UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Exelon Generation Company, LLC Project Nos. 405-106 and 405-121

COMMENTS ON PROPOSED SETTLEMENT AGREEMENT

Waterkeepers Chesapeake and Lower Susquehanna Riverkeeper respectfully submit these comments on the Joint Offer of Settlement submitted by Exelon Generation Company, LLC ("Exelon") and Maryland Department of the Environment ("MDE") regarding Exelon's application for relicensing of the Conowingo Hydroelectric Project ("Conowingo Dam"). We are joined in these comments by Arundel Rivers Federation, Potomac Riverkeeper, Gunpowder Riverkeeper, and ShoreRivers.

Under the Joint Offer of Settlement ("Proposed Settlement"), MDE would "waive[] any and all rights it had or has to issue a water quality certification under Section 401 of the Clean Water Act" for the relicensing of the Conowingo Dam.[1] MDE cannot "waive[]" its rights to issue a § 401 certification it has already issued. Because the § 401 Certification has been issued, the attempt by MDE and Exelon to wish it out of existence in the Proposed Settlement is unlawful and arbitrary. Accordingly, the proposed settlement itself is unlawful, and approving it would merely invite litigation.

Further, FERC cannot relicense the Conowingo Dam without considering "the protection, mitigation of damage 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," 16 U.S.C. § 797(e), and without including in the Dam's license "conditions for such protection, mitigation, and enhancement," *id.* § 803(j)(1). At a minimum, FERC must consider how much less protection, mitigation, and enhancement that would be provided by the Proposed Settlement compared to by Maryland's § 401 Certification, which sets forth conditions Maryland has found necessary to assure compliance with the Clean Water Act. Relicensing the Dam with nothing more than the scant conditions for "protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat) … protection of recreational opportunities, and … preservation of other aspects of environmental quality" provided by the proposed settlement, *id.* § 797(e)(1), would contravene the Federal Power Act as well as FERC's Settlement Guidelines, and would be arbitrary.

[1] Proposed Settlement at 4.

I. BACKGROUND

I. The Chesapeake Bay and Susquehanna River

The goal of the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[2] To that end, states are first required to set water quality standards for all waters within their boundaries regardless of the sources of pollution.[3] When those water quality standards cannot be met and maintained through effluent limitations and technology-based controls on point sources, water quality-based controls are required under Section 301(b) of the Act. States are required to identify waters within its boundaries that cannot achieve water quality standards based on effluent limitations, and then "shall establish for . . . [impaired] waters . . . the total maximum daily load, for those pollutants which the Administrator identifies . . . as suitable for such calculation."[4]

A TMDL (total maximum daily load) is a specification of the maximum amount of a particular pollutant that can pass through a waterbody each day without water quality standards being violated.[5] Such "load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge. . .."[6] Once the 303(d) list and any TMDLs are approved by the EPA, states must incorporate the list and TMDLs into its continuing planning process.[7] Critically, any permit issued under § 402 of the Clean Water Act must be consistent with assumptions and requirements of any available waste load allocation in an approved TMDL, just as any certification issued under § 401 of the Clean Water Act must comply with applicable effluent limitations and water quality standards and requirements of the Clean Water Act or applicable State Law. Unless TMDLs are appropriately translated into permit limits and certification conditions, TMDLs will be rendered ineffective as a means of ensuring water quality standards are met.

On December 29, 2010, the U.S. Environmental Protection Agency established the Chesapeake Bay Total Maximum Daily Load (TMDL) under §§ 303 and 317 of the Clean Water Act. The Bay TMDL is not like any of the other 75,000 TMDLs issued. It represents a historic and comprehensive agreement that includes an additional accountability framework specific to this Bay TMDL that is designed to provide additional assurance necessary to restore clean water acknowledging the particular difficulty of coordinating action among the seven jurisdictions within the Chesapeake Bay Watershed. The agreement is a national and indeed international model for watershed restoration. It sets limits for pollution that equate to a 25 percent reduction

[2] 33 U.S.C. § 1251(a).
[3] 33 U.S.C. §1313(a)(3)(A).
[4] 33 U.S.C. § 1313(d)(1)(C).
[5] *Id*.
[6] *Id.*
[7] *Id*. at § 303(d)(2).

in nitrogen, 24 percent reduction in phosphorous and 20 percent reduction in sediment.[8] These pollution limits are further divided by jurisdiction and major river basin based on modeling tools, monitoring data, peer-reviewed science and close interaction with jurisdiction partners. "The TMDL is designed to ensure that all pollution control measures needed to fully restore the Bay and its tidal rivers are in place by 2025, with at least 60 percent of the actions completed by 2017."[9]

Since the issuance of the TMDL in 2010, the courts have not only upheld the legality of the Bay TMDL against challenges by trade associations, but affirmed the critical roles and responsibilities of EPA and each state to the Bay TMDL accountability framework. As the Third Circuit has noted, the "Clean Water Act does not simply direct the publication of the TMDL; it is one step in a process with several layers, each placing primary responsibility for pollution controls in state hands with 'backstop authority' vested in the EPA."[10]Section 117 of the Act establishes responsibilities for EPA and the states to take certain actions regarding the implementation of the Chesapeake Bay Agreement and the Chesapeake Bay TMDL.[11] Section 117(g) states that the EPA Administrator, "*in coordination with other members of the Chesapeake Executive Council [of which Maryland's Governor is the current Chair], shall ensure that management plans are developed and implementation is begun* by signatories to the Chesapeake Bay Agreement to *achieve and maintain* (A) the *nutrient goals* of the Chesapeake Bay Agreement for the quantity *of nitrogen and phosphorous* entering the Chesapeake Bay and its watershed; (B) the water quality requirements necessary to restore living resources in the Chesapeake Bay ecosystem; … (D) habitat restoration, protection, creation, and enhancement goals established by Chesapeake Bay Agreement signatories for wetlands, riparian forests, and other types of habitat associated with the Chesapeake Bay ecosystem; and (E) the restoration, protection, creation, and enhancement goals established by the Chesapeake Bay Agreement signatories for living resources associated with the Chesapeake Bay ecosystem."[12]

Susquehanna

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[8] Chesapeake Bay TMDL, Executive Summary at 1 (Dec. 29, 2010), https://www.epa.gov/sites/production/files/2014-12/documents/bay_tmdl_executive_summary_final_12.29.10_final_1.pdf.

[9] *Id.*

[10] *Am. Farm Bureau Fed'n v. United States EPA*, 792 F.3d 281, 289 (3d Cir. 2015).

[11] In 2014, the Bay states signed the most recent iteration of the Chesapeake Bay Watershed Agreement, and included the goals and outcomes established for water quality in the Bay TMDL. One of the key goals of the Agreement is to "reduce pollutants to achieve the water quality necessary to support the aquatic living resources of the Bay and its tributaries and protect human health." *Chesapeake Bay Watershed Agreement* at 7 (2014), https://www.chesapeakebay.net/documents/FINAL_Ches_Bay_Watershed_Agreement.withsignatures-HIres.pdf.

[12] 33 U.S.C. § 1267(g) (emphasis added).

The Susquehanna River provides nearly half of the Bay's freshwater, 41% of its nitrogen, 25% of its phosphorus and 27% of its sediment load. These pollutants come from wastewater treatment plants, polluted agricultural, urban, and suburban runoff and other sources of pollution throughout the Susquehanna River watershed. Since its construction in 1928, Conowingo Dam has been trapping sediment, nitrogen, and phosphorus pollution in the reservoir behind the structure. However, scientists now acknowledge that this capacity to trap sediments is substantially diminished.

Conowingo in the TMDL (Appendix T)

When the TMDL was established in 2010, it was believed that the Conowingo Dam would continue to trap a portion of the sediment and nutrient pollution flowing down the Susquehanna River, at least through 2025.[13] This trapping capacity was factored into the projections of the pollution reductions that would be needed under the Bay TMDL. Newer research determined that the reservoir behind Conowingo Dam has effectively filled-in and hence, larger pollution reductions are needed to meet the Bay's water quality standards than originally calculated. Making the situation even more challenging, climate conditions in this region are projected to result in greater flows through the Conowingo Dam, and this climate analysis is an essential component of the state certification process. Furthermore, any increases in nutrient and sediment pollution from the dam due to climate change were simply not considered in the Chesapeake Bay TMDL, as originally drafted.

II. Water Quality Impacts of the Conowingo Dam

The Conowingo Hydroelectric Project is a 100-foot concrete dam and integrated power plant that traverse the Susquehanna River in Maryland, approximately 10 miles north of its confluence with the Chesapeake Bay. The Conowingo Dam Project has profoundly altered the Lower Susquehanna River system. It has historically trapped an average of 50-67% of the annual sediment load (1.5 to 2 million tons),[14] along with the nitrogen and

[13] Chesapeake Bay TMDL, Appendix T (Dec. 29, 2010), https://www.epa.gov/sites/production/files/2015-02/documents/appendix_t_susquehanna_dams_final.pdf.

[14] *See* Final Study Report: Sediment Introduction and Transport Study: RSP 3.15 at 11, 14-15 (Aug. 2012) ("FSR 3.15"),

phosphorus attached to the trapped sediment. If not for the Conowingo Dam, this load would have been delivered to the Lower Susquehanna River and Chesapeake Bay at normal rates. Exelon incorrectly claims that the Conowingo Dam Project has functioned as a "best management practice" for the Chesapeake Bay, but this is an overly simplistic portrayal of the Project's effects. In fact, the Dam and its reservoir have produced an enormous artificial repository of sediment and associated nutrients that can be scoured by high flow events, re-mobilized, and delivered downstream by large storm-induced flows.[15] In fact, these scoured loads add pollutant loads at times when the downstream receiving waters are already vulnerable, receiving their heaviest loads of suspended pollution from the Susquehanna River Watershed.[16]

The threshold flow needed to produce scouring will be surpassed many times during the requested license period.[17] As the U.S. Geological Survey stated in a 2012 peer-reviewed report:

> The evidence presented in this report indicates that the predicted changes are <u>not just a theoretical issue for future consideration, but are already underway</u>. These changes in the reservoirs are already overwhelming the progress being made to reduce constituent loads from the Susquehanna River watershed. Therefore, efforts to reduce nutrient and sediment inputs to the Chesapeake Bay will need to include consideration of changes in the trapping of sediment entering, and scouring of sediment in, the reservoirs along with the management actions implemented upstream in the watershed.[18]

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http://mde.maryland.gov/programs/Water/WetlandsandWaterways/Documents/ExelonMD/FERC/Conowingo-FRSP-3.15.pdf; *id*. at 58 tbl.3.2-1 (citing Michael J. Langland, *Bathymetry and Sediment-Storage Capacity Change in Three Reservoirs on the Lower Susquehanna River, 1996-2008* (2009) (hereafter "Langland (2009)"): sediment accumulation rate for 1996-2008 was 1.5 million tons/year; for 1959-2008 average rate was 2 million tons/year); *see also* FSR 3.15 Appendix F at 5 (Exelon's bathymetric survey of Conowingo Pond, estimating 1.45-1.69 tons deposited annually based on 2008-2011 average).

[15] *See* FSR 3.15 at i, 10-11; Michael J. Langland & Robert A. Hainly, *Changes in Bottom-Surface Elevations in Three Reservoirs on the Lower Susquehanna River, Pennsylvania and Maryland, Following the January 1996 Flood; Implications for Nutrient and Sediment Loads to Chesapeake Bay* (1997) (hereafter, "Langland & Hainly (1997)"); Langland (2009); Robert M. Hirsch, *Flux of Nitrogen, Phosphorus, and Suspended Sediment from the Susquehanna River Basin to the Chesapeake Bay during Tropical Storm Lee, September 2011, as an Indicator of the Effects on Reservoir Sedimentation on Water Quality* (2012) (hereafter "Hirsch (2012)").

[16] LSRWA at 78 (noting that proportion of scoured sediment loads increases with higher flows); *id*. Table 4-7 (Scour and Load Predictions for Various Flows in Conowingo Reservoir).

[17] LSRWA at 65, Table 4-3.

[18] Hirsch (2012) at 13.

Thus, scoured loads deliver much greater quantities of sediment and nutrients to the Chesapeake Bay than the natural loading that would have occurred during the same flow events had the Project not been in place. This is particularly true during very large storms, such as 25-year, 50-year, 75-year, and 100-year return interval flow events, for which there is a substantial likelihood of repeated occurrence during the requested license period. As discussed below, project-induced scouring could overwhelm pollution reductions undertaken upstream in the Lower Susquehanna River watershed.

Indeed, the effects of climate change will likely lead to more frequent and severe scouring events at the Project. Over the past century or so, the Northeast (including the Chesapeake Bay region) has experienced increases in the average annual temperature, amount of precipitation, and number of extreme precipitation events, and these trends are expected to continue and strengthen in the coming years due to climate change.[19] For example, the average temperature in the Northeast is expected to rise between 2.7 and 3°F by 2035, between 3.6 and 4.8°F by 2055, and between 4.7 and 8°F by 2085, compared with the average temperature in 1971-1999.[20] In addition, the annual amount of precipitation in the Northeast is expected to increase between 2-7% in 2041-2070, compared with 1971-2000.[21] Finally, the frequency of extreme precipitation, defined as the number of days with over an inch of precipitation, is expected to increase by about 10-20% in the Chesapeake Bay watershed by 2041-2070, compared with 1971-2000.[22] These significant climate-related impacts must be considered by MDE during the certification process because they will likely increase the predicted levels of scouring threshold exceedances that were originally assumed for the Project. As shown in the attached weather data spreadsheet, the forecasting trendline for precipitation in this region has increased steadily from 1995 to 2019 and an extension of this trendline would indicate further increases.[23]

The Dam and its Reservoir have thus produced an enormous artificial repository of sediment and associated nutrients, which are available to be "scoured" by high flow conditions like storms or snow melt events, and then dumped all at once into the Lower

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[19] K. E. Kunkel, L. E. Stevens, S. E. Stevens, L. Sun, E. Janssen, D. Wuebbles, J. Rennells, A. DeGaetano, and J. G. Dobson, 2013: Regional Climate Trends and Scenarios for the U.S. National Climate Assessment: Part 1. Climate of the Contiguous United States, NOAA Technical Report NESDIS 142-9, *available at* https://scenarios.globalchange.gov/sites/default/files/NOAA_NESDIS_Tech_Report_142-1-Climate_of_the_Northeast_U.S_1.pdf ("Kunkel *et al*."); *see also* Raymond Najjar, *Climate Change in the Northeast U.S.: Past, Present, and Future*, The Pennsylvania State University, Chesapeake Climate Projections Workshop, March 7-8, 2016, available at http://www.chesapeake.org/stac/presentations/258_Najjar%20Climate%20Chesapeake.pdf ("Najjar").

[20] Kunkel *et al.* at 35, 38.

[21] *Id*. at 56.

[22] *Id.* at 57-61

[23] Weather data spreadsheet, Ex. A hereto.

Susquehanna River, the Susquehanna Flats (the shallow underwater delta of the Susquehanna River), and the upper Chesapeake Bay.[24] Scoured loads deliver much greater quantities of sediment and nutrients to the Lower Susquehanna River and Chesapeake Bay than the natural loading that would have occurred during the same flow events had the Project not been in place. The resulting excessive concentrations of sediment and nutrients impair aquatic wildlife habitat by fueling excessive algae growth, blocking light penetration that is critical to underwater life, and physically smothering sensitive aquatic life, including underwater vegetation and oyster beds.[25] Particularly in the case of very large storms, scouring of the Project's sediment accumulation could overwhelm pollution reduction efforts undertaken upstream in the Lower Susquehanna River watershed, and set water quality and the growth of underwater grasses in the Susquehanna Flats and Chesapeake Bay back for decades. Ex. B at 13.

Maryland Water Quality Standards

Maryland has adopted a number of water quality standards that are applicable to the Conowingo Hydroelectric Project's receiving waters, including "designated uses" and the numeric and narrative water quality criteria designed to protect those uses. 33 U.S.C. § 1313(c)(2)(A). The portion of the River from the Dam to the River's confluence with the Bay is designated to be used for "water contact recreation, public water supply, habitat for non-tidal warmwater aquatic life, estuarine and marine aquatic life and shellfish harvesting, migratory spawning and nursery, seasonal shallow water submerged aquatic vegetation (SAV), and Open-Water Fish and Shellfish."[26] Maryland has also adopted numeric criteria that apply to these waters, and that govern toxic substances, color, turbidity, temperature, pH, and dissolved oxygen.[27] In addition, this segment of the River is covered by narrative water quality criteria that prohibit pollution by any material in an amount that would produce objectionable color for aesthetic purposes, or would interfere directly or indirectly with designated uses, among other things.[28]

The designated uses of the Chesapeake Bay include support of "aquatic life, fishing, seasonal migratory fish spawning and nursery, seasonal shallow water [submerged aquatic vegetation], … open-water fish and shellfish uses, seasonal deep-

[24] Lower Susquehanna Riverkeeper *et al*., *Comments Re: Conowingo Hydroelectric Project, Application for Water Quality Certification, Application # 17-WQC-02* at 7-8 (Sept. 11, 2017), Ex. B hereto.
[25] *Id*.; Ex. B at 12-13, ¶ 6.G-J.
[26] Maryland Department of the Environment, Clean Water Act Section 401 Certification for the Conowingo Hydroelectric Project FERC Project No. P-405/MDE WSA Application No. 17-WQC-02 ("Certification") at 8-9, ¶ 5.B.i, Ex. C hereto.
[27] *Id.*
[28] *Id*.

water fish and shellfish, [and] seasonal deep-channel refuge."[29] To implement these designated uses Maryland has adopted a set of numeric criteria for dissolved oxygen that are specific to a variety of timeframes and seasons.[30] The Bay is also covered by narrative criteria that prohibit pollution by materials or substances that are unsightly, putrescent, odorous, create a nuisance, or interfere directly or indirectly with designated uses.[31]

Maryland's Water Quality Certification.

Clean Water Act § 401 requires Exelon to obtain a certification from MDE that "any discharge" from the Conowingo Dam "will comply with the applicable provisions of" Clean Water Act §§ 301, 302, 303, 306, and 307. 33 U.S.C. § 1341(a)(1). It requires that all conditions "necessary to assure" compliance with these provisions become conditions on the Conowingo Dam's license. *Id.* § 1341(d). On April 27, 2018, MDE issued a § 401 Certification for the Conowingo Dam. Clean Water Act Certification for the Conowingo Hydroelectric Project. In its Certification, Maryland found that operations of Conowingo Dam had the following impacts on water quality:

A. The Project has significantly and adversely impacted biota in the Lower River and the northern Bay over the past 90 years of operation, as a result of: (i) its highly unnatural operational flow regimes; (ii) the Dam serving as a barrier to fish passage upstream; and (iii) the Dam serving as an obstacle to fish passage and coarse-sediment transport for habitat downstream. Aquatic habitat in the Tailrace is adversely affected by daily peaking flows and the elimination of movement of some coarse-grained sediments that are stored in the Reservoir. Daily peaking hydropower operation also results in high velocities and excessive turbulence in water discharged through the Dam, which reduces deposition of any available coarse-grained sediment and affects the amount of Lower River habitat available to species such as Shad, Herring, Sturgeon, Eels, turtles, and freshwater mussels, as well as SA V and macro-invertebrate communities.

B. When initially constructed and for many decades of its initial operation, the Project had no provision for fish to move upstream and did not maintain any minimum level of water flowing downstream. Fish kills occurred downstream and the quantity and quality of suitable habitat for riverine species in the River were adversely impacted. The duration of time before the Project was required to maintain any amount of daily minimum flow downstream throughout the year, and before any working fishlift was constructed to allow fish to move by their own volition upstream, has had significant consequences for the health of the aquatic system from above the Dam to the northern Bay.

[29] Certification at 10, ¶ 5.B.ii.
[30] *Id.*
[31] *Id.*

C. As currently operated, the Project's peaking flow regime, characterized by drastic daily changes in water depth below the Dam and velocities of discharge over a period of one hour, continues to cause fish kills downstream by stranding fish in shallow pools with insufficient water and subjecting them to increased threat of predation. The flow regime also delays upstream movement of important migratory spawning species such as Shad and Herring, and adversely impacts downstream habitat and the integrity of the downstream aquatic system.

D. Additional provision for fish passage *is* necessary to assist in the recovery of historic fish populations. Prior to the construction and operation of the Project, species such as Shad and Herring spawned in prime spawning habitat in the River above the current location of the Dam. The River and northern Bay were vibrant and active fisheries for these species. With a healthy aquatic system, millions of Shad and Herring should be passing upstream in the River every year; in 2017, only 15,000 Shad and 65 Herring passed the Dam. Millions of Eel, an important host species for freshwater mussels that filter pollution out of waters, should be present in the Lower River, including areas upstream of the Dam; in 2017, only thousands were collected at the base of the Dam and transported upstream. Consequently freshwater mussel populations have declined dramatically in the system. The River should support tens of millions of freshwater mussels; today, the freshwater mussel population is significantly diminished above and below the Dam such that it is considered unviable.

E. The Reservoir, formed by the construction of the Project, replaced 14 miles of flowing, dynamic River habitat with an impoundment and fundamentally altered aquatic habitat. The Reservoir lacks suitable habitat for freshwater mussels, which has adverse consequences for water quality, as these organisms provide important ecosystem services of filtration and transformation of sediment and nutrient pollution. Reservoir-adapted fish such as gizzard shad have replaced and continue to threaten populations of riverine species that would typically be dominant. The Reservoir has elevated levels of chlorophyll-A during summer months with increased water temperatures, which impact drinking water supply uses of the water. Elevated PCB levels in fish tissue in fish in the Reservoir and below the Dam impact fish consumption- related uses, and have triggered the development of TMDLs to address these impairments.

F. Invasive fish species, which may be more likely to proliferate in a degraded system, passing the Dam have the potential to suppress native species, alter the food web and reduce biodiversity. Invasive species including the blue catfish *(lctalurus furcatus)* and northern snakehead *(Channa argus)* have spread throughout the Bay watershed. Based on information from the Licensee, a snakehead or blue catfish has already passed volitionally through a fishlift at the Project in 2017. The blue catfish and snakehead are both top predators in areas where they have become established and would further threaten the ecological balance

of the River.

G. Although the Dam has in the past trapped and stored sediment and nutrients and served as a barrier to downstream transport to the Bay, the Reservoir is now full, as no efforts have been undertaken over the life of the Project, such as routine dredging, to maintain any trapping function. As a result, sediments and nutrients move downstream, and during large storm events, significant amounts of trapped sediment and nutrients are scoured from the behind the Dam and discharged downstream. By releasing significant amounts of sediment and nutrients through scouring during storm events, the Dam has altered the nature, timing, and delivery method of these materials with adverse consequences for the Lower River and the Bay. Nutrients discharged as a result of the in-filled state of the Reservoir adversely impact DO levels and thus aquatic life in the DO Non-Attainment Area.

H. In-filling of the Reservoir with sediment increases the velocity of water in the Reservoir, and the altered hydrological dynamics result in unfavorable substrate conditions and a generally sparse invertebrate community in the lower two-thirds of the Reservoir. Increased water velocity also increases bed shear and induces additional scour and movement downstream of sediment and associated nutrients.

I. The Project traps trash and debris behind the Dam, which accumulates over time, threatening recreational uses of the Reservoir and potentially concentrating pollutants, and if not removed regularly is vulnerable to sudden downstream transport during moderate to large storm events. Significant amounts of trash and debris moving downstream in single events creates hazards for recreational uses and blocks water supply intakes downstream.

J. Absent the Dam, there would be 24 miles of open river between the dam at Holtwood and the Bay, and there would be some natural transformation and attenuation of sediment and nutrients, as the River would be better connected to its floodplain and there would be coarse sediment regularly moving downstream. This would support larger SA V beds, and the area downstream of the head of tide (about 5 miles from the mouth of the River) would have a larger delta formed from deposition of sediment carried by the River as its flow enters the slower moving water in the Bay. More coarse sediment, floodplain connection, and SA V would make the River system more resilient, including its ability to attenuate nutrients and minimize damage associated with moderate to large rainfall events.[32]

To address this wide array of water quality impacts, Maryland's Certification imposes a number of conditions intended to implement water quality criteria for dissolved oxygen and to support the related designated uses. The Certification states expressly: "The Department hereby certifies that the Project's operations and discharge into navigable waters will comply with applicable effluent limitations, other limitations, and water quality

[32] Certification at 11-12.

standards and requirements issued or approved under Sections 301, 302, 303, 306, and 307 of the Clean Water Act or applicable State Law, provided that Licensee complies with all of the provisions, requirements, and conditions in this Certification." Certification at 7 (emphasis added). Thus, it confirms that "compli[ance] with all of the provisions, requirements and conditions" in the Certification is necessary to assure the Dam's compliance with water quality standards. The Certification states plainly that it is MDE's "final decision."[33]

The Certification requires Exelon, among other things, to "annually reduce the amount of nitrogen included in the Project's discharges by six million (6,000,000) pounds and the amount of phosphorus in the Project's discharges by two hundred sixty thousand (260,000) pounds (or such different amounts of phosphorus and nitrogen reductions as may be approved by [the Maryland Department of the Environment], provided that such different amounts of nitrogen and phosphorus reductions provide the equivalent protection of [dissolved oxygen] levels...)."[34]

The Certification allows Exelon to propose to meet these reduction requirements through "any combination" of reduction strategies, including:

a) Payment of an in-lieu fee annually at $17.00 per pound of nitrogen and $270.00 per pound of phosphorus in accordance with payment instructions provided by MDE from time to time; *provided*, that the in-lieu fee amounts of $17.00 and $270.00 are deemed effective as of January 1, 2019 and shall be adjusted for inflation on January 1, 2020 and on January 1 of each year thereafter, based on the cumulative change in the CPI;
b) Installation of best management practices and/or ecosystem restoration actions (e.g., restoration of buffers, land conservation, stream and wetland restorations, re-forestation, and/or freshwater mussel and oyster restoration); and/or
c) Dredging the Reservoir, subject to Licensee obtaining all necessary Authorizations for such dredging.[35]

Based on the payment in lieu schedule provided in the Certification, if Exelon were to choose to make payment for the full nutrient reduction loading, it would amount to $172 million per year. Over the life of the 50 year license period, this would amount to payment of $8.6 billion for nutrient reduction in the Susquehanna River and the Chesapeake Bay, yielding a present value of $4,977,295,606.00.

The Certification also establishes other important conditions that are necessary to ensure compliance with the Clean Water Act. It requires Exelon to:

[33] Certification at 27.
[34] *Id*. at 15, ¶ 7.D.ii.
[35] *Id*. at 16, ¶ 7.D.iv.

- ensure that the water downstream of the Dam meets water quality standards for dissolved oxygen (DO), continuously monitor DO levels, report of exceedances, and implement of corrective actions;[36]
- ensure the passage past the Dam of 5 million Shad and 12 million Herring each year;[37]
- meet specific numeric flow levels;[38]
- remove trash and debris from the reservoir behind the Dam, respond promptly to complaints about trash and debris, and submit a study regarding the feasibility of "trash wheel" technology;[39]
- submit and implement a plan to monitor chlorophyll-A levels in the reservoir and, if these levels ever exceed Water Quality Standards, submit and implement a plan to reduce them;[40]
- reduce PCB levels in the Reservoir or the Dam's discharges if MDE determines it to be necessary;[41]
- comply with limitations on its use of land on the shoreline of the Dam;[42]
- submit plans for the protection and enhancement of bog turtles and northern map turtles, including the protection and enhancement of their habitat;[43]
- submit a waterfowl nesting protection plan;[44]
- submit a plan to provide the best available real-time monitoring of flow in the Tailrace, and submit monitoring results no less than annually;[45]
- submit a plan for the protection and enhancement of Sturgeon populations, including provisions to prevent the stranding of Sturgeon as a result of Dam operations;[46]
- submit a plan for implementing Habitat Improvement Projects, targeting habitat improvements for Shad, Herring, freshwater mussels, native EAV and SAV, shortnose Sturgeon, smallmouth bass, and macroinvertebrates;[47]
- submit a plan to monitor and protect fish in the Lower River, specifically targeting the endangered Maryland Darter, and the threatened Chesapeake Logperch;[48] and

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[36] Certification at 16-17, ¶ E.
[37] *Id.* at 13, ¶ B.
[38] *Id.* at 14-15, ¶ C & Att. 4-5.
[39] *Id.* at 17-18, ¶ F.
[40] *Id.* at 18-19, ¶ G.
[41] *Id.* at 19, ¶ H.
[42] *Id.* at 19-20, ¶ I.
[43] *Id.* at 20, ¶ J.
[44] *Id.* at 20-21, ¶ K.
[45] *Id.* at 21, ¶ L.
[46] *Id.* at 21, ¶ M.
[47] *Id.* at 21-22, ¶ N.
[48] Certification at 22, ¶ O.

- submit a plan to modify the spillway Trailrace and/or modify operational flow practices to reduce the numbers of rare, threatened, or endangered fish species that are stranded by Dam operations.[49]

In addition, the Certification contains several general requirements relating to Exelon's compliance with the Certification's conditions and other legal obligations, penalties for noncompliance, and monitoring, inspection, recordkeeping and reporting requirements to ensure compliance with the Certification and other legal obligations.[50] As noted above, Maryland determined that all of these conditions are necessary to assure compliance with the Clean Water Act.[51]

The Proposed Settlement

In response to Maryland's issuance of the Certification, Exelon embarked on a litigation campaign, challenging both the Certification and Maryland's authority to issue it in actions filed before this Commission, Maryland courts, and a Federal district court. Exelon's litigation before FERC and in Federal district court remains pending. Exelon's suit in Maryland state court has been dismissed, and Exelon has filed an appeal of that decision.

In the litigation to date, Maryland has vigorously defended the Certification and its right to issue the Certification. Nonetheless, on October 29, 2019, Maryland entered into a proposed settlement agreement with Exelon, without the involvement or input of any other interested parties. Under the proposed settlement, Maryland would waive its right to issue a water quality certification,[52] despite having already issued the water quality Certification on April 27, 2018. That Certification was subject to public notice and comment as well as public hearing.

Although as noted above, Maryland necessarily determined that the specific conditions in the Certification are necessary to assure compliance with water quality standards, these conditions are absent from the Proposed Settlement. In the Proposed Settlement, there simply is no explanation of the water quality impacts of Conowingo operations, nor is there any discussion of how these impacts, clearly identified in the water quality Certification, can be addressed by the proposed settlement terms. Nowhere does the Proposed Settlement explain why Maryland believes the conditions in the Certification – conditions Maryland has determined to be necessary to assure compliance with water quality standards – are now unnecessary. In fact, the vague provisions and meager cash payments, as compared to those in the water quality Certification, provide no assurance that *any* state water quality standards will be met.

[49] *Id.* at 22, ¶ P.
[50] *Id.* at 22-27, ¶ Q.
[51] *Id.* at 7.
[52] Proposed Settlement at 4-5.

Under the Proposed Settlement, Maryland also would waive any discharge permit requirements for the Conowingo Project for the entire 50 year time-period of the proposed settlement.[53]

II. ARGUMENT

I. THE PROPOSED SETTLEMENT VIOLATES THE CLEAN WATER ACT, THE ADMINISTRATIVE PROCEDURE ACT, AND MARYLAND'S REGULATIONS.

A. EPA Cannot Undo Its Certification By Waiving The Right To Make It.

MDE's Certification of the Conowingo Dam is a final decision that can be appealed through the administrative appeal process provided by Maryland's regulations, which provide for the "Appeal of Final Decision."[54] Exelon and commenters have filed administrative appeals, and MDE has never disputed that these still-pending appeals are properly before it as appeals of a final decision.[55]

Clean Water Act § 401(a) provides that an applicant for a Federal license to conduct any activity which may result in any discharge into navigable waters, "shall provide the licensing or permitting agency a certification from the state in which the discharge originates or will originate."[56] The only way an applicant can obtain a license without such a certification is "[i]f the State … fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request…"[57] In those circumstances only, the Act provides that "the certification requirements of this subsection shall be waived with respect to such Federal application."[58] The D.C. Circuit has made plain that "the purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401."[59] The purpose of the waiver provision is not to allow States to back out of certification decisions they have already made, or to reverse certifications they come to view as inconvenient, without going through notice and comment rulemaking procedures.

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[53] Proposed Settlement at 16-17, ¶ 3.6.
[54] Code of Maryland Regulations (COMAR) § 26.08.02.10(F)(4).
[55] The Maryland Circuit Court has held that the Certification is not final action for the purpose of "judicial review" because MDE's own appeals process is not yet exhausted. Exelon v. MDE, No. 24-C-18-003410, Memorandum Opinion and Order of October 9, 2018, attached, at 17.
[56] 33 U.S.C. § 1341(a)(1).
[57] *Id.* (emphasis added).
[58] *Id.*
[59] *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1101 (D.C. Cir. 2019) (quoting *Alcoa Power Generating, Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011)).

Here, Maryland neither "fail[ed]" nor "refuse[d]" to act on Exelon's request.[60] To the contrary, MDE acted by reaching a final decision and issuing the Certification. Indeed, Exelon and MDE have jointly represented to FERC that "[o]n April 27, 2018, MDE issued a water quality certification for the Project pursuant to Section 401 of the Clean Water Act (CWA)…"[61] Because MDE neither refused nor failed to act on Exelon's certification request, but instead acted by issuing the Certification, MDE's attempt to waive its right to issue a certification now exceeds MDE's statutory authority and contravenes the Clean Water Act. Because MDE's waiver of rights on which the proposed settlement depends is unlawful, the settlement itself is unlawful.

Although the lack of statutory authority for MDE's waiver is reason enough to reject the settlement as unlawful, another compelling reason is that regardless whether MDE waives its rights to issue a certification, the Certification already exists. Under § 401, this Certification "shall become a condition" of Exelon's license.[62] Because the existing Certification "shall" be a part of Exelon's license, Exelon must comply with all the requirements of the Certification regardless whether MDE subsequently waives its rights to issue a certification. If Exelon fails to comply with all requirements in the Certification it will be violating the conditions of its license and subject to enforcement actions.

Alternatively, even if MDE's purported waiver of its rights to issue a § 401 certification could be considered a withdrawal of the existing Certification – which it is not – it would exceed MDE's statutory authority and be unlawful. Although the Clean Water Act recognizes that states may refuse to issue water quality certifications, it does not authorize states to withdraw water quality certifications. States acting under the Clean Water Act have only the authority that this statute grants them. Because the Clean Water Act does not authorize Maryland to withdraw its § 401 Certification, Maryland may not do so.

Maryland's regulations appear to contemplate the withdrawal of a water quality certification, but only through the appeal process they set forth. They provide for applications for a certification,[63] for public notice of such applications,[64] for public hearings on water quality certifications,[65] and for the issuance of water quality certifications,[66] They then provide for the appeal of MDE's decisions concerning water quality certifications,[67] indicating that if MDE reconsiders its decision in that appeal process (or if MDE's decision is reversed by a court), the Certification may be withdrawn or vacated. There are no other provisions that authorize or even

[60] 33 U.S.C. § 1341(a)(1).
[61] Proposed Settlement at 3 (emphasis added).
[62] 33 U.S.C. § 1341(d).
[63] COMAR § 26.08.02.10(B).
[64] *Id*. § 26.08.02.10(C).
[65] *Id*. § 26.08.02.10(D) & (F).
[66] *Id.* § 26.08.02.10(E).
[67] *Id*. § 26.08.02.10(F)(4).

contemplate the withdrawal of water quality certifications, and certainly none that allow MDE to take this step simply by announcing that it is "waiving" the Certification it has already issued.

Assuming *arguendo* that a § 401 certification can be withdrawn once it has been issued, outside the appeal process provided in Maryland's regulations, such an action is equal in practical and legal significance (if opposite in effect) to the issuance of a certification. Accordingly, any such withdrawal must satisfy the same notice-and-comment rulemaking requirements as the issuance of the Certification itself. MDE must provide notice of its intent to withdraw the Certification and an opportunity for public comment on the withdrawal.[68] MDE must hold a public hearing.[69] MDE must then issue an appealable final determination in accordance with § 26.08.02.10(F)(3) and (F)(4)(a).

Here, because MDE's existing § 401 Certification reflects MDE's determination that several specific conditions are necessary to assure compliance with water quality standards, any attempt by MDE to withdraw the certification would require MDE to make a valid finding, supported by substantial evidence, that the conditions in the Certification are not necessary compliance with water quality standards.

MDE has not taken any of these steps. It has not purported to withdraw its § 401 Certification, through notice-and-comment rulemaking or otherwise, and it has never found or even suggested that the conditions it determined to be necessary for compliance with water quality standards are not actually necessary. If a § 401 certification can be withdrawn at all outside the appeal process, and MDE's action could be considered a withdrawal of the Certification MDE issued to Exelon, such withdrawal would contravene the notice-and-comment rulemaking requirements in Maryland's regulations as well as those in the Administrative Procedure Act. It also would be arbitrary and capricious, because it would not be supported by substantial evidence.

B. Any Attempt To Excuse Exelon From Compliance With The Conditions Of MDE's § 401 Certification For The Conowingo Dam Would Contravene The Clean Water Act.

Clean Water Act § 401(d) provides that "[a]ny" certification provided under § 401 "shall become a condition on any Federal license or permit subject to the provisions of this section." 42 U.S.C. § 1341(d) (emphasis added). It is beyond dispute that MDE's § 401 Certification of the Conowingo Dam currently exists. Because that Certification is a "certification provided under" § 401, it "shall" become a condition on Conowingo's Federal license. *Id.* Unless the MDE's § 401 Certification for the Conowingo Dam is lawfully withdrawn and eliminated – which it has not been – the Certification's conditions must become conditions on the Dam's license. Accordingly, no matter what FERC decides to do with the Proposed Settlement, any license it grants to Exelon must include the conditions in MDE's § 401 Certification.

[68] COMAR § 26.08.02.10(C).
[69] *Id.* § 26.08.02.10(D), (F)(1)-(2).

Even more fundamentally, the conditions in the § 401 Certification are all conditions that MDE found "necessary" to assure compliance with the Clean Water Act. The Certification expressly states that the Dam will comply with the Clean Water Act "provided that Licensee complies with all of the provisions, requirements, and conditions in this Certification."[70] Although MDE now offers to waive its right to issue a certification as part of the Proposed Settlement, MDE has never withdrawn, qualified, or even questioned its conclusion that compliance with "all of the provisions, requirements, and conditions" in the Certification are necessary to assure compliance with water quality standards.

Although assuring compliance with the Clean Water Act is not FERC's primary obligation, FERC is an agency of the Federal government and the Clean Water Act is a Federal law. FERC should not accept a settlement that eliminates conditions that have been found necessary – by the state in which a major dam is located – to assure that dam's compliance with water quality standards. The situation might be different if MDE had reversed or revised its conclusion that all the conditions in its § 401 Certification are necessary to assure the Conowingo Dam's compliance with water quality standards. MDE has not done so, however. Until MDE reverses or revises this conclusion – assuming *arguendo* that MDE can lawfully and non-arbitrarily do so by including a reasoned analysis to support a revised conclusion – FERC must respect it. Because the state agency has found that all the conditions in the § 401 Certification are necessary to assure compliance with the Clean Water Act, the Proposed Settlement – which does not contain these conditions – would allow the Dam to violate Clean Water Act requirements. Accordingly, FERC should reject the Proposed Settlement.

C. Exelon's Arguments That MDE Waived Its Right To Issue A § 401 Certification Under *Hoopa Valley* Lack Merit.

In another case before FERC, Exelon has argued that, under *Hoopa Valley*, MDE has waived its right to issue a § 401 certification. Although those arguments are not directly relevant to whether FERC approves the Proposed Settlement, FERC needs an accurate view of the legal context for the Proposed Settlement to properly evaluate it. It is especially important that FERC fully appreciate the value of Maryland's right to certify the Dam and what it would mean for the Susquehanna River, the Chesapeake Bay, and the people who use and enjoy these waters if Maryland gives up this right in the Proposed Settlement. Accordingly, FERC needs to understand the serious flaws in Exelon's arguments that Maryland's right to certify the Dam has been waived already. MDE has not waived its right to issue a § 401 certification, and in no event is it in the interests of Maryland or its citizens that Maryland enter into – or FERC bless – a settlement that provides less protection for Maryland's waters than a § 401 certification must provide under the Clean Water Act.

Hoopa Valley addressed a situation where two States, California and Oregon, engaged in a "coordinated withdrawal-and-resubmission scheme" with an applicant, PacifiCorp.[71]

[70] Certification at 7 (emphasis added).
[71] *Hoopa Valley*, 913 F.3d at 1103.

PacifiCorp "entered a written agreement with the reviewing states to delay water quality certification,"[72] even though "the record indicate[d] that PacifiCorp's water quality certification request ha[d] been complete and ready for review for more than a decade."[73] Under these highly specific circumstances, *Hoopa Valley* held that the States had not acted on the application and had waived their right to issue a certification under § 401.[74] The *Hoopa Valley* Court expressly declined to rule on whether a State could waive its rights to issue a § 401 certification where an applicant withdraws its request and submits one that is either "wholly new" or substantially different.[75] The Court expressly limited its holding to the specific facts before it, where the "PacifiCorp's withdrawals-and-resubmissions …were not new requests at all" and the agreement between PacifiCorp, the States, and the other parties "ma[de] clear that PacifiCorp never intended to submit a 'new request.'"[76]

The record here is entirely different, and it makes clear that neither the holding nor the reasoning in *Hoopa Valley* apply.

1. There Was No Agreement To Delay Certification.

Contrary to Exelon's claims in previous filings with FERC, there was never an "agreement" between Exelon and MDE – written or otherwise – "to delay water quality certification."[77] As explained by MDE in its previous filings with FERC, Exelon first filed an application that was either incomplete, defective, or both on January 30, 2014.[78] The very next day, Maryland informed Exelon that Exelon's application "is deficient" with respect to limiting sediment pollution from the Dam.[79] MDE announced that it intended "to deny the application."[80] To avoid a denial, Exelon then withdrew its application voluntarily and unconditionally. The withdrawal was not subject to any agreement to delay water quality certification or any "coordinated withdrawal-and-resubmission scheme,"[81] and Exelon has not produced any evidence that any such "agreement" or "scheme" existed.

After MDE made clear that its initial applications for a § 401 certification would be denied, Exelon agreed to fund a Sediment Study that could be used to evaluate any future

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[72] *Id.* at 1104.
[73] *Id.* at 1105.
[74] *Id.* at 1104-1105.
[75] *Id.* at 1104.
[76] *Id.*
[77] *Hoopa Valley*, 913 F.3d at 1104.
[78] Letter from Colleen E. Hicks to Robert Summers, Secretary, Maryland Department of the Environment, Jan. 30, 2014, (attaching Exelon Corp., Application for a Maryland Water Quality Certificate for the Conowingo Hydroelectric Project), Ex. D hereto.
[79] MDNR, Jan. 31, 2014 Comments, Ex. E hereto.
[80] Public Notice, *Proposed Relicensing of the Conowingo Hydroelectric Project, Exelon Application for Water Quality Certification Withdrawn*, MDE (Nov. 14, 2014), Ex. F hereto.
[81] *Hoopa Valley*, 913 F.3d at 1103.

application.[82] In a letter to MDE, Exelon made clear it intended to develop "appropriate conditions" for its license, indicating plainly that both parties contemplated Exelon would be submitting a different application in the future.[83] The Sediment study Exelon agreed to undertake was a multi-year study that could not be completed before 2016 or 2017 at the earliest. Responding to a question from FERC, not MDE, Exelon stated that it intended to resubmit its application every year until the sediment study was completed.[84] Nothing in the record indicates that Exelon's plan was part of any agreement with MDE. Further, each time Exelon withdrew an application, it did so voluntarily, unconditionally, and without any agreement or other consideration from MDE.

2. Exelon's Application Was Neither Complete Nor Ready Until The Sediment Study Was Finished.

Unlike the situation in *Hoopa Valley*, where "the record indicate[d] that PacifiCorp's water quality certification request ha[d] been complete and ready for review for more than a decade,"[85] Exelon's application was glaringly incomplete when it was submitted, and remained so until Exelon finally provided the Sediment Study in 2017.

It has been well known for years that, although the Conowingo Dam has many adverse impacts on water flow, water quality, and aquatic life, the impacts of the sediment and nutrients that the Dam traps and releases into the Susquehanna River are among the most severe and consequential. When Exelon provided its original application in 2014 without seriously addressing this problem, it was painfully obvious to everyone with an interest in the Susquehanna River and the Chesapeake Bay that that application was not remotely "complete" or "ready."[86] It was precisely for this reason that MDE indicated it intended to deny that application.[87] As Maryland explained to FERC in its comments on that application:

> 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 implications 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

[82] Letter from Exelon to MDE (Dec. 4, 2014), Ex. G hereto.
[83] *Id.*
[84] Letter from Exelon's Counsel to FERC (Dec. 22, 2014), Ex. H hereto.
[85] *Hoopa Valley*, 913 F.3d at 1105.
[86] *Id*.
[87] Ex. F.

Project's impacts or appropriate Protection, Mitigation, and Enhancement (PM&E) measures.[88]

Although Exelon submitted new applications in 2015 and 2016, both were submitted before the Sediment Study was completed. In its 2015 Application, Exelon admitted that the Sediment Study was not completed and that it would provide additional information to MDE regarding "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."[89] In its 2016 Application, Exelon again stated the Sediment Study was incomplete and cited this fact as its reason for withdrawing the 2015 Application.[90]

The Sediment Study was not completed until 2017. When Exelon subsequently submitted its final 2017 application – the only application that was accompanied by the Sediment Study and the only application that MDE deemed complete – MDE issued the water quality Certification for the Dam.

3. Exelon's Applications Were Substantially Different.

One of the main reasons the *Hoopa Valley* Court found a "withdrawal-and-resubmission scheme" was that the requests submitted by PacifiCorp "were not new requests at all" and the written agreement between PacifiCorp and the states "ma[de] clear that PacifiCorp never intended to submit a 'new request.'" *Hoopa Valley*, 913 F.3d at 1104. Here, the record shows just the opposite: that, from the beginning of the process, both MDE and Exelon did intend that Exelon would submit a new application, one that provided the Sediment Study to allow MDE to fully evaluate the impacts of sediment and nutrients from the Dam and the appropriate mitigation and enhancement measures. MDE made this plain in its communications with Exelon, and Exelon made clear that it understood that the Sediment Study was necessary. Further, the applications that Exelon submitted were new and substantially different. Exelon's second application, submitted in 2015, announced its agreement to fund and participate in the sediment study.[91] Exelon's third application included a new agreement to improve fish passage over the dam and included a reference to the Lower Susquehanna River Watershed Assessment Final Report.[92] Exelon's fourth and most recent application contained yet more changes, including a supplemental filing regarding eel passage and a proposal to increase its minimum flows and make them continuous year-round.[93] In both regards, the situation here is different than the one in *Hoopa Valley.*

[88] Ex. E.
[89] Second Certification Application (Mar. 4, 2015), Ex. I hereto.
[90] Third Certification Application (Apr. 26, 2016), Ex. J hereto.
[91] Ex. I.
[92] Ex. J.
[93] Fourth Certification Application (May 17, 2017), Ex. K hereto.

Moreover, Exelon's filings make clear that it was solely responsible for any delay in the licensing decision. Exelon explained that the multi-year sediment study, which Exelon had proposed and funded to avoid outright denial of its application, was not complete. For its part, MDE made clear that it understood Exelon's actions as not intended to delay relicensing but to provide MDE with the information it needed to ensure that the Certification included the conditions necessary for the Dam to meet water quality standards.[94]

4. Exelon's Arguments Mischaracterize *Hoopa Valley*.

In its prior filings, Exelon portrays *Hoopa Valley* as a draconian ruling, under which certification applicants can game the certification process by submitting patently incomplete applications, promising to fix them, and then – no matter how obviously necessary those fixes are – arguing that a state has waived the right to certify a project by allowing an applicant to make the fixes it promised. Exelon dismisses the absence of any agreement to delay certification as a magic words argument and claims that all that matters is that more than a year has passed since it first submitted an application.

Exelon misreads *Hoopa Valley*. As the Court explained, "the purpose of the waiver provision is to prevent a State from indefinitely delaying a federal licensing proceeding by failing to issue a timely water quality certification under Section 401." *Hoopa Valley*, 913 F.3d at 1101 (quoting *Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 972 (D.C. Cir. 2011)). The written agreement to delay proceedings in *Hoopa Valley* and the fact that the application in question had been complete and ready for review for more than a decade were central to the holding in that case: they were evidence that PacifiCorp and the states had developed a "scheme" to "circumvent" congressional intent. *Id.* at 1104. The absence of any such scheme here is not just the absence of magic words. MDE was not trying to circumvent congressional intent, nor was it trying to "usurp FERC's control over whether and when a federal license [would] issue." *Id.* Rather, MDE was trying to get the information it needed to evaluate Exelon's application and determine the conditions that would be necessary for certification. As the record shows, both Exelon and FERC understood that the Sediment Study was necessary and that Exelon's final application, as accompanied by the Sediment Study, would be new and substantially different. That Exelon's final application was new and substantially different confirms this point.

D. MDE's Certification Constitutes Action Under Clean Water Act § 401.

Exelon also argues in prior filings before FERC that MDE waived its right to certify the Dam because it never acted on Exelon's 2017 application. Exelon does not deny that MDE issued the Certification but argues in its petition for a FERC declaratory order that the Certification was just a "placeholder" because it can be altered in the appeal process.

The Clean Water Act requires only that a state "act" on an application for a § 401 certification, and MDE did so. MDE acted on Exelon's application by issuing a § 401

[94] Letter from MDE to Exelon (Mar. 13, 2017), Ex. L hereto.

certification for the dam. MDE's action is subject to the appeals process in Maryland's regulations, which provide for the "Appeal of a Final Decision." COMAR § 26.08.02.10(F)(4). Notably, Exelon has filed an appeal under this provision.

Exelon appears to believe that because certifications can be altered in Maryland's appeals process and because the process involves an initial appeal before the Office of Administrative Hearings instead of in court, MDE's Certification was not an action under the Clean Water Act. By Exelon's logic no § 401 certification issued by Maryland would constitute action under § 401 because all such certifications are subject to the same appeals process.

Maryland's appeals process does not transform MDE's Certification of the Dam into something less than an action under § 401. Most decisions issued by state and federal agencies – thousands issued every year – are subject to some appeals process. Some laws and regulations send appeals directly to court; others provide for an initial administrative appeal. Exelon's apparent dissatisfaction with the appeals process adopted by Maryland does not mean that MDE did not "act" under § 401 when it certified the Conowingo Dam. Further, Exelon's disparagement of the Certification as a "placeholder" in its filings before FERC are belied by Exelon's challenge to the Certification in federal court, which necessarily assumes that the Certification is final action. If the Certification is final action for the purposes of giving a federal court jurisdiction to review it, it is, at the very least, action under Clean Water Act § 401.

Regardless, the gist of Exelon's complaint is directed towards the appeals process set forth in Maryland's regulations. It is that process that, according to Exelon, renders the Certification something less than an "act" under Clean Water Act § 401. FERC has no reason even to consider such arguments in evaluating the Proposed Settlement, let alone credit it. Exelon has raised that argument in Maryland state court, and an appeal of the trial court's dismissal of Exelon's case is currently pending. Exelon is free to pursue that appeal if it continues to believe that the appeals process in Maryland's regulations renders certification decisions by MDE something less than an "act" under Clean Water Act § 401, but FERC need not and should not be drawn into a review of a collateral attack on Maryland's regulations.

II. RELICENSING THE CONOWINGO DAM WITH ONLY THE CONDITIONS IN THE PROPOSED SETTLEMENT WOULD CONTRAVENE THE FEDERAL POWER ACT AND BE ARBITRARY AND CAPRICIOUS.

The Federal Power Act provides that "[i]n deciding whether to issue any license under this subchapter for any project, 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 damage 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." 16 U.S.C. § 797(e). Any project that receives a license from FERC must be, in FERC's judgment, "best adapted" to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power

development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 797(e). *Id.* § 803(a)(1). Further, "in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement." *Id.* § 803(j)(1).

To give the required "equal consideration" to "the protection, mitigation of damage 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,"[95] and to assure that the Dam is "best adapted to a comprehensive plan … for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat),"[96] FERC must, at a minimum consider the extent to which fish, wildlife, and environmental quality would be harmed by accepting the Proposed Settlement. Maryland's § 401 Certification for the Dam spells out conditions that Maryland has determined to be necessary to assure the Conowingo Dam's compliance with the Clean Water Act. These same conditions are necessary to protecting, mitigating the damage to, and enhancing fish and wildlife (including related spawning grounds and habitat) affected by the Conowingo Dam. The Proposed Settlement does not include these conditions, and the conditions it does include – which are far less protective – are not sufficient to protect, mitigate the damage to, and enhance fish and wildlife (including related spawning grounds and habitat).

The total cash payments under the proposed settlement agreement for the entire 50 year term of the license, total $61.6 Million and the 2020 present value of those payments is $56.6 million.[97] This total is approximately one percent of the present value of the payments required under the Certification over the 50-year term of the license renewal, $4,977,295,606.00. Again, it bears emphasis that Maryland determined the payments in the Certification – or the equivalent value in reductions in nitrogen and phosphorous – to be necessary to assure compliance with water quality standards. Thus, the proposed settlement necessarily forgoes conditions needed to ensure the Project meets water quality standards as required under state and federal law.

The yearly payments under the Proposed Settlement are, of course, also much smaller. As noted above, the Certification requires Exelon to reduce the Dam's discharges of nitrogen and phosphorous by 6,000,000 pounds per year and 260,000 pounds per year respectively, or to make payments reflecting the value of those reductions, $172,000,000 per year. In sharp contrast the Proposed Settlement does not require Exelon to make any reductions in the Dam's discharges of

[95] 16 U.S.C. § 797(e).
[96] 16 U.S.C. § 803(a)(1).
[97] 16 U.S.C. § 803(a)(1). Since these payments are spread-out over a 50 year period, a present value must be calculated in order to provide any meaningful sense of the current worth of those payments.

nitrogen and phosphorous. Moreover, the only payments it does require add up to a tiny fraction of the money value of the reductions required by the Certification. The Proposed Settlement requires Exelon to pay $2 million per year for only two years to fund a mussel restoration initiative, along with significantly lesser payments in subsequent years.[98] It requires a $2 million payment for "resiliency initiatives," along with significantly lesser payments in subsequent years.[99] For all other projects, it requires Exelon to pay less than $4,000,000 in the first year, along with a significantly lesser payment in subsequent years. All told the highest payment Exelon would make in any year under the Proposed Settlement would be less than $8,000,000, and its payments would drop sharply after that year to less than $2,000,000 per year. In short, the money value of the environmental protection and enhancement measures in the Proposed Settlement is a tiny and diminishing fraction of the money value of those in the Certification – less than ten percent at most and closer to one percent for most of the term of the license that Exelon seeks. The attached comments on dredging the Dam's Reservoir as a means of reducing discharges of nutrients and sediments show that dredging would be both effective and feasible.[100] It further shows that the yearly cost of dredging would be approximately $41 million per year.[101] Thus, addressing the harm caused by scour during storm events can be accomplished under the Certification but not under the Proposed Settlement, which neither requires any reductions of nitrogen and phosphorous nor requires payments that would come close to paying for dredging.

Apart from the vast difference in the monetary value of the conditions in the Certification and the provisions of the Proposed Settlement, the Proposed Settlement does not assure that specific necessary measures to assure compliance with water quality standards will be taken.

First, the Proposed Settlement does virtually nothing to reduce the impacts, caused by the Dam during storm events. These impacts, which are clearly identified in the Certification, include "significant amounts of trapped sediment and nutrients are scoured from the behind the Dam and discharged downstream."[102] As MDE also explained, "[b]y releasing significant amounts of sediment and nutrients through scouring during storm events, the Dam has altered the nature, timing, and delivery method of these materials with adverse consequences for the Lower River and the Bay. Nutrients discharged as a result of the in-filled state of the Reservoir adversely impact DO levels and thus aquatic life in the DO Non-Attainment Area."[103] Further, "[i]n-filling of the Reservoir with sediment increases the velocity of water in the Reservoir, and the altered hydrological dynamics result in unfavorable substrate conditions and a generally sparse invertebrate community in the lower two-thirds of the Reservoir," and "[i]ncreased water velocity also increases bed shear and induces additional scour and movement downstream of sediment and associated nutrients."[104] Instead of requiring measures that will significantly reduce

[98] Proposed Settlement at 6, ¶ 2.2.
[99] *Id*. at 7, ¶ 2.3.
[100] Dredging Comments, Ex. M hereto.
[101] *Id*.
[102] Certification at 12.
[103] *Id*. at 12.
[104] *Id*. at 11-12.

discharges of nitrogen and phosphorous during storm events, the Proposed Settlement contains only a non-license provision pursuant to which Exelon agrees to provide financial support of projects to make the River and Bay "more resilient" to its discharges. That "support" consists of just $3.25 million per year[105] for the first three years and $500,000 per year thereafter – a sum that does not come remotely close to the monetary value of the reductions in nitrogen and phosphorous that Maryland determined to be necessary in the Certification, $172 million per year.[106]

Second, the Proposed Settlement allows Exelon to continue the drastic flow changes that MDE has found to "cause fish kills downstream by stranding fish in shallow pools with insufficient water and subjecting them to increased threat of predation," to "delay[] upstream movement of important migratory spawning species such as Shad and Herring, and adversely impacts downstream habitat and the integrity of the downstream aquatic system."[107] For the first three years, it allows minimum flow levels that are significantly less than MDE determined to be necessary to meet water quality standards. For example, whereas MDE found a minimum flowrate of 4,000 cfs to be necessary during the months of January, February, and March,[108] the Proposed Settlement allows "3,500 cfs or natural inflow, whichever is less."[109] Even after the first three years, the Proposed Settlement leaves Exelon's obligations vague. From January to March, for example, it would require a minimum flow of 4,000 cfs "or natural inflow, whichever is less."[110] The Proposed Settlement also allows Exelon to deviate from the flow requirements for significant periods of time – *e.g.*, for 32 hours in the month of September – for no reason at all.[111] Such departures can cause significant environmental harm, including wholly unnecessary fish kills.

Third, the Proposed Settlement would allow the Dam to continue trapping trash and debris behind the Dam. As MDE explained, Exelon's current practices allow trash and debris to "accumulate[] over time, threatening recreational uses of the Reservoir and potentially concentrating pollutants, and if not removed regularly is vulnerable to sudden downstream transport during moderate to large storm events."[112] As a result, "[s]ignificant amounts of trash and debris moving downstream in single events creates hazards for recreational uses and blocks water supply intakes downstream."[113] The Proposed Settlement would allow Exelon to continue

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[105] The Settlement itself appears to provide less than this sum. *See* Proposed Settlement at 7, ¶ 2.3.
[106] Proposed Settlement at 19-20.
[107] Certification at 11.
[108] *Id.* at 14-15 & Att. 4.
[109] Proposed Settlement at 10-12; *id*., Att. A ("Proposed License Articles") at 1.
[110] Proposed Settlement at 10-12; *id*., Att. A ("Proposed License Articles") at 1.
[111] *Id.* at 3.
[112] Certification at 11-12.
[113] *Id.*

doing no more to reduce these impacts than it did in 2018 – *i.e.*, to continue to rely on plainly inadequate measures.[114]

Fourth, whereas the Certification requires specific numeric requirements for Shad and Herring passage past the Dam, the Proposed Settlement contains none. As MDE explained, "[w]ith a healthy aquatic system, millions of Shad and Herring should be passing upstream in the River every year; [but] in 2017, only 15,000 Shad and 65 Herring passed the Dam."[115] Accordingly, the Certification requires Exelon to "take such actions as may be necessary to permit at least 5,000,000 Shad and at least 12,000,000 Herring that approach the Project to pass the Dam each year…"[116] The Proposed Settlement does not include any numeric requirements for Shad and Herring passage. In it, Exelon's only commitment that addresses these species even indirectly is to make modifications to its East Fish Lift.[117] The Proposed Settlement does not claim that this measure will increase Shad and Herring passage at all, let alone by the amounts MDE found necessary.

Fifth, the Certification requires Exelon to determine whether chlorophyll-A levels exceed water quality standards in the Maryland Portion of the Dam's Reservoir and, if they do, submit a plan to reduce chlorophyll-A levels to meet water quality standards within five years.[118] The Proposed Settlement requires Exelon merely to implement a plan for "monitoring" chlorophyll-A levels, "subject to certain cost limitations."[119] It does not require Exelon to take any measures to actually meet water quality standards if the chlorophyll-A levels in the Dam's reservoir exceed them. Thus, the Proposed Settlement does not contain measures necessary to assure compliance with the water quality standards for chlorophyll-A.

Further, many of the Proposed Settlement's conditions are deliberately left out of the License Articles, undermining their enforceability and making them entirely unenforceable by the public.[120] Among these are the most important conditions of the settlement: the funding of mussel restoration, the funding to make the River and the Bay more "resilient" to the scouring events caused by the Dam, and the funding for other water quality projects including forest buffers and buffer crops.[121] The Certification's conditions, in sharp contrast, must all become conditions of the Dam's License and are thus all enforceable not only by MDE but also by the public. FERC's regulations make such conditions enforceable by the public, by providing that "[a]ny person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other

[114] Proposed Settlement at 12.
[115] Certification at 11 (emphasis added).
[116] *Id.* at 13.
[117] Proposed Settlement at 5-6.
[118] Certification at 18-19.
[119] Proposed Settlement at 21.
[120] Proposed Settlement at 18-22.
[121] *Id.*

law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction."[122] The complaint must be answered and addressed on the merits.[123] Typically, settlements that heavily impact the public interest are structured to include interested members of the public as parties to both the settlement negotiations and the settlement approach itself. This approach gives the impacted public a voice in the settlement process, a seat at the settlement table, and it allows the public to enforce the settlement, which is especially important when the state is unable or unwilling to do so. Here the commenters and other public-interest NGOs were left out of the settlement process entirely, and they are not parties to the settlement. As a result leaving many of the settlement's conditions out of the License Articles is particularly prejudicial to these groups and to the public interest.

Finally, in addition to stripping vital protections for fish, wildlife and the environment from the License, the settlement converts the License into a get-out-of-jail-free card that preemptively excuses Exelon from compliance with requirements that may arise under Clean Water Act provisions other than § 401.[124] It provides that "MDE agrees that it shall not seek to impose upon Exelon" any additional requirements under these provisions even if becomes apparent during the Dam's 50-year License that additional requirements are necessary to assure compliance with the Clean Water Act and/or water quality standards. For example, if it becomes apparent that fish in the Dam's Reservoir does not meet water quality standards for chlorophyll-A or PCBs, Exelon is shielded from any effort by MDE to hold it accountable, to clean up the Reservoir, and to make the fish safe to eat. Even more egregious, if possible, is the requirement that "MDE will represent in any Collateral Proceedings that Exelon's compliance with this Agreement and the new License satisfy Exelon's obligations under applicable water quality standards…"[125] In other words, the settlement requires MDE to represent that Exelon is in compliance with water quality standards even if that is not true.

The Proposed Settlement does not protect, mitigate damage to, or enhance fish and wildlife (including related spawning grounds and habitat). Nor does it "preserv[e] other aspects of environmental quality." 16 U.S.C. § 797(e). Just the opposite, it eliminates conditions that Maryland found necessary to the achievement of water quality standards. Further, the weak protections the Proposed Settlement are largely unenforceable. And the Proposed Settlement would severely limit MDE's ability to ensure that the Dam complies with requirements that arise under Clean Water Act provisions other than § 401. For all of these reasons, giving equal consideration to "protection, mitigation of damage 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" requires FERC to reject the Proposed Settlement.[126] At a minimum, the Proposed Settlement's failure to address all the

[122] 18 C.F.R. § 385.206(a).
[123] *Id.*
[124] Proposed Settlement at 16-17, ¶ 3.6.
[125] Proposed Settlement at 17, ¶ 3.6.
[126] 16 U.S.C. § 797(e).

adverse impacts of the Dam – and of foregoing the protections in the Certification for far weaker ones in the Proposed Settlement create a genuine issue of material fact that has not been addressed in the Proposed Settlement.

III. CONCLUSION

For all the reasons given above, FERC should reject the Proposed Settlement.