO THE FEDERAL LICENSE

Exelon's Petition attacks the merits of the conditions MDE included in the Certification. The Certification reflects the judgment of MDE, the expert state agency charged with assessing the Conowingo Project's substantive impacts on water quality in Maryland, on how best to address those impacts. As Section 401 establishes a scheme of co-operative federalism, the Commission should defer to the State's judgment on the conditions necessary to protect the environment and assure compliance with state water quality standards. While Exelon may disagree with the State's determination, it has other available avenues to present its objections. It has invoked the administrative appeal process, and ultimately has resort to state courts (and, depending on the claim, the Supreme Court), to challenge either the factual basis or the legality of the Certification conditions. The State—not the Commission nor federal reviewing courts—is best positioned to conduct such review, as Section 401 properly envisions. Thus, even if the

Commission finds a waiver, the conditions adopted by Maryland should be incorporated into the license.¹²²

A. The Commission Should Not Reject the Certification as a Whole

Exelon offers three reasons for why the Commission should ignore the Certification; none are persuasive. First, Exelon wrongly suggests that the record to support the Certification is yet to be created. But the state court agreed with MDE that the State properly “relied upon its findings to determine the requirements and conditions that Exelon must follow to secure the Certification and licensure by FERC.”¹²³

Second, Exelon’s claims aside, there is nothing “inchoate” about the Certification. It is true that the Certification calls for Exelon to develop plans or to conduct studies, but nothing about that is fatal under Section 401. The Commission has included and determined that it can enforce conditions that call for development of plans that may require future, as yet undetermined action.¹²⁴ Nor is the Certification incomplete because it provides for adaptive management or contains re-opening provisions in light of changing environmental conditions.¹²⁵

¹²² 16 U.S.C. § 803(a)(2)(B) (requiring the Commission to consider “[t]he recommendations of Federal and State agencies exercising administration over flood control, navigation, irrigation, recreation, cultural and other relevant resources of the State in which the project is located.”); 16 U.S.C. § 797(e) (“the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damages to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.”).

¹²³ Memorandum Opinion and Order at 21.

¹²⁴ *Blue Heron Hydro LLC*, 140 FERC ¶ 61,049 (2012) (incorporating, and holding that Commission can enforce, conditions in a certification requiring development and approval or plans to monitor flow releases, to monitor dissolved oxygen and water temperature to determine impacts downstream, to construct and operate downstream fish passage, and to collect trash and debris); *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wash. 2d 568, 597 (Wash. 2004) (certifying agency can rely on post-certification plans, reports, and studies completed pursuant to WQC conditions “so long as their implementation, expected outcomes, and contingency plans were set forth in the § 401 certification in sufficient detail so as to support reasonable assurance.”); *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 993

As to Exelon's claim that no additional studies were needed and that the record before the Commission is sufficient to impose appropriate environmental conditions, Maryland disagrees. The State has long been on record in this proceeding as to the need for additional information to determine the appropriate, environmentally protective measures—*i.e.*, those ultimately set forth in the Certification—that should be incorporated into the license, as well as the insufficiency of the measures proposed by Exelon in its license application. For example, with respect to nutrients, the State observed in its comments on the Final Lease Application in 2014:

Unfortunately, the Applicant's [Final License Application] is deficient with respect to [nutrients], and at this point, the record before FERC fails to provide a sufficient basis upon which to draw reasonable conclusions about the Project's impacts or appropriate Protection, Mitigation and Enhancement (PM&E) measures

Since 2009, the State Agencies have repeatedly requested that FERC require Exelon to conduct appropriate sediment and nutrient studies to determine the Project's impacts on water quality and living resources of the Lower Susquehanna River and Chesapeake Bay Although FERC eventually required Exelon to conduct a sediment and nutrient study, the fundamental design of this study and Exelon's implementation of it were inadequate to reasonably determine the projects impacts on water quality and living resource Exelon and FERC have attempted to remedy this deficiency by referring to an ongoing sediment and nutrient study led by the US Army Corps of Engineers (USACE). Although the

(9th Cir. 1993) (affirming condition that called for a three-year monitoring program, and development of a mitigation plan if monitoring showed violations of water quality standards, as not arbitrary and capricious even though Corps did not know at the time of certification exactly what water quality impacts would occur).

¹²⁵ *S.D. Warren Co. v. Me. Dept. of Env't Prot.*, 2004 WL 1433675, *7 (Sup. Ct. Me. May 4, 2004) (affirming the inclusion of re-opener provisions that are "specific and are necessary to ensure that the state's water quality standards are met."); *Alabama Power Co.*, 155 FERC ¶ 61,080, P 99 ("The Commission's longstanding practice of including license reopener provisions that allow the Commission to alter license requirements in response to changed environmental conditions through the term of the license . . ."), *on reh'g*, 156 FERC ¶ 61,171 (2016), *reviewed sub nom. Am. River v. FERC*, 895 F.3d 32 (D.C. Cir. 2018); *Port of Seattle*, 151 Wash. 2d at 606 ("Both the law and the record in this case firmly support a conclusion that monitoring and adaptive management are fundamental elements of reasonable assurance. Because a finding of 'reasonable assurance' is predictive in nature, [the state] could not be absolutely certain when it issued the § 401 certification that the project as currently planned would comply with water quality standards. Monitoring and adaptive management provide a mechanism through which [the state] can mitigate that inherent uncertainty.").

USACE study will advance scientific knowledge with respect to sediment and nutrient dynamics and impacts in the Lower Susquehanna River and Chesapeake Bay, the study was never intended to be part of FERC's licensing process"¹²⁶

Those comments were in addition to prior action by the State in the pre-application phase of the Integrated Licensing Process, where the State also expressed concern about sediment and nutrient issues, as well as other issues, including fish passage and flow.¹²⁷

Finally, should the Commission be inclined to accept Exelon's invitation to review the substance of the conditions and decide whether to incorporate them, MDE requests the opportunity, before the Commission takes action, to develop more fully the record in this proceeding on the need for the conditions. This can be done either through supplemental briefing or by the Commission convening an evidentiary hearing. Either way, the State seeks only to ensure that it has a fair chance to present its case on the need for and appropriateness of each of the challenged, specific conditions contained in the Certification.

B. The Commission Should Reject Exelon's Request to Exclude Specific Conditions

The Commission should reject Exelon's request to exclude specific license conditions, including those related to nutrients, fish passage and flow, and trash and debris removal. Each of these issues have been raised in the re-licensing proceeding in comments by state or federal resource agencies or from other interested parties. Flow and fish passage conditions are supported both by the record before MDE (upon which the Certification is based), and by the record before the Commission itself.¹²⁸ As neither of those conditions have been challenged by Exelon in its pending administrative appeal, its request here that the Commission exclude them is

¹²⁶ MDNR January 31, 2014 Comments at 2.

¹²⁷ See Comments cited in note 25, *supra*.

¹²⁸ MDNR, January 31, 2014 Comments at 6-7 ("The study results and other available literature show a clear connection between Project operation, more specifically flows (including duration, magnitude and ramping rates) and its effects on migratory fish passage, habitat availability, fish stranding and RTE species.").

disingenuous at best.¹²⁹ Maryland has also consistently pointed out, for example, that Exelon's license application fails to address trash removal and debris management adequately.¹³⁰

Given the substantial focus in the Petition on the conditions relating to nutrients and the Certification's requirement that the dam not violate water quality standards for dissolved oxygen in the Bay, more detailed discussion is warranted here. First, there is clear legal and factual justification for these conditions. Contrary to Exelon's claims, MDE has never taken the position that the dam structure itself introduces nutrients into the river, nor is that the basis for including nutrient conditions in the Certification. Rather, the Certification identifies the numerous key ways that the dam's existence has fundamentally altered the river system. As a facility fully spanning the river, the dam traps sediment, blocks upstream fish and eel passage, and creates a large impoundment. Separately, the Project's operations and maintenance—including a peaking flow regime—alters the quality and quantity of sediment transport downstream and negatively impacts aquatic habitat in the river below the dam. These impacts have exacerbated water quality concerns associated with the nutrients already present in the system.¹³¹ For example, by impeding eel passage upstream, altering flow, and degrading habitat, the Project's operations

¹²⁹ Petition Exh. H. Responding to a question from MDE as to whether "Exelon object[s] to the fish passage provisions," counsel for Exelon responded: "We have not raised those." *Id.* at 45. Similarly, counsel stated with respect to flow:

Obviously, the most fundamental thing a dam does is it changes the flow of the river. Typically slows that flow down. That impact on water flow has an effect on various aspects of water quality, and the Supreme Court of the United States has made clear because of those impacts on water flow, a state can regulate under 401, and we did not in our petition for reconsideration challenge the restrictions that MDE imposed on water flow even though they're different from the conditions that FERC imposed.

Id. at 45-46.

¹³⁰ MDNR, January 31, 2014 Comments at 7 ("The Applicant failed to propose improvements or new measures for debris management, which is an important issue for the State.").

¹³¹ MDE Certification at 11-13.

have had disastrous consequences on populations of freshwater mussels upriver. Healthy mussel populations that would be present absent the dam (or with the imposition of additional measures, including eel passage and habitat restoration) would *dramatically* reduce the pounds of nutrients flowing into the Conowingo reservoir and discharged out of the project during high flow events. Mussels such as eastern elliptio are powerful filter feeders that remove nutrients and other pollutants from the water and provide other nutrient cycling and storage benefits. Eastern elliptio reproduction requires a fish host, such as migratory species like American eel, and this process is severely derailed by the dam, which is a fish passage impediment; in combination with impacts to suitable habitat and degraded environmental conditions, mussels cannot perform desperately needed nutrient removal. While Exelon routinely falls back to the argument that it does not introduce nutrients into the system, the lack of a healthy mussel population that would naturally be present is directly attributable to the Project and the way in which it is currently operated.

To be sure, decades of unmitigated sediment build-up behind the structure and the current lack of sediment trapping capacity are another way in which excess nutrients are delivered downstream to the river and Bay.¹³² But, Exelon's framing aside, the Certification does not focus solely on the lack of continued sediment trapping as the Project's key impact. Again, in addition to blocking eel migration and upstream mussel passage, the pond itself as an impoundment (caused by the existence of the dam) serves as an unsuitable habitat for healthy populations of mussels or sub aquatic vegetation (SAV). Downstream, the dam routinely blocks transport of coarse sediments needed to build and sustain healthy habitat, and, combined with high flows

¹³² The Commission has acknowledged the water quality impacts associated with build-up or trapped sediment and nutrients: "Sediments, which may contain nutrients such as phosphorus and nitrogen, can be trapped behind dams. If the sediments are released, they can affect the downstream aquatic environment, as by encouraging the growth of algae, which in turn can decrease the amount of dissolved oxygen in affected water." *Exelon Generation Co., LLC*, 140 FERC ¶ 61,209, P 1 n.4 (2012); *see also* MDNR January 31, 2014 Comments at 2 (noting water quality impacts associated with lack of trapping capacity).

during peaking power generation or storm events, any potentially suitable habitat has been obliterated, leaving mostly bare bedrock as substrate. The lack of healthy, naturally present aquatic habitat downstream—such as SAV beds—further degrades the river’s ability to attenuate nutrients from upstream sources naturally. Indeed, the highly unnatural flow regime and presence of the dam alters completely the normal delivery process for both sediment and nutrients downstream.

Taken together, the impacts from the Project’s existence and operation have resulted in an annual 6,000,000 pound nitrogen, and 260,000 pound phosphorus, problem. The Certification rightly places on Exelon the obligation to mitigate these effects, but leaves open the combination of strategies that Exelon could implement to meet these goals. To be clear, the Certification conditions mandate only an outcome, not a particular methodology: Exelon must take steps to reduce the annual amount of nitrogen and phosphorus in its discharge by 2025 in order to meet water quality standards for dissolved oxygen and aquatic life in the Chesapeake Bay.¹³³ The condition then directs Exelon to develop a plan in order to achieve these reductions, which “may propose any combination of corrective action strategies.”¹³⁴ For example, the plan can combine reductions associated with increased eel passage (which is already required elsewhere in the Certification, but can be counted toward nutrient reductions), mussel restoration, SAV or other habitat improvement projects, and other best management practices to address nitrogen and phosphorous. There is no support for Exelon’s outright rejection of the three specific strategies the Certification proposes, nor is Exelon limited to only those options. Certainly Exelon is not mandated by the Certification to pay fees.

¹³³ MDE Certification at 15.

¹³⁴ *Id.* at 16.

In an effort to avoid its obligation to address the nutrient impacts from the dam, Exelon also points misleadingly to separate efforts between and among the federal government and the Chesapeake Bay-states to address water quality impairments in the Bay. It is true that in the TMDL process EPA and the Bay-states have also identified the nutrient problem as an impediment to a Bay clean-up, and the States have separately agreed to achieve the TMDL targets by 2025 to eliminate the dissolved oxygen impairment. Whatever the States may agree to in the TMDL has no impact on the fundamental responsibility of Exelon to operate its facility in a manner that does not violate state water quality standards. That includes implementation of the nutrient reduction plan to mitigate the numerous ways the dam contributes to and exacerbates the problems associated with nutrients already in the system. And to the extent upstream states undertake successful and separate measures to reduce nutrients, that in turn would benefit Exelon and reduce its nutrient reduction obligation accordingly. The Certification itself accounts for this possibility.¹³⁵

Nothing in the Certification interferes with EPA's ability to allocate pollutant load reductions, or otherwise usurps EPA's authority under the TMDL process. As such, there is no reason the TMDL process would interfere with inclusion of appropriate nutrient conditions in the Project license.

CONCLUSION

For the foregoing reasons, MDE respectfully requests that the Commission deny Exelon's Petition. Alternatively, if the Commission is disinclined to deny the Petition, Maryland asks that the Commission take actions consistent with the positions expressed here, including, if necessary, setting the matter for supplemental briefing or an evidentiary hearing.

¹³⁵ *Id.* at 15.

Respectfully submitted,

/s/

Jonathan E.C. May
Assistant Attorney General
Jeanie S. Ismay
Assistant Attorney General
Counsel to MDE

CERTIFICATE OF SERVICE

I hereby certify that I have this 28th day of March, 2019, caused the foregoing document to be served upon each person designated on the official service list compiled by the Commission in this proceeding.

/s/

Jonathan E.C. May
Assistant Attorney General
Counsel to MDE

LIST OF ATTACHMENTS

1. Letter from Exelon to MDE (Aug. 31, 2012)
2. Letter from MDE to Exelon (Dec. 6, 2012)
3. Public Notice, *Proposed Relicensing of the Conowingo Hydroelectric Project, Exelon Application for Water Quality Certification Withdrawn*, Md. Dep't of the Env't (Nov. 14, 2014)
4. Press Release, *Department of the Environment solicits comment, schedules public hearing on Water Quality Certification application for proposed Conowingo Dam relicensing*, Md. Dep't of the Env't (Nov. 18, 2014)
5. Letter from Exelon to MDE (Dec. 4, 2014)
6. Public Notice, *Proposed Relicensing of the Conowingo Hydroelectric Project, Exelon Application for Water Quality Certification Withdrawn*, Md. Dep't of the Env't (Dec. 15, 2014)
7. Press Release, *Water Quality Certification application for proposed Conowingo Dam relicensing withdrawn, January 7 Water Quality Certification public hearing canceled, Exelon agrees to fund additional study*, Md. Dep't of the Env't (Dec. 8, 2014)
8. Letter from Exelon to MDE (Feb. 5, 2016)
9. Letter from Exelon to MDE (Feb. 17, 2017)
10. Letter from MDE to Exelon (Apr. 19, 2017)
11. Letter from Exelon to MDE (Apr. 20, 2017)
12. Public Notice, *Proposed Relicensing of the Conowingo Hydroelectric, Project Application for Water Quality Certification*, Md. Dep't of the Env't (July 10, 2017)
13. Public Notice, *Proposed Relicensing of the Conowingo Hydroelectric Project, Exelon Application for Water Quality Certification Public Comment Period Extended*, Md. Dep't of the Env't (Aug. 8, 2017)
14. Press Release, *Department of the Environment extends public comment period on Water Quality Certification application for proposed Conowingo Dam relicensing*, Md. Dep't of the Env't (Aug. 8, 2017) (included as Attachment 14 to this pleading).
15. Public Hearing Announcement, *Proposed Relicensing of the Conowingo Hydroelectric Project, Exelon Application for Water Quality Certification*, Md. Dep't of the Env't (Oct. 13, 2017)
16. Letter from MDE to Exelon (Apr. 20, 2018)
17. Letter from MDE to Exelon (Apr. 27, 2018)
18. Press Release, *Hogan Administration issues comprehensive environmental plan for Conowingo Dam, Susquehanna River and Chesapeake Bay*, Md. Dep't of the Env't (Apr. 27, 2018)

Attachment 1



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August 31, 2012

Mr. Elder Ghigiarelli, Jr.
Deputy Program Administrator
Federal Consistency Coordinator
Wetlands and Waterways Program
Maryland Department of the Environment
Montgomery Park Business Center
1800 Washington Boulevard, Suite 430
Baltimore, MD 21230-1708

RECEIVED

THANK YOU

Re: Conowingo Hydroelectric Project, FERC Project No. 405; Maryland Coastal Zone Management Program Consistency Certification.

Dear Mr. Ghigiarelli:

Exelon Corporation, on behalf of its wholly-owned subsidiary, Exelon Generation Company, LLC (Exelon), certifies that the proposed Federal Energy Regulatory Commission (FERC) relicensing of the Conowingo Hydroelectric Project (Conowingo Project or Project), FERC Project No. 405 complies with the enforceable policies of the Maryland Coastal Zone Management Program (CZMP) and will be conducted in a manner consistent with the CZMP.

Exelon, in accordance with Sections (§§) 5.17 and 5.18 of Title 18 of the Code of Federal Regulations, is concurrently filing with FERC an Application for a New License for Major Project – Existing Dam – for the Conowingo Project. The existing license for the Project was issued by FERC to Susquehanna Power Company and Philadelphia Electric Power Company. The license was issued on August 14, 1980, for a term ending August 31, 2014.

The Conowingo Project is located on the Susquehanna River (at river mile 10) in Pennsylvania and Maryland. Conowingo Dam is located in Maryland connecting Cecil and Harford Counties, as is the lowermost six miles of the Project reservoir, Conowingo Pond. The remaining eight miles of Conowingo Pond are located in Pennsylvania, within York and Lancaster counties. The Project consists of: 1) a main dam, 2) a spillway, 3) a reservoir (Conowingo Pond), 4) an intake and powerhouse, and 5) two fish lifts.

Exelon intends to continue to operate the Project as it has operated historically, although Exelon is proposing to implement a number of new environmental protection, mitigation, and enhancement measures during the new license term. In addition, Exelon intends to implement several resource management plans, including a comprehensive management and upgrade proposal for the recreational facilities at the Conowingo Project. All of these proposals are described in the enclosed Application for New License.

The Application for New License also describes in detail the 1) Project facilities (see Exhibit A), 2) existing and proposed Project operations (see Exhibit B), 3) existing environmental and recreational resources (see Exhibit E); and 4) direct, indirect, and cumulative impacts of the proposed Project on

various environmental and recreational resources (see Exhibit E). Pertinent environmental and recreational studies completed in support of the Application for License are included as well.

If you have any questions regarding the above, please do not hesitate to contact Colleen Hicks. Thank you for your assistance in this matter.

Respectfully submitted,

Colleen E. Hicks

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Cc: FERC Docket, FERC No. 405.

Enc. CD Containing

Final License Application Volume 1 of 4
Final License Application Volume 3 of 4
Final License Application Volume 4 of 4
Conowingo Project Relicensing Study Reports

Attachment 2



MARYLAND DEPARTMENT OF THE ENVIRONMENT

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Martin O'Malley
Governor

Robert M. Summers, Ph.D.
Secretary

Anthony G. Brown
Lieutenant Governor

December 6, 2012

Ms. Colleen E. Hicks
Manager, Regulatory and Licensing, Hydro
Exelon Power
300 Exelon Way
Kennett Square, PA 19348

RE: Conowingo Hydroelectric Project, FERC Project No. 405

Dear Ms. Hicks:

I am writing with regard to the State's Federal Consistency review, pursuant to Section 307 of the Federal Coastal Zone Management Act of 1972, as amended (CZMA), for the proposed relicensing of the Conowingo Hydroelectric Project (Project), Federal Energy Regulatory Commission (FERC) Project No. 405. The State received the Exelon Generation Company, LLC (Exelon) Federal Consistency certification statement that the proposed Project is consistent with the Maryland Coastal Zone Management Program (CZMP), on September 6, 2012. Exelon's Federal Consistency certification and supporting information, submitted pursuant to 15 CFR Part 930, § 930.57 and § 930.58, respectively, commenced the six-month Federal Consistency timeclock for the State's review and decision.

The purpose of this letter is to inform Exelon of the status of the State's Federal Consistency review and to request Exelon to agree to extend or stay the Federal Consistency timeclock. As you know, a major concern of the State of Maryland is the accumulation of sediment and nutrient loads behind the dam and potential impacts to the Susquehanna River and Chesapeake Bay related to the release of such sediments and nutrients. Maryland is also concerned about migratory fish and eel passage, minimum flows, and other factors related to Conowingo Dam that impact Maryland's coastal resources. The State has been working with Exelon to determine the most appropriate means of addressing sediment, fish passage, and other issues within the relicensing process that Exelon has initiated at FERC. The State intends to continue to engage with Exelon on these critical issues through the Federal Consistency review process. In this regard, for example, the State met with Exelon on November 20, 2012, to discuss the sediment issue and Exelon's participation in a sediment study currently being conducted by the U.S. Army Corps of Engineers.

Colleen E. Hicks
December 6, 2012
Page 2

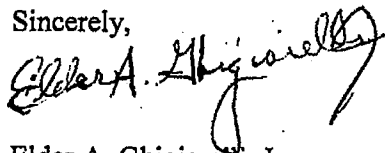
As you are aware, the Project also requires a Clean Water Act, Section 401 Water Quality Certification (WQC) from the Maryland Department of the Environment (MDE). To date, Exelon has not submitted an application for the WQC.

Maryland's CZMP is a "networked" program that is based on existing State laws and regulations. Thus, Maryland's Federal Consistency review and decision is based on the Project's compliance with applicable laws and regulations that make up the State's CZMP, including the State's water quality standards. Thus, the State cannot make a CZMA Federal Consistency decision until its review of the application for a Section 401 WQC is complete.

In the absence of Exelon's application for a WQC, and the outstanding sediment and other issues of concern to the State, it is unlikely that Maryland will complete its review of the Project within the six-month Federal Consistency timeframe which will terminate on March 6, 2013. Accordingly, pursuant to 15 CFR Part 930, § 930.60(a)(3), Maryland requests that Exelon agree to an extend or stay the Federal Consistency timeclock to coincide with that of the Section 401 WQC. Assuming that Exelon agrees to this request, the State's Federal Consistency decision will be rendered concurrent with its decision on the WQC.

Maryland looks forward to Exelon's response to this request and to continuing its work with Exelon on the important issues associated with the relicensing of the Conowingo Hydroelectric Project. If you have any questions, please contact me at 410-537-3763 or by email at eghigiarelli@mde.state.md.us.

Sincerely,



Elder A. Ghigiarelli, Jr.
Deputy Program Administrator
Federal Consistency Coordinator
Wetlands and Waterways Program

Cc: Kathleen Barrón, Vice President, Federal Regulatory Affairs, Exelon
Secretary John Griffin, DNR
Secretary Robert M. Summers, MDE
Brent Bolea, OAG, MEA
Steve Johnson, OAG, MDE
Shawn Seaman, PPRP, DNR
Jay Sakai, WMA, MDE

Attachment 3



MARYLAND DEPARTMENT OF THE ENVIRONMENT
1800 Washington Boulevard • Baltimore MD 21230
410-537-3000 • 1-800-633-6101

Martin O'Malley
Governor

Anthony G. Brown
Lieutenant Governor

Robert M. Summers, Ph.D.
Acting Secretary

PUBLIC NOTICE

**PROPOSED RELICENSING OF THE
CONOWINGO HYDROELECTRIC PROJECT
APPLICATION FOR WATER QUALITY CERTIFICATION**

DATE: November 14, 2014

Pursuant to Code of Maryland Regulations (COMAR) 26.08.02, Regulation .10 Water Quality Certification, the Maryland Department of the Environment ("the Department") is required to give public notice of this application. Section 401 of the federal Clean Water Act prohibits the issuance of a federal license or permit for any activity that will result in any discharge into navigable waters unless the State certifies that the activity will not violate State water quality standards and limitations.

**Applicant: Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, PA 19348**

**Application # 14-WQC-03
Lower Susquehanna River and Upper Chesapeake Bay
Use I & 2 Waters**

The purpose of this public notice is to solicit comments from the public regarding the work described below and to announce the date of a public hearing on the subject application. At this time, the Department intends to deny the application due to insufficient information provided by the applicant regarding the impacts of the activity on State water quality standards and limitations. A public hearing on the application has been scheduled for the following date, time and location:

**Date: Wednesday, January 7, 2015
Time: 1:00 pm**

**Location: Maryland Department of the Environment
Aeris and Aqua Lobby Conference Rooms
1800 Washington Blvd.
Baltimore, Maryland 21230**

The purpose of the public hearing is to take testimony/statements from interested persons/parties. Depending on the number of speakers, a time limit of three minutes per speaker may be set to ensure that all interested parties have an opportunity to present their views.



**Water Quality Certification
Application # 14-WQC-03**

Project Description: Exelon Corporation, on behalf of its wholly owned subsidiary, Exelon Generation Company, LLC (Exelon), has filed with the Federal Energy Regulatory Commission (FERC) an application for a New License for the operation of the Conowingo Hydroelectric Project. Under federal law and as part of FERC's relicensing process, Exelon is required to obtain a Clean Water Act, Section 401 Water Quality Certification (WQC) from the Department for the continued operation of the facility. Exelon's application for the WQC and supporting information is available on the Department's website at the following link:

http://www.mde.state.md.us/programs/Water/WetlandsandWaterways/Pages/Cono_WQC_App.aspx

Any person interested in commenting on the water quality impacts of this project is invited to submit written comments to Elder Ghigiarelli, Jr., Deputy Program Administrator, Wetlands and Waterways Program, Water Management Administration, Maryland Department of the Environment, 1800 Washington Boulevard, Suite 430, Baltimore, MD 21230, or email comments to elder.ghigiarelli@maryland.gov. Comments may also be submitted at the public hearing on January 7, 2015. All comments must be received by the close of business on January 7, 2015.



Attachment 4



MARYLAND DEPARTMENT OF THE ENVIRONMENT

1800 Washington Boulevard • Baltimore MD 21230
410-537-3000 • 1-800-633-6101 • www.mde.state.md.us

Martin O'Malley
Governor

Anthony G. Brown
Lieutenant Governor

Robert M. Summers, Ph.D.
Secretary

FOR IMMEDIATE RELEASE

Media Contact:
Jay Apperson
410-537-3003
jay.apperson@maryland.gov

**Department of the Environment solicits comment, schedules public hearing on
Water Quality Certification application for proposed Conowingo Dam relicensing**

Applicant must show project will comply with State water quality standards; MDE states intention to deny application due to insufficient information

BALTIMORE, MD (November 18, 2014) -- The Maryland Department of the Environment has issued public notice of the Proposed Relicensing of the Conowingo Hydroelectric Project Application for Water Quality Certification. The purpose of the notice is to solicit comments from the public and to announce the scheduling of a public hearing.

The Federal Energy Regulatory Commission (FERC) has issued a one-year extension of the current license for the operation of the Conowingo Dam. Under federal law and as part of FERC's relicensing process, Exelon is required to obtain a Clean Water Act, Section 401 Water Quality Certification from MDE for the continued operation of the facility. Issuance of a Water Quality Certification is contingent upon the applicant demonstrating to MDE that the project will comply with State water quality standards. At this time, although no final determination has been made MDE intends to deny the application due to insufficient information provided by the applicant regarding the impacts of the activity on State water quality standards.

The insufficiency of information is reflected in the draft Lower Susquehanna River Watershed Assessment report. The draft report found that the loss of long-term sediment trapping capacity at the Conowingo Dam is causing impacts to the health of the Chesapeake Bay ecosystem. It also found that additional nutrient pollution associated with these changed conditions in the lower Susquehanna River system could result in Maryland not being able to meet Chesapeake Bay water quality standards, even with full implementation of Watershed Implementation Plans by 2025, in some of the Bay's deeper northern waters. The draft report recommends additional study to quantify the full impact on Bay water quality caused by conditions at the Conowingo Dam. Enhanced monitoring is planned over the next two years.

If it is ultimately determined that the project cannot comply with State water quality standards, the applicant could be required to mitigate the impacts to water quality through, for example, actions taken at the facility or by offsetting the facility's impacts with pollution reduction activities at other locations in the watershed.

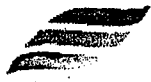
Exelon filed its Water Quality Certification application on January 31, 2014. The State must act within one year of receipt of the application or it waives its right to make a decision. Notice of the application, solicitation of public comments and the scheduling of a public hearing were published in the Maryland Register. A public hearing on this application is scheduled for January 7, 2015, at MDE's Baltimore headquarters. Written comments may also be submitted. All comments must be received by the close of business on January 7, 2015.

Information on the notice, including information on submitting written comments, is on MDE's website at <http://bit.ly/MDEConowingowqc>.

###

If you would rather not receive future communications from State of Maryland, let us know by clicking [here](#).
State of Maryland, 45 Calvert Street Room 145, Annapolis, MD 21401 United States

Attachment 5



Exelon Generation

December 4, 2014

The Honorable Robert Summers
Secretary
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, MD 21230

Re: Withdrawal of Application for Water Quality Certification

Dear Secretary Summers:

Exelon Corporation, on behalf of its wholly-owned subsidiary, Exelon Generation Company, LLC ("Exelon") is in the process of relicensing the Conowingo Hydroelectric Project located in Cecil and Harford Counties, Maryland. Pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, prior to obtaining a new license from the Federal Energy Regulatory Commission, Exelon must obtain a water quality certification from the Maryland Department of the Environment ("MDE"). On January 31, 2014, Exelon submitted to MDE an application for certification that the Conowingo Project meets applicable Maryland water quality standards.

Based on conversations with representatives from the State of Maryland, it is our understanding that MDE believes it currently has insufficient information to process Exelon's application at this time. As a result, Exelon is hereby withdrawing its pending application for a water quality certification. Federal Energy Regulatory Commission policy requires that an applicant resubmit its request for a water quality certification within 90 days of the date of withdrawal.¹ Accordingly, Exelon will work with MDE to coordinate the refiling of its application for certification within the next 90 days.

On a related matter, Exelon and MDE previously agreed to extend the Federal Consistency timeclock under the Coastal Zone Management Act to coincide with MDE's review and issuance of the water quality certification. Exelon, therefore, agrees to extend the Federal Consistency six-month timeclock until one year from the date that Exelon refiles its application for certification. Exelon agrees that if the withdrawal and resubmission of the application for certification continues to be necessary, the Federal Consistency timeclock shall continue to be automatically stayed until one year from the date that Exelon resubmits its application for certification to MDE.

¹ See Letter from Federal Energy Regulatory Commission Staff to Skykomish River Hydro, Inc., Project No. 10942-001 (Jan. 3, 2003) ("Consistent with Commission policy, a request for section 401 certification must be on file with the Commission within 90 days of the date of . . . withdrawal to allow continued processing of [the] application.").

December 4, 2014

Please do not hesitate to contact the undersigned with any questions regarding this matter.

With kind regards,



Vicky Will
Vice President, Environmental Services
Exelon Power
Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, PA 19348
Tel: (610) 765-5611
Email: Vicky.Will@exeloncorp.com

CC: Steven Johnson (MDE)
Brent Bolea (Maryland Energy Administration)

Attachment 6



MARYLAND DEPARTMENT OF THE ENVIRONMENT
1800 Washington Boulevard • Baltimore MD 21230
410-537-3000 • 1-800-633-6101

Martin O'Malley
Governor

Robert M. Summers, Ph.D.
Secretary

Anthony G. Brown
Lieutenant Governor

PUBLIC NOTICE

**PROPOSED RELICENSING OF THE
CONOWINGO HYDROELECTRIC PROJECT
EXELON APPLICATION FOR WATER QUALITY CERTIFICATION WITHDRAWN
JANUARY 7, 2015 PUBLIC HEARING CANCELED**

DECEMBER 15, 2014

Applicant: Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, PA 19348

Application # 14-WQC-03 Withdrawn

Lower Susquehanna River and Upper Chesapeake Bay

Use I & 2 Waters

The purpose of this public notice is to announce that Exelon Generation Company, LLC (Exelon) has withdrawn its application to the Maryland Department of the Environment ("MDE" or "the Department") for a Clean Water Act, Section 401 Water Quality Certification (WQC) which is required under federal law and as part of the Federal Energy Regulatory Commission (FERC) relicensing process for the continued operation of the Conowingo Hydroelectric facility. The Department initially issued a public notice in the Maryland Register on Exelon's application on November 14, 2014, which announced a public hearing to be held on January 7, 2015. That public hearing is canceled.

Recognizing MDE's position that more information is needed for the State to determine whether the discharges from the Conowingo Dam comply with State water quality standards, Exelon has withdrawn its application for the WQC. FERC regulations/policy require that Exelon resubmit its application for the WQC within 90 days of December 4, 2014, the date of its withdrawal of the application. Exelon has agreed to work with MDE to coordinate the refiling of its application and has agreed to provide up to \$3.5 million to study the effects of sediment and associated nutrients on the water quality of the downstream Susquehanna River and Chesapeake Bay. Until this additional information is available, it is possible that a refiled application or applications might also be withdrawn.

Any questions on this notice may be directed to Elder Ghigliarelli, Jr., Deputy Program Administrator, Wetlands and Waterways Program, Water Management Administration, Maryland Department of the Environment, 1800 Washington Boulevard, Suite 430, Baltimore, MD 21230, or by email to elder.ghigliarelli@maryland.gov.

Attachment 7



MARYLAND DEPARTMENT OF THE ENVIRONMENT

1800 Washington Boulevard • Baltimore MD 21230
410-537-3000 • 1-800-633-6101 • www.mde.state.md.us

Martin O'Malley
Governor

Anthony G. Brown
Lieutenant Governor

Robert M. Summers, Ph.D.
Secretary

FOR IMMEDIATE RELEASE



Media Contact:

Jay Apperson

410-537-3003
jay.apperson@maryland.gov

Water Quality Certification application for proposed Conowingo Dam relicensing withdrawn, January 7 Water Quality Certification public hearing canceled, Exelon agrees to fund additional study

Exelon agrees to provide up to \$3.5 million for additional study of effects of Conowingo Dam on Chesapeake Bay water quality; previously scheduled public hearing on company's application canceled, company says it must refile application within 90 days

BALTIMORE, MD (Dec. 8, 2014) – Recognizing the Maryland Department of the Environment's position that more information on the effects of the Conowingo Dam is needed before it can be determined whether the facility complies with State water quality standards, Exelon Corporation has withdrawn its application for the Water Quality Certification that is required as part of the relicensing process for the dam and has agreed to fund additional study of the issue.

MDE had stated its intention to deny the Proposed Relicensing of the Conowingo Hydroelectric Project Application for Water Quality Certification application due to insufficient information provided by the applicant. The company said it will work with MDE to coordinate the refile of its application within 90 days. It has also agreed to provide up to \$3.5 million to study the effects of sediment related to the Dam on water quality in the Susquehanna River and the Chesapeake Bay.

MDE had scheduled a public hearing on Exelon's application for Water Quality Certification for Jan. 7, 2015, at the Department's Baltimore headquarters. Due to the withdrawal of the application by Exelon, the hearing on the application is canceled. This action does not affect the scheduled public meeting on the Lower Susquehanna River Watershed Assessment draft report. The public meeting on that draft report will still be held at 7 p.m. tomorrow, Dec. 9, at Harford Community College.

The Federal Energy Regulatory Commission (FERC) has issued a one-year extension of the current license for the operation of the Conowingo Dam. Under federal law and as part of FERC's relicensing process, Exelon is required to obtain a Clean Water Act, Section 401 Water Quality Certification from MDE for the continued operation of the facility. Issuance of a Water Quality Certification is contingent upon the applicant demonstrating to MDE that the project will comply with State water quality standards. In issuing notice of the application, solicitation of public comments and scheduling of a public hearing, MDE stated the Department's intent to deny the application due to insufficient information provided by the applicant regarding the impacts of the activity on State water quality standards.

The insufficiency of information is reflected in the draft Lower Susquehanna River Watershed Assessment report. The draft report found that the loss of long-term sediment trapping capacity at the Conowingo Dam is causing impacts to the health of the

Chesapeake Bay ecosystem. It also found that additional nutrient pollution associated with these changed conditions in the lower Susquehanna River system could result in Maryland not being able to meet Chesapeake Bay water quality standards, even with full implementation of Watershed Implementation Plans by 2025, in some of the Bay's deeper northern waters. The draft report recommends additional study to quantify the full impact on Bay water quality caused by conditions at the Conowingo Dam.

Exelon has agreed to provide up to \$3.5 million for additional study. A study plan has been prepared with input by MDE, Exelon, the Maryland Department of Natural Resources, the U.S. Geological Survey, the University of Maryland Center for Environmental Science, the U.S. Environmental Protection Agency Chesapeake Bay Program and the U.S. Army Corps of Engineers. Enhanced monitoring is planned over the next two years.

Exelon cited its understanding of FERC policy requiring that an applicant resubmit its request for Water Quality Certification within 90 days of date of withdrawal in stating its intention to refile an application within that time period. It is possible that a refiled application or applications might also be withdrawn, followed by the resubmission of applications.

If it is ultimately determined that the project cannot comply with State water quality standards, the applicant could be required to mitigate the impacts to water quality through, for example, actions taken at the facility or by offsetting the facility's impacts with pollution reduction activities at other locations in the watershed.

###

If you would rather not receive future communications from State of Maryland, let us know by clicking [here](#).
State of Maryland, 45 Calvert Street Room 145, Annapolis, MD 21401 United States

Attachment 8



Exelon Generation

February 5, 2016

The Honorable Benjamin H. Grumbles
Secretary
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, MD 21230

**Re: Withdrawal of Application for Water Quality Certification
Conowingo Hydroelectric Project (FERC Project No. 405)
Cecil and Harford Counties**

Dear Secretary Grumbles:

Exelon Corporation, on behalf of its wholly-owned subsidiary, Exelon Generation Company, LLC ("Exelon") is in the process of relicensing the Conowingo Hydroelectric Project ("Conowingo Project") located in Cecil and Harford Counties, Maryland. Pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, prior to obtaining a new license from the Federal Energy Regulatory Commission, Exelon must obtain a water quality certification from the Maryland Department of the Environment ("MDE"). Exelon filed its currently pending application for a water quality certification on March 3, 2015.

As you know, Exelon entered into an agreement with MDE to work with state agencies in Maryland, the U.S. Army Corps of Engineers, the U.S. Geological Survey, the University of Maryland Center for Environmental Science ("UMCES"), and the U.S. Environmental Protection Agency to design and conduct a multi-year sediment study ("Sediment Study") that will provide additional information to MDE in support of its consideration of Exelon's application. The goals of the Sediment Study are to quantify the amount of suspended sediment concentration, associated nutrients, suspended sediment load, and nutrient load present in the major entry points to the Lower Susquehanna River Reservoir System and the upper Chesapeake Bay. Exelon will contribute up to \$3.5 million to fund the Sediment Study.

The Clean Water Act requires that states act on applications under Section 401 within one year. Although Exelon continues to work with the Maryland agencies, UMCES, and the other participants to conduct the Sediment Study, the Sediment Study will not be completed before the expiration of the statutory one-year period on March 3, 2016. Therefore, Exelon is withdrawing its pending application for a water quality certification.

Federal Energy Regulatory Commission policy requires that an applicant resubmit its request for a water quality certification within 90 days of the date of withdrawal.¹ Accordingly, Exelon will work with MDE to coordinate the refiling of its application for certification within the next 90 days. In addition, as previously discussed, Exelon agrees that if the withdrawal and resubmission of the application for certification continues to be necessary,

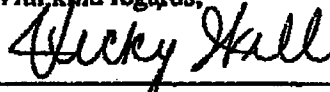
¹ See Letter from Federal Energy Regulatory Commission Staff to Skykomish River Hydro, Inc., Project No. 10942-001 (Jan. 14, 2003) ("Consistent with Commission policy, a request for section 401 certification must be on file with the Commission within 90 days of the date of . . . withdrawal to allow continued processing of [the] application.").

February 5, 2016

the Federal Consistency timeclock under the Coastal Zone Management Act shall be automatically stayed until one year from the date that Exelon resubmits its application for certification to MDE.

Please do not hesitate to contact the undersigned with any questions regarding this matter.

With kind regards,



Vicky Will
Vice President, Operations Support
Exelon Power
Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, PA 19348
Tel: (610) 765-5611
Email: Vicky.Will@exeloncorp.com

CC: Steve Johnson (MDE)
Steve Talson (Maryland Energy Administration)

Attachment 9



Exelon Generation[®]

February 17, 2017

The Honorable Benjamin H. Grumbles
Secretary
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, MD 21230

**Re: Withdrawal of Application for Water Quality Certification
Conowingo Hydroelectric Project (FERC Project No. 405)
Cecil and Harford Counties**

Dear Secretary Grumbles:

Exelon Corporation, on behalf of its wholly-owned subsidiary, Exelon Generation Company, LLC ("Exelon") is in the process of relicensing the Conowingo Hydroelectric Project ("Conowingo Project") located in Cecil and Harford Counties, Maryland. Pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341, prior to obtaining a new license from the Federal Energy Regulatory Commission, Exelon must obtain a water quality certification from the Maryland Department of the Environment ("MDE"). Exelon filed its currently pending application for a water quality certification on April 25, 2016.

As you know, Exelon entered into an agreement with MDE to work with state agencies in Maryland, the U.S. Army Corps of Engineers, the U.S. Geological Survey, the University of Maryland Center for Environmental Science ("UMCES"), and the U.S. Environmental Protection Agency to design and conduct a multi-year sediment study ("Sediment Study") that will provide additional information to MDE regarding sediment and nutrients in the major entry points to the Lower Susquehanna River Reservoir System and the upper Chesapeake Bay. Exelon has committed to contribute up to \$3.5 million to fund the Sediment Study.

The Clean Water Act requires that states act on applications under Section 401 within one year. Although Exelon continues to work with the Maryland agencies, UMCES, and the other participants to conduct the Sediment Study, the Sediment Study and the agency review of the modeling data supporting the study will not be completed before the expiration of the statutory one-year period on April 25, 2017. Therefore, Exelon is withdrawing its pending application for a water quality certification.

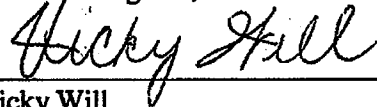
Federal Energy Regulatory Commission policy requires that an applicant resubmit its request for a water quality certification within 90 days of the date of withdrawal.¹ Accordingly, Exelon will work with MDE to coordinate the refiling of its application for certification within the next 90 days. In addition, Exelon agrees that if the withdrawal and resubmission of the application for certification continues to be necessary, the Federal Consistency time-clock under the Coastal Zone Management Act shall be automatically stayed until one year from the date that Exelon resubmits its application for certification to MDE.

¹ See Letter from Federal Energy Regulatory Commission Staff to Skykomish River Hydro, Inc., Project No. 10942-001 (Jan. 14, 2003) ("Consistent with Commission policy, a request for section 401 certification must be on file with the Commission within 90 days of the date of . . . withdrawal to allow continued processing of [the] application.").

February 17, 2017

Please do not hesitate to contact the undersigned with any questions regarding this matter.

With kind regards,



Vicky Will
Vice President, Operations Support
Exelon Power
Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, PA 19348
Tel: (610) 765-5611
Email: Vicky.Will@exeloncorp.com

CC: Andrea Baker (MDE)
Jonathan May (MDE)

Attachment 10



Maryland
Department of
the Environment

Larry Hogan
Governor

Boyd Rutherford
Lieutenant Governor

Ben Grumbles
Secretary

APR 19 2017

Ms. Colleen Hicks
Manager Regulatory and Licensing, Hydro
Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, PA 19348

RE: Eel Passage Facility at Conowingo Hydroelectric Project

Dear Ms. Hicks:

This letter serves to confirm the discussions over the last few weeks between the Maryland Department of the Environment (MDE) and Exelon Corporation regarding the construction and operation of the eel passage facility at the Conowingo Hydroelectric Project, and the pending Federal Energy Regulatory Commission (FERC) re-licensing application for the Conowingo dam.

Exelon has agreed to supplement its FERC re-licensing application for Conowingo, to include provisions for the eel passage facility required as a condition of Exelon's FERC license and Clean Water Act Section 401 Water Quality Certification for the Muddy Run Pumped Storage Facility, located upriver in Pennsylvania. Exelon will also include operation of the eel passage facility in the application for the 401 water quality certification for Conowingo, which was withdrawn by Exelon on February 17, 2017 and will be re-submitted to MDE on or before May 18, 2017.

Exelon has acknowledged that MDE will address eel passage as part of the 401 certification process for the overall re-licensing of the Conowingo dam, and Exelon has agreed that it will not challenge MDE's authority to do so. Exelon has not waived, however, any right to appeal the 401 certification once it is issued, as may be appropriate at that time. In the meantime, it is the parties' expectation that the eel passage facility will be constructed and operational on or about May 1, 2017, in satisfaction of Exelon's existing obligations under the FERC license and the water quality certification for the Muddy Run facility.

I would appreciate a prompt response acknowledging Exelon's understanding of the above, and confirming the parties' agreement on the path forward for the Conowingo re-licensing process.

If I may be of further assistance, please contact me at 410-537-3567 or Ms. Denise Keehner, Program Manager, Wetlands and Waterways Program at 410-537-3874 or by email at denise.keehner@maryland.gov.

Sincerely,

D. Lee Currey, Acting Director
Water Management Administration

cc: Jay Ryan, Counsel, Baker Botts, LLP
Todd Cutler, Associate General Counsel, Exelon

Attachment 11



April 20, 2017

D. Lee Currey
Acting Director
Water Management Administration
Maryland Department of the Environment
1800 Washington Boulevard
Baltimore, MD 21230

Re: Eel Passage Facility at Conowingo Hydroelectric Project

Dear Mr. Currey:

I am in receipt of your letter dated April 20, 2017 regarding the eel passage facility at the Conowingo Hydroelectric Project ("Conowingo") and the pending Federal Energy Regulatory Commission ("FERC") relicensing application for Conowingo.

As set forth in your letter, Exelon will supplement its pending FERC relicensing application for Conowingo to include provisions for the eel passage facility required as a condition of Exelon's FERC license and Clean Water Act section 401 water quality certification for the Muddy Run Pumped Storage Project ("Muddy Run"). Exelon also will include operation of the eel passage facility in the application for the water quality certification for Conowingo, which was withdrawn by Exelon on February 17, 2017 and will be refiled with the Maryland Department of the Environment ("MDE") on or before May 18, 2017.

Exelon acknowledges that MDE will address eel passage at Conowingo as part of the Clean Water Act section 401 certification process for the overall relicensing of Conowingo, and Exelon agrees that it will not challenge MDE's authority to do so. However, Exelon does not waive any right to appeal the water quality certification once it is issued, as may be appropriate at the time. In the interim, Exelon expects that, pending FERC approval, the eel trapping and eel holding facility will be constructed and operational on or about May 1, 2017, in satisfaction of Exelon's obligations under the FERC license and water quality certification for Muddy Run.

Please do not hesitate to contact the undersigned if you have any questions or require additional information regarding this matter.

D. Lee Currey

- 2 -

April 20, 2017

Respectfully submitted,

Colleen E. Hicks

Colleen E. Hicks
Manager Regulatory and Licensing, Hydro
Exelon Power
300 Exelon Way
Kennett Square, PA 19348
Tel: (610) 765-6791
Email: colleen.hicks@exeloncorp.com

Attachment 12



Maryland
Department of
the Environment

Larry Hogan
Governor

Boyd Rutherford
Lieutenant Governor

Ben Crumbles
Secretary

PUBLIC NOTICE

**PROPOSED RELICENSING OF THE
CONOWINGO HYDROELECTRIC PROJECT
APPLICATION FOR WATER QUALITY CERTIFICATION**

DATE: July 10, 2017

Pursuant to Code of Maryland Regulations (COMAR) 26.08.02, Regulation .10 Water Quality Certification, the Maryland Department of the Environment (“the Department”) is required to give public notice of this application. Section 401 of the federal Clean Water Act prohibits the issuance of a federal license or permit for any activity that will result in any discharge into navigable waters unless the State certifies that the activity will not violate State water quality standards and limitations. The purpose of this public notice is to solicit comments from the public regarding the work described below.

Background: On August 30, 2012, Exelon Corporation filed with the Federal Energy Regulatory Commission (FERC) an application for a New License for the Conowingo Hydroelectric Project. On January 30, 2014, Exelon filed with the Department an application for a Clean Water Act, Section 401 Water Quality Certification (WQC) for the project. The WQC is required as part of FERC’s relicensing process. Recognizing that the State had one year to make its decision and did not have sufficient information upon which to base its decision, Exelon withdrew its application in December, 2014. In addition, Exelon agreed to provide up to \$3.5 million to further study the effects of sediment and associated nutrients on the water quality of the lower Susquehanna River and Chesapeake Bay.

While the sediment study was ongoing, Exelon agreed to withdraw and resubmit, in accordance with FERC requirements, its application for the WQC until the results of the sediment study are available. On May 16, 2017, the Department received Exelon’s current application for the required WQC. The Department anticipates making a final decision on the WQC based on this current application. The State has one year, or until May 15, 2018, to render its final decision.

Applicant: Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, PA 19348

Application # 17-WQC-02
Lower Susquehanna River and Upper Chesapeake Bay
Use I & 2 Waters

Project Description: Exelon Corporation, on behalf of its wholly owned subsidiary, Exelon Generation Company, LLC (Exelon), has filed with the Federal Energy Regulatory Commission (FERC) an application for a New License for the operation of the Conowingo Hydroelectric Project. Under federal law and as part of FERC’s relicensing process, Exelon is required to obtain a Clean Water Act, Section 401 Water Quality Certification (WQC) from the

Department for the continued operation of the facility. Exelon's application for the WQC and supporting information is available on the Department's website at the following link:

<http://mde.maryland.gov/programs/water/WetlandsandWaterways/Pages/ExelonMD-Conowingo-WQApp.aspx>

Any person interested in commenting on the water quality impacts of this project is invited to submit written comments to Elder Ghigiarelli, Jr., Deputy Program Administrator, Wetlands and Waterways Program, Water Management Administration, Maryland Department of the Environment, 1800 Washington Boulevard, Suite 430, Baltimore, MD 21230, or email comments to **elder.ghigiarelli@maryland.gov**. Comments must be received by the close of business on August 9, 2017.

Subsequent to the close of the comment period, the Department intends to hold a public hearing on this application in the fall, 2017. A public notice announcing the hearing will be advertised in the Maryland Register, placed on the Department's website, and mailed to the Wetlands and Waterways Program interested persons list.

Attachment 13



Maryland
Department of
the Environment

Larry Hogan
Governor

Boyd Rutherford
Lieutenant Governor

Ben Crumbles
Secretary

PUBLIC NOTICE

**PROPOSED RELICENSING OF THE
CONOWINGO HYDROELECTRIC PROJECT
EXELON APPLICATION FOR WATER QUALITY CERTIFICATION**

PUBLIC COMMENT PERIOD EXTENDED

AUGUST 8, 2017

Applicant: Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, PA 19348

Application # 17-WQC-02
Lower Susquehanna River and Upper Chesapeake Bay
Use I & 2 Waters

On July 10, 2017, the Maryland Department of the Environment ("MDE" or "the Department") issued a public notice on the Exelon Generation Company, LLC (Exelon) application for a Clean Water Act, Section 401 Water Quality Certification (WQC) required as part of the relicensing of the Conowingo Hydroelectric Project by the Federal Energy Regulatory Commission. The public notice announced that comments must be received by August 9, 2017. The purpose of this public notice is to announce that the public comment period has been extended to August 23, 2017. In addition, MDE will re-open the comment period in the future, should important new information become available.

Exelon's application for the WQC and supporting information is available on the Department's website at the following link:

<http://mde.maryland.gov/programs/water/WetlandsandWaterways/Pages/ExelonMD-Conowingo-WQCApp.aspx>

Any person interested in commenting on the water quality impacts of this project is invited to submit written comments to Elder Ghigiarelli, Jr., Deputy Program Administrator, Wetlands and Waterways Program, Water and Science Administration, Maryland Department of the Environment, 1800 Washington Boulevard, Suite 430, Baltimore, MD 21230, or by email to elder.ghigiarelli@maryland.gov.

Subsequent to the close of the comment period, the Department intends to hold a public hearing on this application in the fall, 2017. A public notice announcing the hearing will be advertised in the Maryland Register, placed on the Department's website, and mailed to the Wetlands and Waterways Program interested persons list.

Attachment 14



Maryland

Department of the Environment

Governor
Boyd Rutherford
Lieutenant Governor
Ben Grumbles
Secretary

FOR IMMEDIATE RELEASE

Media contact: Jay Apperson
jay.apperson@maryland.gov
410-537-3003

Department of the Environment extends public comment period on Water Quality Certification application for proposed Conowingo Dam relicensing

Applicant Exelon must show project will comply with state water quality standards and requirements; public hearing to follow public comment period

BALTIMORE (Aug. 8, 2017) – The Maryland Department of the Environment is extending by two weeks the public comment period on the Proposed Relicensing of the Conowingo Hydroelectric Project Application for Water Quality Certification under the Clean Water Act.

In July, the department issued public notice to solicit comments from the public and state the department's intention to hold a public hearing in the fall. To allow and encourage further public participation and input, the department is extending the public comment period from Aug. 9 to Aug. 23. The department will reopen the public comment period at the time of the hearing and may reopen the public comment period in the event that additional information becomes available which it determines should be subject to review and comment.

Under federal law and as part of the Federal Energy Regulatory Commission's relicensing process, the applicant, Exelon Generation Company LLC, is required to obtain a Clean Water Act, Section 401 Water Quality Certification from the Maryland Department of the Environment for the continued operation of the facility. Issuance of a Water Quality Certification is contingent upon the applicant demonstrating to the department that the project will comply with State water quality standards and requirements.

Science has demonstrated that the Conowingo Dam has essentially lost its capacity to trap sediment and phosphorus, and if it's not addressed Chesapeake Bay cleanup goals will likely not be met. Governor Larry Hogan convened a second Conowingo Dam Summit today to share proposed solutions.

"Maryland will use all available tools, including a potential veto under the federal Clean Water Act, to protect the Susquehanna River and Chesapeake Bay in the relicensing of the Conowingo Dam," said Maryland Environment Secretary Ben Grumbles. "We look forward to working with Exelon and many other partners in the coming weeks."

In 2014, in response to Exelon's initial application for Water Quality Certification, the Maryland Department of the Environment stated its intent to deny the application due to insufficient information provided by the applicant regarding the water quality impacts of the proposed activity. In recognition of that position, Exelon withdrew its application and agreed to provide up to \$3.5 million for further study of the effects of sediment and associated nutrients on the water quality of the lower Susquehanna River and the Chesapeake Bay.

Last July, Governor Hogan held an inaugural Conowingo Dam Summit and announced the formation of a multi-agency workgroup to seek innovative solutions for reducing pollution that threatens the Chesapeake Bay. The Hogan administration also announced a formal Request for information to help find solutions and determine if dredging of the Conowingo Dam and re-use of dredged materials can be done in an efficient and effective way. In March, the Department of the Environment, in collaboration with the Maryland Department of Transportation's Port Administration, issued draft guidelines for reuse of dredged material in innovative ways that protect and benefit the environment and public health.

In May, Exelon submitted the current application for Water Quality Certification for the dam's relicensing. As part of its review, the Maryland Department of the Environment, in close coordination with the Department of Natural Resources and other agencies, will identify all applicable water quality standards and requirements and utilize data, modeling and further scientific analysis, along with materials provided by Exelon and information provided in public comments, to determine whether the operation of and discharges from the Conowingo Hydroelectric Project will comply with all applicable Maryland water quality standards and requirements, including those downstream, in the Chesapeake Bay. The department has until mid May 2018 to complete its review.

The public is invited to submit written comments on the water quality impacts of the project. Comments may be submitted to: Elder Ghigliarelli Jr. Deputy Program Administrator, Wetlands and Waterways Program, Water Management Administration, Maryland Department of the Environment, 1800 Washington Boulevard, Suite 430, Baltimore, MD 21230 or by email to elder.ghigliarelli@maryland.gov.

Subsequent to the close of the comment period, the department intends to hold a public hearing on the application in the fall. A public notice announcing the hearing will be published in the Maryland Register, placed on the department's website and mailed to those on the Wetlands and Waterways Program interested persons list.

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If you would rather not receive future communications from State of Maryland, let us know by [clicking here](#).
State of Maryland, 45 Calvert Street Room 145, Annapolis, MD 21401 United States

Attachment 15



Maryland
Department of
the Environment

Larry Hogan, Governor
Boyd Rutherford, Lt. Governor
Ben Grumbles, Secretary
Horacio Tablada, Deputy Secretary

MARYLAND DEPARTMENT OF THE ENVIRONMENT

PUBLIC HEARING ANNOUNCEMENT

**PROPOSED RELICENSING OF THE
CONOWINGO HYDROELECTRIC PROJECT
APPLICATION FOR WATER QUALITY CERTIFICATION**

Date: October 13, 2017

Exelon Corporation, on behalf of its wholly owned subsidiary, Exelon Generation Company, LLC (Exelon), has filed with the Federal Energy Regulatory Commission (FERC) an application for a New License for the continued operation of the Conowingo Hydroelectric Project. Under federal law and as part of FERC's relicensing process, Exelon is required to obtain a Clean Water Act (CWA), Section 401 Water Quality Certification (WQC) from the Maryland Department of the Environment ("MDE" or "the Department"). Section 401 of the CWA requires that any applicant for a federal license or permit for any activity that may result in any discharge into navigable waters obtain from the State in which the discharge originates a certification that any such discharge meets State water quality standards and limitations. In accordance with this requirement, Exelon applied to MDE for the WQC on May 16, 2017.

Applicant: Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, PA 19348

Application # 17-WQC-02
Lower Susquehanna River and Upper Chesapeake Bay
Use I & 2 Waters

The purpose of this public notice is to announce the date of a public hearing on the subject application. A public hearing on the application has been scheduled for the following date, time, and location:

Date: December 5, 2017
Time: 6:00 pm
Location: Harford Community College
Darling Hall, room 202 A,B&C
401 Thomas Run
Bel Air, Maryland 21015

The purpose of the public hearing is to take testimony/statements from interested persons/parties. Depending on the number of speakers, a time limit per speaker may be imposed to ensure that all interested parties have an opportunity to present their views.

Background Information: Exelon's application for the WQC was received on May 16, 2017. The Department's final decision on the application must be rendered by May 15, 2018. On July 10, 2017, pursuant to the Code of Maryland Regulations (COMAR) 26.08.02, Regulation .10 Water Quality Certification, MDE issued a public notice soliciting comments on Exelon's application. The end of the public comment period was subsequently extended from August 9 to August 23, 2017.

The public comments received in response to the Department's July 10, 2017 public notice are posted on the Department's website at the following link:

<http://mde.maryland.gov/programs/Water/WetlandsandWaterways/Pages/chp-comments.aspx>

Exelon's application for the WQC and supporting information is available on the Department's website at the following link:

<http://mde.maryland.gov/programs/Water/WetlandsandWaterways/Pages/ExelonMD-Conowingo-WQCApp.aspx>

Any additional comments on this application may be submitted in writing to Elder Ghigiarelli, Jr., Deputy Program Administrator, Wetlands and Waterways Program, Water and Science Administration, Maryland Department of the Environment, 1800 Washington Boulevard, Suite 430, Baltimore, MD 21230, or email comments to elder.ghigiarelli@maryland.gov. Comments may also be submitted at the public hearing on December 5, 2017. All comments must be received by December 5, 2017.

Attachment 16



Maryland
Department of
the Environment

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor

Ben Grumbles, Secretary
Horacio Tablada, Deputy Secretary

April 20, 2018

Via E-Mail

Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, Pennsylvania 19348
Attn: Joseph Dominguez, Senior Vice President

Re: Water Quality Certificate Application #17-WQC-02
Conowingo Hydroelectric Project

Dear Mr. Dominguez:

I appreciate the additional information Colleen Hicks provided on April 16, as a follow-up to our prior meetings and discussions. I also appreciate the many services Exelon Generation Company, LLC ("Exelon") provides to Maryland's citizens and communities. After reviewing the latest information, however, I believe it is unrealistic to expect that the Maryland Department of the Environment ("MDE") and Exelon can reach a negotiated settlement regarding the water quality certificate ("WQC") for the relicensing of the Conowingo Dam prior to May 17, 2018.

We were optimistic Exelon and the Department could find a constructive solution to the challenges at Conowingo by working together, which is why I invited you and your team to meet with us on December 8, 2017. At that point, I believed we had sufficient time prior to the May 17, 2018 deadline to reach a negotiated settlement.

On January 16, 2018, Exelon submitted a comment letter to MDE asserting that, "Exelon has consistently stated throughout the relicensing process that it is open to providing some level of support to improve Chesapeake Bay water quality as a part of a settlement agreement." I viewed this as a positive sign, which is why I sent Ms. Hicks a letter requesting detailed clarification from Exelon about the offer to provide "some level of support".

When MDE and Exelon met on February 26, 2018, you provided a PowerPoint presentation generally summarizing a potential settlement offer. In a follow-up meeting on March 9, 2018, my staff made it clear to Exelon that the PowerPoint lacked sufficient detail to be actionable.

At our meeting on April 6, 2018, I reiterated the need for more detail about Exelon's settlement proposal. While I appreciate the additional detail Ms. Hicks eventually submitted on April 16, it underscores how much remains unresolved between MDE and Exelon at this late stage.

Exelon Generation Company, LLC
April 20, 2018
Page 2

MDE has the information it needs to issue a WQC for the Conowingo Dam relicensing. With less than 30 days left until the statutory deadline, we are focusing our resources on that task. We are confident we can develop reasonable and necessary conditions to ensure continued progress for the Susquehanna River and Chesapeake Bay. We look forward to constructive partnerships with Exelon and others in the implementation phase of the WQC. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Ben Grumbles". The signature is written in a cursive style with a large, stylized initial "B".

Ben Grumbles
Secretary

Attachment 17



Maryland
Department of
the Environment

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor

Ben Grumbles, Secretary
Horacio Tablada, Deputy Secretary

April 27, 2018

Via E-Mail (colleen.hicks@exeloncorp.com) and overnight mail

Exelon Generation Company, LLC
300 Exelon Way
Kennett Square, Pennsylvania 19348
Attn: Colleen E. Hicks, Manager, Regulatory & Licensing

Re: Water Quality Certificate Application #17-WQC-02
Conowingo Hydroelectric Project

Dear Ms. Hicks:

After thorough consideration, the Maryland Department of the Environment ("MDE") has determined that the above-referenced application meets the statutory and regulatory criteria for issuance of the enclosed Water Quality Certification ("WQC"), which is MDE's final decision on the application. We anticipate the WQC will be published in the May 11, 2018 issue of the *Maryland Register*.

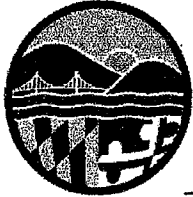
We look forward to working collaboratively with Exelon to implement the WQC.

Sincerely,

A handwritten signature in black ink, appearing to read "Ben Grumbles".

Ben Grumbles
Secretary

Attachment 18



Maryland Department of the Environment

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor
Ben Grumbles, Secretary
Horacio Tablada, Deputy Secretary

FOR IMMEDIATE RELEASE

Media Contact:
Jay Apperson
410-537-3003
jay.apperson@maryland.gov

HOGAN ADMINISTRATION ISSUES COMPREHENSIVE ENVIRONMENTAL PLAN FOR CONOWINGO DAM, SUSQUEHANNA RIVER AND CHESAPEAKE BAY

Newly issued Water Quality Certification for dam will drive major restoration and pollution prevention efforts upstream and downstream to benefit the river and Bay

BALTIMORE (April 27, 2018) – The Maryland Department of the Environment today issued a Water Quality Certification with special conditions for the proposed relicensing of the Conowingo Dam. As part of a comprehensive strategy for Chesapeake Bay restoration, the certification requires the applicant, Exelon Generation Company LLC, to reduce water pollution that flows from the dam to the lower Susquehanna River and, eventually, the Bay.

The certification also requires Exelon to take several steps to reduce sediment and nutrient pollution and improve conditions for aquatic life, including changes in its control of water flow from the dam and installation of equipment to improve migration of fish to upstream spawning areas. It also requires Exelon to improve its management of debris that collects at the dam, including conducting a feasibility study on a solar-powered trash collection wheel.

Science has demonstrated that the Conowingo Dam has lost its capacity to trap sediment and nutrient pollution, which severely threatens the state's and region's ability to meet Chesapeake Bay cleanup goals. The Water Quality Certification, developed in partnership with the Maryland Department of Natural Resources, is part of a comprehensive strategy and regional approach to find solutions and ensure progress in Bay restoration.

"Maryland has taken bold, decisive action to reduce pollution in the Chesapeake Bay and we are making tremendous progress, but all of our progress could be at risk if we do not pursue a comprehensive regional approach to reducing pollution in the Susquehanna River," said Governor Larry Hogan. "From the beginning of our administration we have sounded the warning on the problems caused by the Conowingo Dam. This certification provides a strong framework for working with the upstream states and private partners such as Exelon to take real actions to address the sediment and nutrient pollution problems caused by the dam so we can preserve the Bay for future generations."

"The stringent environmental conditions in the certification are at the heart of a comprehensive strategy to speed up the cleanup of the Bay and hold our partners accountable for doing their part to create a healthier watershed. This water quality certification, based on sound science and law, includes responsible and necessary conditions for pollution prevention and continued progress for the Susquehanna River and the Chesapeake Bay," said Maryland Environment Secretary Ben Grumbles. "This water quality certification is part of a holistic approach, working with Exelon and our fellow watershed states, to meet our Bay restoration goals and help launch a restoration economy."

Since identifying sediment pollution flowing down the Susquehanna as a critical impediment to Bay restoration progress during his campaign for governor, Governor Hogan has convened two Conowingo Dam summit meetings to discuss solutions to the facility's growing threat to the Bay. Following the second summit meeting, the Hogan administration launched a pilot project to dredge behind the dam and develop beneficial reuses for the dredged material. The dam's effect on water quality is also a key element in the midpoint assessment of the multi-state Chesapeake Bay Total Maximum Load (TMDL), or pollution diet, and associated Watershed Implementation Plans (WIPs).

Governor Hogan serves as chair of the Chesapeake Executive Council of the Chesapeake Bay Program, which establishes the policy direction for the restoration and protection of the Bay. In March, consensus was reached on developing a separate Watershed Implementation Plan (WIP) to address the

Conowingo. This summer, the Governor will reconvene the Chesapeake Executive Council to further discussions on the Conowingo WIP and other critical Chesapeake Bay initiatives.

The Conowingo Dam: water quality and relicensing

The presence of any dam, including the Conowingo Dam, influences the flow and conditions of a waterway in ways that affect its ability to naturally transport and process sediment and associated nutrients. For many years, the Conowingo Dam improved water quality in the lower Susquehanna River and Chesapeake Bay by trapping sediment that can contain nutrients. However, because the reservoir has reached capacity the dam is no longer acting as a trap. This leads to additional nutrients – nitrogen and phosphorus that in the past would have been trapped by the dam – entering the Bay.

Exelon is seeking a 50-year federal license renewal for the dam's operation. Under federal law, and as part of the Federal Energy Regulatory Commission's relicensing process, Exelon is required to obtain a Clean Water Act, Section 401 Water Quality Certification from the Maryland Department of the Environment for the continued operation of the dam. The certificate enforces the requirement that the facility's operation comply with state water quality standards.

In 2014, in response to Exelon's initial application for a water quality certification, MDE stated its intent to deny the application due to insufficient information provided by the applicant regarding the water quality impacts of the proposed activity. In recognition of that position, Exelon withdrew its application and agreed to provide up to \$3.5 million for further study of the effects of sediment and associated nutrients on the water quality of the lower Susquehanna River and the Chesapeake Bay.

In May 2017, Exelon submitted the current application for Water Quality Certification for the dam's relicensing. As part of its review, MDE, in close coordination with the Maryland Department of Natural Resources and other agencies, identified all applicable water quality standards and requirements and utilized data, modeling and further scientific analysis, along with materials provided by Exelon and information provided in public comments.

MDE sought to find a constructive solution to the challenges at Conowingo Dam by working together with Exelon, but recently concluded that it is unrealistic for the department and the company to reach a negotiated settlement regarding the water quality certificate prior to the May 17, 2018, deadline, as mandated under the Clean Water Act, for a state response to the application.

The certification's nutrient reduction requirements

The certification establishes a requirement, based on the Clean Water Act, for Exelon to reduce nutrient pollution in amounts equal to what had previously been trapped by the dam. A scientific analysis shows those amounts to be six million pounds of nitrogen and 260,000 pounds of phosphorus a year. Exelon will be required to develop a sediment and nutrient management plan to meet its obligation.

Recognizing the constant challenges posed by upstream pollution flowing down the river, the certification also includes a provision under which Bay watershed states will also make reductions. Under the terms of the certification, the reductions required of Exelon would be reduced by the amount of reductions made by bay watershed states under the new Conowingo WIP. The Bay watershed states have agreed to work together, along with Exelon, to achieve water pollution reductions needed to account for the additional pollution resulting from the loss of the dam's trapping capacity. Those reductions by the states are to be in addition to the reductions each state is already required to make under their pollution reduction plans.

Improving conditions for aquatic life

Exelon controls the flow of water from the Conowingo Dam. The dam's operation causes unnatural flows of water downstream, adversely affecting migratory fish such as the American shad, river herring and American eel, as well as habitat for mussels and other aquatic life. The certification requires Exelon to implement its proposed changes in flow to improve conditions for downstream aquatic life and increase fish migration upstream. It would also allow Exelon 10 years to study flow, at which time Exelon would be required to implement a more natural flow regime, as proposed by the Susquehanna River Basin Commission and the Nature Conservancy and supported by the Chesapeake Bay Foundation and Midshore Riverkeeper Conservancy, unless Exelon can show that some or all of those provisions will not provide significant benefits to migratory fish and other aquatic life.

The certification also requires Exelon to build an additional eel passage facility at the dam and comply with provisions for restoring migratory fisheries contained in a prior fish passage agreement. The Department of Natural Resources will play a key role in overseeing the implementation of provisions to improve conditions for aquatic life and migratory fish passage.

Debris and other conditions

The certification requires Exelon to improve its operation to remove debris, which threatens recreational use of the reservoir for boating and fishing as well as recreational uses and clean water supplies downstream after a large storm. Under terms of the certification, Exelon must more frequently remove debris and must conduct a study on the feasibility of installing and operating a solar-powered trash collection wheel, similar to those used in the Baltimore Harbor.

The Hogan administration and the Chesapeake Bay

Governor Hogan's fiscal year 2019 budget invests a record \$1.2 billion in state funds toward wide-ranging Chesapeake Bay restoration efforts, continuing the Hogan administration's commitment to protecting Maryland's most precious natural asset. With more than \$4 billion toward restoration efforts since taking office, no administration in state history has invested more in its first four years.

The record levels of funding for key Chesapeake Bay conservation and regulatory innovation programs includes \$52.9 million for the Chesapeake and Atlantic Coastal Bays Trust Fund, marking the third year in a row that the Hogan administration has fully funded Bay restoration efforts. The fiscal year

2019 budget marks the first time since 2008 that no funding for transfer tax programs, including Program Open Space, is diverted to the General Fund. In total, these programs receive \$253 million, an increase of \$67 million from the prior fiscal year.

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If you would rather not receive future communications from State of Maryland, let us know by clicking [here](#).
State of Maryland, 45 Calvert Street Room 145, Annapolis, MD 21401 United States